Originally prepared by M. Montgomery and M. Howell (4-28-16 version). Updated with new case law by Damon Chetson (3-4-24)

It is well-established in North Carolina law that "a witness mat not vouch for the credibility of a victim." *State v. Giddens*, 199 N.C. App. 115, 121,681 S.E.2d 504, 508 (2009), affd 363 N.C. 826, 689 S.E.2d 858 (2010). "The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784 (1995). To allow a witness to vouch for the credibility of another witness invades the province of the jury. "The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial - determination of the truth." *State v. Kim*, 318 N.C. 614, 621,350 S.E.2d 347, 351 (1986). This rule is based upon the constitutional principle that a criminal defendant's guilt must be determined by an impartial jury. United States Constitution, Amendment VI; North Carolina Constitution, Art. I, Sections 24. *State v. Martin*,222 N.C. App. 213, 729 S.E.2d 717 (2012).

"[O]ur decision reflects, and helps preserve, the jury's fundamental 'responsibility at trial' in our adversarial system to "find the ultimate facts beyond a reasonable doubt." *citations omitted*. Of course, the State is entitled to submit to the jury any admissible evidence that it thinks will help convince jurors to believe a complainant and disbelieve a defendant. But concern for the fairness and integrity of criminal proceedings requires trial courts to exclude testimony which purports to answer an essential factual question properly reserved for the jury. When the trial court permits such testimony to be admitted, in a case where the jury's verdict is contingent upon its resolution of that essential factual question, then our precedents establish that the jury's verdict must be overturned. *State v. Warden*, 376 N.C. 503 (N.C. 2020)

The defendant's failure to object to potentially improper vouching subjects the improper testimony to the much more difficult standard of plain error review. A Deputy's impermissible vouching did not rise to the level of error because defense counsel failed to object to the testimony at trial. *State v. Caballero*, 383 N.C. 464 (N.C. 2022). See also *State v. Wohlers*, 847 S.E.2d 781 (N.C. Ct. App. 2020).

A witness may not vouch for his or her own credibility. "It is improper for... counsel to ask a witness (who has already sworn an oath to tell the truth) whether he has in fact spoken the truth during his testimony." *State v. Chapman*, 359 N.C. 328, 364, 611 S.E.2d 794 (2005); *State v. Solomon*, 340 N.C. 212,456 S.E.2d 778 (1995) (counsel improperly asked witness "if he had accurately pointed out to the prosecutor where his prior statements were untrue" and another witness "if she knew that she was under oath); *State v. Skipper*, 337 N.C. 1, 37, 446 S.E.2d 252, 273 (1995) (improper to ask witness "are you telling this jury the truth"); *State v. Streater*, 197 N.C. App. 632,645, 678 S.E.2d 367 (2009) (error to allow victim

to testify "she had told the truth" in response to ADA's question in direct); but see, *Chapman*, 359 N.C. at 364 (may be permissible for prosecutor to ask State's witness "have you told the truth since you've taken the stand" after the witness' credibility had been attacked on cross-examination).

It is grossly improper for an expert witness or a lay witness to vouch for the credibility of another witness. *State v. Holloway*, 82 N.C. App. 586,587,347 S.E.2d 72 (1986) (pediatrician and psychologist testified that, in their opinion, the child-witness had testified truthfully; *State v. Freeland*, 316 N.C. 13, 16017, 349 S.E.2d 35 (1986) (improper for mother of witness mother to testify that the witness had told her the truth and the witness knew the difference between reality and fantasy). In contrast, testimony by a witness that the victim immediately reported the defendant's sexual assault to her was not impermissible vouching since the witness did not render an opinion about the victim's credibility. *State v. Harris*, 236 N.C. App. 388 (N.C. Ct. App. 2014)

This rule against vouching has been extended to the findings of agencies such that vouch for or bolster the allegations of an accusing child. *State v. Giddens*, 119 N.C. App. 115, 122, 681 S.E.2d 504, 508 (2009) (finding plain error when CPS investigator testified that agency's investigation uncovered evidence indicating abuse and neglect did occur), and *State v. Martinez*, 711 S.E.2d 787, 789 (N.C. Ct. App. 2011) (trial court improperly admitted testimony of DSS social worker that DSS substantiated claim that sex abuse occurred).

No. 29PA22
Supreme Court of North Carolina

State v. Caballero

383 N.C. 464 (N.C. 2022) · 880 S.E.2d 661 · 2022 NCSC 136
Decided Dec 16, 2022

No. 29PA22

12-16-2022

STATE of North Carolina v. Efren Ernesto CABALLERO

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, for the State-appellee. James R. Glover, Chapel Hill, for defendant-appellant.

ERVIN, Justice.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, for the State-appellee.

James R. Glover, Chapel Hill, for defendant-appellant.

464 ERVIN, Justice. *464 ¶ 1 The issue before the Court in this case is whether the trial court's failure to preclude the admission of testimony describing certain information provided by the State's principal witness as "rock solid" constituted plain error. On appeal, the Court of Appeals held that the trial court did not commit plain error by 465 allowing the admission of the challenged *465 testimony. After careful consideration of defendant's challenge to the trial court's judgment in light of the applicable law, we modify and affirm the Court of Appeals' decision.

I. Background

A. Substantive Facts

1. State's Evidence

¶ 2 Beginning in 2016, Liliana Pichardo; her husband Jose Luis Yanez Guerrero; and their fifteen-month-old son lived at 3409 Glenn Road in Durham. Defendant Efren Ernesto Caballero lived next door at 3411 Glenn Road. Defendant's stepfather, Jorge Huerta, was the pastor of a nearby church that Ms. Pichardo and Mr. Guerrero 663 frequently *663 attended, with Mr. Huerta having assisted Ms. Pichardo and Mr. Guerrero by providing them with a place to live and helping them find work.

¶ 3 Ms. Pichardo claimed to have seen defendant almost every day for two years. After the three of them became acquainted, defendant used a demeaning term in talking with Ms. Pichardo and Mr. Guerrero, demanded that Mr. Guerrero drive him places at night, and insisted that Ms. Pichardo and Mr. Guerrero provide him with food, particularly eggs. As a result of this behavior, Ms. Pichardo claimed that she was "afraid" to reject defendant's requests.

¶ 4 About two weeks prior to the date upon which Mr. Guerrero died, someone broke into the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son while the family was attending church. Upon returning home, Ms. Pichardo and Mr. Guerrero noticed that the door facing defendant's house had been propped open, that the lock to that door had been damaged, and that a trail of footprints led from defendant's residence to their home and back, with a carton of eggs and a loaf of bread being missing from their residence. After Mr. Guerrero had a confidential conversation with Mr. Huerta about the break-in,

Mr. Huerta told defendant and his other neighbors about it so that they could take appropriate precautions. Ms. Pichardo stated that defendant's attitude became "more aggressive" after the break-in, with defendant having begun to watch her family, a development that Ms. Pichardo found to be frightening.

¶ 5 At approximately 8:45 p.m. on 13 February 2016, Ms. Pichardo, Mr. Guerrero, and their infant son were in their residence when Ms. Pichardo and Mr. Guerrero heard a "loud noise" outside. Upon looking through the window blinds, Mr. Guerrero observed that defendant was knocking on the door. After defendant repeatedly "insisted" that Mr. Guerrero *466 come outside to assist defendant with his car, Mr. Guerrero agreed to provide the needed help. Although Ms. Pichardo proposed that she should accompany him, Mr. Guerrero told Ms. Pichardo to stay inside with their baby because it was "too cold." At the time that Ms. Pichardo observed defendant at the door to the family residence, he was wearing a black sweatshirt.

¶ 6 After her husband went outside with defendant, Ms. Pichardo heard Mr. Guerrero shouting for help "in a painful way." Upon going outside herself, Ms. Pichardo "saw [defendant] on top of [Mr. Guerrero]" making a repeated motion with his arm in the direction of Mr. Guerrero's body. At that point, Ms. Pichardo ran over to the two men and shoved defendant off Mr. Guerrero. As she did so, Ms. Pichardo could see defendant's face and noticed that defendant was wearing "[a] black sweatshirt and some light-colored pants."

¶ 7 As soon as Ms. Pichardo began attempting to assist her husband, defendant made the same arm motion that he had been making toward Mr. Guerrero in her direction, a development that caused Ms. Pichardo to reenter her home and grab her child. Although defendant kicked the outermost door to the house and managed, at one point, to put his foot inside the structure, Ms. Pichardo was able to lock the inner door to the residence. After Ms. Pichardo locked the inner door, defendant hit the glass portion of that door and struck Ms. Pichardo's face, causing her to sustain bruising and inflicting lacerations and scratches to both Ms. Pichardo and her child as the result of flying glass.

¶ 8 At that point, Ms. Pichardo fled to a different portion of the house and phoned Mr. Huerta for the purpose of telling him that she and her husband were being attacked by defendant. After Mr. Huerta told Ms. Pichardo how to seek emergency assistance, Ms. Pichardo contacted the emergency services dispatcher and reported that she and her husband were being attacked by their neighbor. More specifically, Ms. Pichardo told the dispatcher that her neighbor's name was Ernesto Caballero and that he was a twenty-two-year-old Hispanic who was wearing a black sweatshirt.

¶ 9 After Ms. Pichardo spoke with the dispatcher, defendant made a call for emergency assistance as well. In the course of his conversation with the dispatcher, defendant stated that he had heard screaming emanating from his neighbors' property, said that he had become concerned that his neighbors might be in trouble, and claimed to have seen two men running from the residence occupied *664 by Ms. Pichardo, Mr. Guerrero, and their son. According to defendant, he had been inside his own residence when he heard the noises in question. *467 ¶ 10 Deputies Amanda Andrews and Bobby Bradford of the Durham County Sheriff's Office were the first law enforcement officers to reach the Glenn Road area. After their arrival, the officers approached defendant's residence and spoke with him. According to Deputy Andrews, defendant "was wearing a blue and white ... horizontal striped hoodie," jeans, and leather dress shoes, with both his shoes and his jeans being visibly muddy. In addition, Deputy Bradford testified that there was "fresh" "dirt on [defendant's] pants." In response to the officers' request that he provide an explanation for the condition of his pants and shoes, defendant responded by stating that he had been at work and

that these items of apparel had been in their present condition all day.[1] Defendant told Deputies Andrews and Bradford that he had heard screaming from his neighbors' house and that he had seen two Black males wearing black clothing running from the scene.

[1] One of defendant's friends, Carlos Cruz, testified that defendant did not work that day; that he and defendant had spent the day drinking alcohol and smoking marijuana; and that defendant's clothes had not been muddy prior to his departure from defendant's residence at approximately 7:00 p.m.

¶ 11 Subsequently, Reserve Deputy John Teer of the Durham County Sheriff's Office arrived at the scene and saw Deputies Andrews and Bradford speaking with defendant. As the other officers spoke with defendant, Deputy Teer approached the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son to see if anyone had been injured. As he approached the structure, Ms. Pichardo, who was holding the couple's son, came to the door. At that time, Deputy Teer observed that there was blood on Ms. Pichardo's face, that Ms. Pichardo appeared to be "terrified and upset," that there was "glass all around the doorstep," and that "a window had been broken out" of the door.

¶ 12 In view of the fact that Ms. Pichardo did not speak anything other than Spanish, Deputy Teer and the other officers could not communicate with her. After the officers had made contact with an interpreter service, Ms. Pichardo stated that "the neighbor attacked her and then that her husband was in the backyard." Once Ms. Pichardo had made these statements, other officers brought defendant to the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son so that he could help them by translating what Ms. Pichardo was saying. According to Deputy Andrews, Ms. Pichardo immediately "became very frightened" as soon as she saw defendant, "frantically point[ed] ... directly at [defendant]," and identified defendant as "the one" who attacked her and her husband. Similarly, Deputy Teer indicated that
468 Ms. Pichardo *468 "began excitedly exclaiming ... 'He's the one that did it, it's him,' and pointing directly at [defendant]" as soon as she saw him.

¶ 13 At this point, defendant was placed in handcuffs and detained in the carport of the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son. After defendant's sister arrived and saw her brother in handcuffs, she approached defendant without paying any heed to the officers who were trying to get her to refrain from attempting to get near her brother and asked, "What did you do? What did you do?" The blue jeans, tee-shirt, and shoes that defendant had been wearing at the time that he was admitted into the Durham County detention facility tested positive for the presence of blood, with a subsequent DNA analysis performed upon defendant's jeans indicating the presence of Mr. Guerrero's DNA.

¶ 14 After determining that further conversations with defendant would be pointless, Deputy Teer returned to the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son for the purpose of having a further conversation with Ms. Pichardo. During that conversation, which was conducted with the assistance of the interpreter service, Ms. Pichardo stated that defendant had come to her door and asked for Mr. Guerrero's assistance in starting his automobile, that she had heard Mr. Guerrero screaming shortly thereafter, that she had seen defendant assaulting Mr. Guerrero in the back yard of the residence, and that defendant had punched her through the
665 window while attempting to *665 make a forcible entry into the residence. As she talked with Deputy Teer, Ms. Pichardo identified defendant as her assailant multiple times and in multiple ways and stated that defendant had been wearing a dark hoodie during the attack. After Deputy Teer said that defendant had been wearing a white striped sweatshirt at the time of Deputy Teer's arrival, Ms. Pichardo "immediately said [without hesitation that defendant had] changed his clothes, or he changed out of it." When Deputy Teer asked Ms.

Pichardo if she had seen a weapon and suggested that defendant might have had a knife that she could barely see, Ms. Pichardo persisted in saying that she had never seen a weapon.

¶ 15 Investigating officers found Mr. Guerrero's body lying face down in the grass on the side of the residence that was closest to defendant's home. At that time, the officers noted that Mr. Guerrero's clothing was "soaked" in blood, that blood was coming from Mr. Guerrero's mouth, and that there was blood on the leaves around Mr. Guerrero's body. An autopsy performed upon Mr. Guerrero's body established that Mr. Guerrero had suffered twenty stab wounds and six incised wounds ; that a sharp object had penetrated Mr. Guerrero's carotid artery and his lungs, liver, and diaphragm; 469 that the wounds that Mr. Guerrero had *469 sustained would have caused him to lose consciousness and the ability to breathe; that Mr. Guerrero would have ultimately bled to death; and that Mr. Guerrero had died as the result of "multiple strike force injuries."

¶ 16 After having been arrested and placed in jail, defendant placed a call to his mother, resulting in a lengthy discussion between the two of them concerning the cleaning of defendant's clothes. According to defendant's mother, the whole house had been cleaned, the trash had been removed, and she had "got[ten] everything ... out that was no good." After defendant made inquiry about his clothes and requested that his mother get his clothes and everything else that he had in "[his] other room" and put them in a black bag, defendant's mother responded by stating that she had "brought all [his] dirty clothes" and had "already washed them." At the conclusion of this conversation, defendant reassured his mother that "everything is going to turn out fine."

2. Defendant's Evidence

¶ 17 3409 Glenn Road was one of five houses located on Glenn Road that were owned by a woman who used to live in another one of the houses, which was located at 3417 Glenn Road. Mr. Huerta, who was the pastor of a church and maintained and collected the rents associated with all five houses, and his wife lived in the second residence, which was located at 3415 Glenn Road. Melissa Caballero Martinez, defendant's older sister and Mr. Huerta's stepdaughter, lived in the third house, which was located at 3413 Glenn Road. Defendant lived in the fourth house, which was located at 3411 Glenn Road, along with a previously homeless man named Jonathan Martinez, who had been staying with defendant for about four weeks as of the date of Mr. Guerrero's death.

¶ 18 At approximately 9:00 p.m. on 13 February 2016, Mr. Huerta received a call from Ms. Pichardo, who was yelling and who could not be understood to be saying anything other than that something had happened to Mr. Guerrero. Mr. Huerta informed Ms. Pichardo that he and his wife were out of town and advised Ms. Pichardo to call for emergency assistance. After Mr. Pichardo hung up for the purpose of making the recommended call, Mr. Huerta and his wife immediately drove back to Durham. At the time that Mr. Huerta and his wife arrived at Ms. Pichardo's house, they observed that law enforcement officers and vehicles were present.

¶ 19 Ms. Martinez received a call from her mother at about the time that she finished work for the day, with her mother having informed her that something had occurred at the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son and 470 requested that Ms. Martinez check on *470 Ms. Pichardo. Ms. Martinez arrived at the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son between 9:45 p.m. and 10:15 p.m., at which point she observed that a number of law enforcement officers were present.

¶ 20 Defendant indicated that he did not go to work on 13 February 2022. Instead, defendant was visited by two friends and ate breakfast with them at approximately 11:00 a.m., with defendant 666 having worn a black *666 dress shirt that did not

have a hood and the jeans and brown dress shoes that he ordinarily wore to work at that time. As a result of the fact that his shirt got dirty while he was eating, defendant replaced the black dress shirt with a black and white striped sweater and wore this attire for the remainder of the day.

¶ 21 Between approximately 7:00 p.m. and 8:00 p.m., defendant and his friends went to pick up another friend and his girlfriend because "they had a joint" to smoke. After stopping by a convenience store to purchase snacks and a couple of beers, the group returned to defendant's residence, where they smoked marijuana and drank beer. At the time that one of defendant's friends said that it was time for him to leave, the entire group left defendant's residence except for defendant and his housemate, Mr. Martinez.

¶ 22 At approximately 8:00 p.m., a friend of Mr. Martinez's named Nino and two other people that defendant had never met before arrived at defendant's residence. Although defendant claimed that he had previously told Mr. Martinez that he did not want Mr. Martinez using cocaine in his house, Nino and the other two men entered defendant's residence over defendant's objection and began using cocaine along with Mr. Martinez despite the fact that defendant declined to join in their drug use.

¶ 23 At some point defendant told Mr. Martinez that Nino and the two men had to leave, an instruction that Mr. Martinez conveyed to the other people who were there. After Nino and the two men left defendant's residence at approximately 8:30 p.m., defendant entered his carport for the purpose of smoking a cigarette and heard someone screaming for help.

¶ 24 Upon hearing these screams, defendant ran behind his house, where he observed two men punching someone lying on the ground in his neighbor's back yard. In light of the fact that it was very dark, defendant could not tell if the assailants had a weapon or if the person being assaulted was male or female. As defendant watched, one of the assailants got up and ran, having been followed by the other assailant a few seconds later. According
471 to information that defendant provided to *471 investigating officers, both assailants entered the woods leading toward East Club Boulevard.

¶ 25 After the two men fled, defendant approached the person on the ground, whom he recognized at that point to be Mr. Guerrero, and knelt down beside him. Although defendant did not see any blood or other sign of a visible injury on Mr. Guerrero's person, Mr. Guerrero was shaking and trying to catch his breath. When defendant asked Mr. Guerrero how he was feeling, Mr. Guerrero was unable to answer. After Mr. Guerrero failed to respond, defendant returned to his house in order to call for emergency assistance.

¶ 26 As a result of the fact that he had lost his cell phone several days earlier, defendant had to use Mr. Martinez's phone to make the call. After Mr. Martinez activated his phone, defendant contacted emergency services personnel. As he spoke with the dispatcher, defendant called out to Ms. Pichardo for the purpose of letting her know that law enforcement officers were on their way.

¶ 27 The first officer to reach the scene arrived while defendant was still speaking with the dispatcher. At the time that the officer arrived, defendant suggested that the officer should go to the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son for the purpose of checking on Mr. Guerrero.

¶ 28 After the officer had done as defendant suggested, other officers told defendant that they needed him to come to the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son to serve as a translator. At the time that defendant arrived at her residence, Ms. Pichardo pointed to defendant and claimed that he had perpetrated the assault upon Mr. Guerrero, her child, and herself. As a result, defendant was placed in handcuffs.

¶ 29 After parking her vehicle in the driveway of the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son and approaching the residence, Ms. Martinez saw defendant, who had been placed in handcuffs. After Ms. Martinez asked her brother what he had done, defendant responded that he had not done anything and that he had, in fact, been the person who had called for
667 *667 emergency assistance. However, Ms. Pichardo told Ms. Martinez that defendant "did it" and "that it was him."

B. Procedural History

¶ 30 On 22 February 2016, the Durham County grand jury returned bills of indictment charging
472 defendant with murder, attempted murder, *472 first-degree burglary, assault on a female, and assault on a child under the age of twelve. The charges against defendant came on for trial before the trial court and a jury at the 13 January 2020 criminal session of Superior Court, Durham County, at which point the State elected not to proceed on the assault on a female and assault upon a child under the age of twelve charges. At defendant's trial, Deputy Teer testified on direct examination, without objection, that:

> Q. So why did -- so why did that stick in your head? Why did you push her on that?
>
> A. I pushed her on that because frequently, based on my training and experience, I know that if you're talking to a witness and they will change [their] story as you suggest things. I mean, it reduces their credibility if you say, well, this -- how about this; and they go with that. Oh yeah, it could have been that, yeah, I think he was wearing that. That's a red flag right there for the credibility of that person.
>
> But this stuck out because she stuck to her story. She was resolute and rock solid, never wavered, never changed what she was saying. She knew who her attacker was. She knew what he was wearing. And when I tried to say, hey, it couldn't be that, he's not wearing what you just told me, she said, well, obvious, he changed. He changed his clothing.
>
> The same thing, I also pressed her did you see a weapon; did you see a gun; did you see a knife; was he maybe holding it and you can barely see it. I was trying to give her an opportunity to say, yeah, yeah, I think I saw a knife, I think I saw a gun. She didn't. She said she never saw a weapon. At one point she said, well, his hand was in his pocket, but there -- she did not say that she saw a gun or a knife when I was talking with her.
>
> Despite multiple attempts to give her the opportunity to expand her story, she didn't. Her story stayed entirely 100 percent consistent, resolute and solid.

On 23 January 2020, the jury returned verdicts convicting defendant of first-degree murder on the basis of both malice, premeditation, and deliberation and on the basis of the felony murder

473 rule using the *473 commission of a felonious assault upon Ms. Pichardo as the predicate felony; attempted first-degree murder; and first-degree burglary. Based upon the jury's verdicts, the trial court arrested judgment with respect to defendant's conviction for first-degree murder based upon the felony murder rule, consolidated defendant's remaining convictions for judgment, and sentenced defendant to a term of life imprisonment without parole. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

C. Court of Appeals Decision

¶ 31 In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued that the admission of Deputy Teer's description of Ms. Pichardo's account of the events that occurred at the time of Mr. Guerrero's death as "rock solid" constituted plain error. *State v. Caballero* , 281 N.C. App. 215, 2021-NCCOA-718, ¶ 13, 865 S.E.2d 909 (unpublished). In rejecting defendant's challenge to the admission of the challenged portion of Deputy Teer's testimony, the Court of Appeals concluded that "the transcript reflects that Deputy Teer testified regarding the consistency of [Ms.] Pichardo's account and recollection, not the credibility or truthfulness of her statements," *id.* ¶ 17, and held that, "[b]ecause Deputy Teer's testimony was limited to corroborating [Ms.] Pichardo's statements and testimony, defendant has failed to show that he was prejudiced" and that "the trial court did not commit plain error in admitting Deputy Teer's testimony," *id.* ¶ 18. On 9 March 2022, this Court allowed defendant's petition for discretionary review of the Court of Appeals' decision.

II. Analysis

A. Standard of Review

¶ 32 An issue that was neither preserved by an objection lodged at trial nor deemed to have been preserved by rule or law despite the absence of
668 such an objection *668 can be made the basis of an issue on appeal if the judicial action in question amounts to plain error. N.C. R. App. P. 10(a)(4). Since defendant did not object to the admission of the challenged portion of Deputy Teer's testimony at trial, defendant is only entitled to have this issue reviewed on appeal for plain error. *Id.* Plain error is error that "seriously affect[s] the fairness, integrity[,] or public reputation of judicial proceedings" and is to be "applied cautiously and only in the exceptional case." *State v. Odom* , 307 N.C. 655, 660, 300 S.E.2d 375 (1983) (quoting *United State v. McCaskill* , 676 F.2d 995, 1002 (4th Cir. 1982)). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial," *State v. Lawrence* , 365 N.C. 506, 518, 723 S.E.2d 326 (2012) (citing *Odom* , 307 N.C. at 660, 300 S.E.2d 375), with the defendant being required to show
474 *474 "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.* (cleaned up). This Court reviews decisions of the Court of Appeals for the purpose of determining whether they contain any error of law. N.C. R. App. P. 16(a).

B. Admissibility of the Challenged Portion of Deputy Teer's Testimony

¶ 33 In seeking to persuade us that the admission of the challenged portion of Deputy Teer's testimony constituted plain error, defendant begins by arguing that the issue of whether a witness' testimony is true "is a question of credibility and is a matter for the jury alone." *State v. Solomon,* 340 N.C. 212, 221, 456 S.E.2d 778 (1995). In defendant's view, "[o]pinion testimony about the credibility or the believability" of a witness' testimony "is not admissible even when offered by an expert witness," citing *State v. Hannon* , 118 N.C. App. 448, 451, 455 S.E.2d 494 (1995). According to defendant, the Court of Appeals erred by holding that Deputy Teer's description of Ms. Pichardo's account of the events that occurred at the time of Mr. Guerrero's death as "rock solid" amounted to a characterization of her testimony as consistent with her prior statements rather than the

expression of an opinion about the credibility of her testimony, given that Deputy "Teer's testimony about subjecting [Ms. Pichardo's] narrative account of the events to a 'test of credibility' " could not be properly understood as anything other than the expression of an opinion that she was telling the truth.

¶ 34 After noting that no witness is entitled to express an opinion concerning the defendant's guilt either directly or indirectly, citing *State v. Kim* , 318 N.C. 614, 621, 350 S.E.2d 347 (1986), *State v. Heath* , 316 N.C. 337, 341–42, 341 S.E.2d 565 (1986), and *State v. Galloway* , 304 N.C. 485, 489, 284 S.E.2d 509 (1981), defendant contends that Deputy Teer's description of Ms. Pichardo's account of the events on the night of Mr. Guerrero's death as "rock solid" was nothing more than a backhanded expression of Deputy Teer's opinion that Ms. Pichardo's testimony was credible, with such testimony by a law enforcement officer being particularly harmful to a defendant's chances for a more favorable outcome at trial given that jurors tend to give great weight to testimony given by law enforcement officers, citing *Tyndall v. Harvey C. Hines Co.* , 226 N.C. 620, 623, 39 S.E.2d 828 (1946).

¶ 35 The State, on the other hand, argues that the admission of the challenged portion of Deputy Teer's testimony did not constitute error, much less plain error. According to the State, this Court has repeatedly allowed law enforcement officers to
475 testify concerning prior consistent *475 statements made by other witnesses and has held that an expert witness is entitled "to testify that the victim's allegations did not vary," quoting *State v. Stancil* , 146 N.C. App. 234, 241, 552 S.E.2d 212 (2001), *aff'd per curiam as modified on other grounds* , 355 N.C. 266, 559 S.E.2d 788 (2002). In the State's view, Deputy Teer did not express an opinion concerning Ms. Pichardo's truthfulness and, instead, simply described the consistency of the statements that Ms. Pichardo had made to him on the night of Mr. Guerrero's death. In the course of analogizing this case to our decision in *State v. Betts* , 377 N.C. 519, 2021-NCSC-68, 858 S.E.2d 601, the State asserts that Deputy Teer said "nothing more than that a particular statement [had been] made" and that Ms. Pichardo's accounts of
669 the event on the night *669 of Mr. Guerrero's death were consistent. *Id.* ¶ 20.

¶ 36 The State further contends that, even if the challenged portion of Deputy Teer's testimony had been improperly admitted, "defendant [had] opened the door to such evidence by putting [Ms. Pichardo's] credibility at issue" and that a party is entitled to elicit evidence concerning a witness' truthfulness after that witness' character for truthfulness has been attacked, citing North Carolina Rule of Evidence 608(a). In the State's view, once a defendant has attempted to discredit a witness' testimony on cross-examination, it is "appropriate and competent to show by the officers that [the witness] had made similar consistent statements to them," quoting *State v. Bennett* , 226 N.C. 82, 85, 36 S.E.2d 708 (1946). According to the State, since defendant's trial counsel "challenged [Ms. Pichardo's] credibility by questioning her about prior, allegedly inconsistent statements," evidence concerning the truthfulness of her testimony became admissible.

¶ 37 A careful review of the record in light of the applicable law persuades us that the challenged portion of Deputy Teer's testimony was inadmissible. As we have already noted, "it is typically improper for a party to seek to have [ ] witnesses vouch for the veracity of another witness," *State v. Warden* , 376 N.C. 503, 507, 852 S.E.2d 184 (2020) (cleaned up), given that the truthfulness of a particular witness should be determined by the jury rather than by a witness for one party or the other, as the "jury is the lie detector in the courtroom" and "is the only proper entity to perform the ultimate function of every trial—determination of the truth," *Kim* , 318 N.C. at 621, 350 S.E.2d 347 (citations omitted). In order to enable the jury to evaluate a particular witness' credibility, "[p]rior consistent statements made by a witness are admissible for purposes of

corroborating the testimony of that witness, if it does in fact corroborate [that witness'] testimony," *State v. Holden,* 321 N.C. 125, 143, 362 S.E.2d 513 (1987), with "wide latitude" being "grant[ed] to the admission of this type of evidence," *State v. Martin,* 309 N.C. 465, 476, 308 S.E.2d 277 (1983), and with law enforcement officers having been allowed to testify to prior statements that a witness had made for the purpose of enhancing the credibility of that witness, *State v. Walters* , 357 N.C. 68, 88–89, 588 S.E.2d 344 (2003) ; *State v. Williamson* , 333 N.C. 128, 135–37, 423 S.E.2d 766 (1992) ; *State v. Lawson* , 310 N.C. 632, 639, 314 S.E.2d 493 (1984) ; and *State v. Elkerson* , 304 N.C. 658, 666–67, 285 S.E.2d 784 (1982). In addition, the Court of Appeals has allowed the admission of testimony expressing an opinion that the statements that the victim had made at different points in time did not differ, *see Stancil* , 146 N.C. App. at 241, 552 S.E.2d 212 (stating that an expert may "testify that the victim's allegations did not vary" after describing the statements that the witness actually made).[2] As a result, the ultimate issue raised by defendant's challenge to the admission of the relevant portion of Deputy Teer's testimony is whether that testimony constituted an expression of Deputy Teer's belief that Ms. Pichardo was telling the truth or whether it constituted either a recitation of Ms. Pichardo's prior statements or an expression of opinion that the statements that Ms. Pichardo had made were consistent with each other.[3]

[2] As a result of the fact that this Court did not address the correctness of this aspect of the Court of Appeals' decision, *Stancil* , 355 N.C. at 266, 559 S.E.2d 788, we express no opinion concerning the admissibility of such evidence given that, in our view, there is no need to do so in order to decide this case.

[3] Although, as we have already noted, the extent to which one witness is entitled to testify that statements made by another witness were, in the opinion of the first witness, consistent is an open question before this Court, we will assume, without deciding, that such evidence is admissible for the purpose of deciding this case.

¶ 38 As an initial matter, we cannot accept the assertion that the challenged portion of Deputy Teer's testimony is nothing more than evidence that corroborates Ms. Pichardo's account of the events that occurred at the time of Mr. Guerrero's death. According to well-established North Carolina law, "[a] prior consistent statement of a witness is admissible to corroborate the testimony of the witness whether or not the testimony of the witness has been impeached." *State v. Jones* , 329 N.C. 254, 257, 404 S.E.2d 835 (1991). As is reflected in numerous decisions of this Court, the evidence that is rendered admissible by means of this principle of the law of evidence is evidence concerning the actual statement made by the witness, *Walters* , 357 N.C. at 89, 588 S.E.2d 344 (upholding the admission of a "911 tape and Ione Black's statement to Detective Autry" for the purpose of corroborating Ms. Black's trial testimony); *Farmer* , 333 N.C. at 192, 424 S.E.2d 120 (noting that, "to be admissible as corroborative evidence, a witness's prior consistent statements merely must tend to add weight or credibility to the witness's testimony" and holding that any error that the trial court might have committed in admitting "Shields' written statement to Washburn" was harmless"); *Williamson* , 333 N.C. at 135–37, 423 S.E.2d 766 (upholding the admission of "those portions of Agent White's testimony regarding Logan's statements that were objected to" for the purpose of corroborating the trial testimony of Tyrone Logan); *Jones* , 329 N.C. at 256–58, 404 S.E.2d 835 (upholding the admission of testimony by an investigating officer concerning "a written verbatim account of the statement Mr. Sanders had made to him" for the purpose of corroborating Mr. Sanders' trial testimony); *Lawson* , 310 N.C. at 639, 314 S.E.2d 493 (upholding the admission of the testimony "of police investigators relating to Ms. Soden's prior statements to them made before

and after defendant's arrest" to "corroborate her in-court testimony"); *Martin* , 309 N.C. at 477, 308 S.E.2d 277 (upholding the admission of an extrajudicial statement by Mark Anthony Owens on the grounds that "the prior statement does corroborate his in-court testimony" after "carefully compar[ing] Owens' in-court testimony with his prior written statement,"); *Elkerson* , 304 N.C. at 666–67, 285 S.E.2d 784 (upholding the admission of testimony by "Deputy Sheriff David Smith and S.B.I. Agent Joe Momier ... concerning statements made to them by James Smith which tended to corroborate Smith's trial testimony"); *State v. Medley* , 295 N.C. 75, 77–79, 243 S.E.2d 374 (1978) (upholding the admission of "the prior written statements of Willie James Meaders and Glossie Lee Carter for corroborative purposes"). As a result, what these decisions, and others like them, make admissible is evidence concerning what the witness actually said on a prior occasion without authorizing the admission of what is, in essence, extensive editorial commentary about the relationship between the witness's trial testimony and the extrajudicial statement given that "whether [the extrajudicial statement] in fact corroborated the [witness'] testimony [is,] of course, a jury question. *State v. Ramey* , 318 N.C. 457, 470, 349 S.E.2d 566 (1986) ; see also *Medley* , 295 N.C. at 79, 243 S.E.2d 374 (stating that "[t]he minor variances complained of do not impair the admissibility of the prior statements for corroborative purposes, but affect only the weight and credibility, which is always for the jury").

¶ 39 The challenged portion of Deputy Teer's testimony, which is that, "[d]espite multiple attempts to give [Ms. Pichardo] the opportunity to expand her story, she didn't," with her "story [having] stayed entirely 100 percent consistent, resolute, and rock solid," bears no resemblance to any evidence that this Court has previously allowed to be admitted for corroborative purposes. Instead of simply reciting the statements that Ms. Pichardo made to him and allowing the jury to determine whether that evidence did or did not corroborate Ms. Pichardo's trial testimony or even stating that the statements that Ms. Pichardo made to him were consistent with her trial testimony, Deputy Teer engaged in an extensive discussion of a questioning technique that he utilized for the
478 purpose *478 of determining Ms. Pichardo's credibility, which rested upon the theory that a particular witness' tendency to latch on to additional facts suggested by the questioner would be "a red flag [ ] for the credibility of that person." In the context of this discussion of witness credibility, a reasonable juror could have only understood Deputy Teer's description of Ms. Pichardo's performance on the test of credibility that he administered to her as "rock solid" or "unlikely to change, fail, or collapse," *Rock solid* , *New Oxford American Dictionary* (3d ed. 2010), to be an assertion that, since Ms. Pichardo's statements remained consistent in the face of Deputy Teer's repeated attempts to suggest the presence of additional details to her, her account of what had happened on the night of Mr.
671 Guerrero's death should be deemed credible. *671

¶ 40 The challenged portion of Deputy Teer's testimony at issue in this case is fundamentally different from the evidence at issue in *Betts* , in which we opined that "[a]n expert witness's use of the word 'disclose,' standing alone, does not constitute impermissible vouching as to the credibility of a victim of child sex abuse, regardless of how frequently used, and indicates nothing more than that a particular statement was made." *Betts* , 2021-NCSC-68, ¶ 20, 377 N.C. 519, 858 S.E.2d 601. In other words, we concluded in *Betts* that the word "disclose" was nothing more than a term used by the witness to describe the communications that the alleged victim of an act of child sexual abuse made concerning the defendant's allegedly unlawful conduct and did not have the connotation that the account that the child provided on the occasion in question was an inherently truthful one. *Id.* ¶¶ 18 – 21. The challenged portion of Deputy Teer's testimony, on the other hand, did, for the reasons set out above, go beyond a recitation of what Ms.

Pichardo told him or even an expression of opinion that the statements that she had made to him were consistent with her trial testimony and constituted an expression of Deputy Teer's confidence that the information that Ms. Pichardo had communicated in the statements that she had made to him was credible. As a result, our decision in *Betts* does not support a decision to uphold the admission of the challenged portion of Deputy Teer's testimony.

¶ 41 Similarly, the admission of the challenged portion of Deputy Teer's testimony cannot be upheld as an appropriate response to the fact that defendant had challenged the credibility of Ms. Pichardo's testimony in the course of cross-examining her. Rule 608(a) of the North Carolina Rules of Evidence provides that:

> [t]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject

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> to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

N.C.G.S. § 8C-1, Rule 608(a) (2021). Put another way, Rule 608(a) allows the party that called a witness to bolster the credibility of that witness by eliciting evidence concerning that witness' "character for truthfulness" in the event that the credibility of that witness has been attacked "by evidence in the form of reputation or opinion." In this case, however, defendant did not attack Ms. Pichardo's credibility "by opinion or reputation evidence or otherwise." Instead, defendant attempted to challenge Ms. Pichardo's credibility by pointing out what he believed to be inconsistencies between the information contained in her trial testimony and the statements that she gave to investigating officers.[4] In addition, the challenged portion of Deputy Teer's testimony constituted a direct assertion that Ms. Pichardo had passed the credibility test that he had administered to her rather than "evidence of truthful character." Thus, the admission of the challenged portion of Deputy Teer's testimony cannot be upheld on the basis of N.C.G.S. § 8C-1, Rule 608(a). As a result, for all of these reasons, the challenged portion of Deputy Teer's testimony did not constitute admissible evidence, resulting in the necessity for us to conduct the prejudice inquiry required by our plain error jurisprudence.

[4] For example, defendant's trial counsel sought to impeach Ms. Pichardo's testimony that defendant had punched her through the glass door of her residence by pointing out that, according to the transcript of her call for emergency assistance, she "had gone outside and a person punched her in the eye." Similarly, defendant's trial counsel elicited evidence that Ms. Pichardo had failed to tell investigating officers that she had had to run around a car in the driveway while being chased by defendant despite having made such an assertion in her trial testimony. Finally, defendant's trial counsel elicited evidence tending to show, on the one hand, that Ms. Pichardo had a good relationship with Mr. Huerta and had stated to investigating officers that she had no problem traveling to the Durham County Sheriff's Office with Mr. Huerta before asking, on the other hand, how such statements could be consistent with her testimony that Mr. Huerta had been "bothering [her]."

C. Plain Error

¶ 42 In seeking to persuade us that the admission of the challenged portion of Deputy Teer's

672 testimony was sufficiently *672 prejudicial to constitute plain error, defendant argues that this Court has tended to find that the admission of

testimony that improperly vouches for the
480 credibility *480 of a prosecution witness rises to the level of plain error in the event that the jury's decision to convict the defendant rested almost entirely upon the credibility of that witness, citing *Warden* , 376 N.C. at 507–10, 852 S.E.2d 184, *State v. Hannon* , 118 N.C. App. 448, 451, 455 S.E.2d 494 (1995), and *State v. Holloway* , 82 N.C. App. 586, 587, 347 S.E.2d 72 (1986). According to defendant, the jury's decision in this case hinged upon the manner in which it resolved "the issue of whether to believe the testimony of [Ms. Pichardo] or of [defendant]," with the accounts provided by Ms. Pichardo and defendant being absolutely contradictory. In addition, defendant asserts that the record does not contain any physical evidence tending to connect him to the assault upon Mr. Guerrero, that there were inconsistencies between Ms. Pichardo's trial testimony and the initial statement that she provided to Deputy Teer that served to cast doubt upon the credibility of her identification of defendant as the person who attacked Mr. Guerrero and herself, and that "[t]he State [had] not [been] able to provide any evidence for why [defendant] would want to assault [Mr. Guerrero]." As a result, defendant contends that it was reasonably probable that he would have been acquitted in the event that Deputy Teer had not been allowed to describe Ms. Pichardo's statements as "rock solid."

¶ 43 The State asserts, on the other hand, that defendant has failed to show that the admission of the challenged portion of Deputy Teer's testimony constituted a "fundamental error" that had a "probable impact" on the jury's verdict, quoting *Lawrence* , 365 N.C. at 518, 723 S.E.2d 326. In support of this assertion, the State claims to have presented overwhelming evidence of defendant's guilt, including Ms. Pichardo's testimony identifying defendant as the perpetrator of the attack upon Mr. Guerrero and herself, the fact that defendant admitted having been present at the time of the assault upon Mr. Guerrero and that Mr. Guerrero's blood was on his pants, and the "bizarre and conflicting accounts [that defendant provided] to police of that night's events," which "[n]o reasonable jury [was likely to] credit." Although the State concedes that the admission of evidence vouching for the credibility of another witness is generally prejudicial in the absence of physical evidence tending to support a finding of guilt, citing *Warden* , 376 N.C. at 504, 852 S.E.2d 184, the State asserts that this principle has no application in this instance given the undisputed evidence that someone knocked on Ms. Pichardo's door that night, that someone stabbed Mr. Guerrero to death, that someone punched Ms. Pichardo through the glass door to her residence; and that Mr. Guerrero's blood had been detected on defendant's muddy pants. Finally, the State contends that, even if any improper bolstering might have caused prejudice, "that prejudice was cured by the trial court's instructions to the jury."

481 *481 ¶ 44 A careful review of the record satisfies us that it is not reasonably probable that defendant would have been acquitted had the challenged portion of Deputy Teer's testimony not been admitted. Although this Court has held that the opinions of law enforcement officers can carry great weight with the members of a jury, *Tyndall* , 226 N.C. at 623, 39 S.E.2d 828 (stating that "[t]he witness was a State [highway patrolman] whose duty it was to make a disinterested and impartial investigation" and whose "testimony should, and no doubt did, carry great weight with the jury"), that fact alone does not suffice to necessitate a finding of plain error in this case given the strength of the State's case against defendant. Among other things, the record reflects that Ms. Pichardo had had ample previous opportunities to observe defendant, so there can be little room to doubt that she knew who he was. In addition, the record reflects that Ms. Pichardo consistently identified defendant as the person who attacked Mr. Guerrero and herself on the evening in question during her call for emergency assistance, her statements to investigating officers, and her trial testimony. Furthermore, the DNA test results

admitted into evidence provided near conclusive proof that, contrary to some of his initial statements to the emergency assistance dispatcher and investigating officers, defendant had been present at the time of Mr. Guerrero's murder and
673 had Mr. Guerrero's blood on his muddy *673 jeans. Similarly, defendant provided conflicting accounts to police concerning what had allegedly happened on the night of Mr. Guerrero's death that included differing descriptions of the race or ethnicity of the two men that he claimed to have attacked Mr. Guerrero and both an admission and a denial that he had approached Mr. Guerrero in the immediate aftermath of the stabbing. Finally, the record contains physical evidence tending to show that a criminal assault had been committed upon both Ms. Pichardo and Mr. Guerrero on the night of Mr. Guerrero's death, including the injuries that Ms. Pichardo, Mr. Guerrero, and their son sustained; the broken glass associated with the door to the residence that Ms. Pichardo, Mr. Guerrero, and their son occupied; and the presence of defendant's blood on Mr. Guerrero's muddy pants. Thus, given the strength of the State's evidence of defendant's guilt and the dubious credibility of defendant's denial of any involvement in the attacks that were perpetrated against Ms. Pichardo and Mr. Guerrero, we are unable to say that there is a reasonable probability that defendant would have been acquitted in the event that Deputy Teer had not been allowed to testify that Ms. Pichardo's account of the events that occurred at that time was "rock solid." As a result, we hold that the trial court did not commit plain error by allowing the admission of the challenged portion of Deputy
482 Teer's testimony. *482 **III. Conclusion**

¶ 45 Thus, for the reasons set forth above, we hold that, while Deputy Teer should not have been allowed to testify that Ms. Pichardo's account of the events that occurred on the evening of Mr. Guerrero's death was "rock solid," the admission of the challenged portion of Deputy Teer's testimony did not constitute plain error. As a result, we modify and affirm the Court of Appeals' decision in this case.

MODIFIED AND AFFIRMED.

Justice BARRINGER dissenting in part, concurring in result.

¶ 46 I agree with the majority that there is no plain error. The majority opined that Deputy John Teer's testimony would have been inadmissible if the objection had been raised. Further, Deputy Teer's testimony was admissible because it merely corroborated Liliana Pichardo's ("Ms. Pichardo") testimony. For that reason, I respectfully dissent in part and concur in result.

¶ 47 At trial, Ms. Pichardo testified that she saw defendant Efren Ernesto Caballero, who was wearing a black sweatshirt with a zipper, attack her husband. He then attacked her. After Ms. Pichardo gave her testimony, Deputy Teer testified that Ms. Pichardo gave him a description of her attacker. Deputy Teer testified further that she told him that her attacker was "her neighbor, Mr. Caballero," and he was wearing "a dark jacket or a dark hoodie with a zipper." However, when Deputy Teer saw defendant at the scene of the incident, defendant was wearing a white hoodie with stripes. Deputy Teer testified that after he informed Ms. Pichardo that defendant, Mr. Caballero, "was wearing a white hoodie with stripes on it," Ms. Pichardo, with "no hesitation," responded that defendant must have changed his clothes. Deputy Teer testified that Ms. Pichardo's "instant" response "stuck in [his] head" because "she knew who [the attacker] was."

¶ 48 The State then asked Deputy Teer why that stuck in his head and why he pushed Ms. Pichardo to be certain about defendant's clothing. Deputy Teer responded,

> I pushed her on that because frequently, based on my training and experience, I know that if you're talking to a witness and they will change [their] story as you suggest things. I mean, it reduces their credibility if you say, well, this -- how about this; and they
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> go with that. Oh, yeah, it could have been that, yeah, I think he was wearing that. That's a red flag right there for the credibility of that person.
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> But this stuck out because she stuck to her story. She was resolute and rock solid, never wavered, never changed what she was saying. She knew who her attacker was. She knew what he was wearing. And when I tried to say, hey, it couldn't be that, he's not wearing what you just told me, she said, well, obvious[ly], he changed. He changed his clothing.
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> The same thing, I also pressed her did you see a weapon; did you see a gun; did you see a knife; was he maybe holding it
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> and you can barely see it. I was trying to give her an opportunity to say, yeah, yeah, I think I saw a knife, I think I saw a gun. She didn't. She said she never saw a weapon. At one point she said, well, his hand was in his pocket, but there -- she did not say that she saw a gun or a knife when I was talking with her.
>
> Despite multiple attempts to give her the opportunity to expand her story, she didn't. Her story stayed entirely 100 percent consistent, resolute[,] and solid.

¶ 49 This Court has established that a witness's prior consistent statements are admissible as corroborative evidence. *State v. Walters* , 357 N.C. 68, 88–89, 588 S.E.2d 344 (2003) ("It has been well established in this state that '[a] prior consistent statement of a witness is admissible to corroborate the testimony of the witness whether or not the witness has been impeached,' even though the statement was hearsay.") (alteration in original) (quoting *State v. Jones* , 329 N.C. 254, 257, 404 S.E.2d 835 (1991)). Such statements are admissible as long they "merely ... tend to add weight or credibility to the witness'[s] testimony." *Id.* at 89, 588 S.E.2d 344 (quoting *State v. Farmer* , 333 N.C. 172, 192, 424 S.E.2d 120 (1993)). However, a witness typically cannot vouch for the credibility of another witness. *See, e.g.* , *State v. Robinson* , 355 N.C. 320, 334–35, 561 S.E.2d 245 (2002) (stating that it is improper for a witness to "vouch for the veracity of another witness"). "[I]t is the province of the jury ... to assess and determine witness credibility." *State v. Hyatt* , 355 N.C. 642, 666, 566 S.E.2d 61 (2002).

¶ 50 Here, Deputy Teer's testimony when read in context—that Ms. Pichardo "never wavered and was rock solid"—merely established that Ms. Pichardo's trial testimony was consistent with her 484 numerous prior *484 statements. Surrounding the statement that Ms. Pichardo was "rock solid," Deputy Teer made the point that she "stuck to her story;" she "stayed entirely 100 percent consistent, resolute and solid;" she "never changed what she was saying;" and "she was sure and never deviated." Deputy Teer was not vouching for her credibility because he did not testify that Ms. Pichardo was telling the truth, simply that she did not vary her account. Since Ms. Pichardo's statements remained consistent in the face of his repeated attempts to suggest additional details, this "stuck in his head." His testimony did nothing more than corroborate Ms. Pichardo's testimony with her prior statements. His testimony in no way impeded the jury's ability to make a credibility determination about Ms. Pichardo's testimony.

Thus, Deputy Teer's testimony was not vouching for Ms. Pichardo's testimony and therefore was proper.

¶ 51 Accordingly, I respectfully dissent in part and concur in result.

Chief Justice NEWBY and Justice BERGER join in this dissenting in part and concurring in result opinion.

No. 146A02
Supreme Court of North Carolina

State v. Chapman

359 N.C. 328 (N.C. 2005) · 611 S.E.2d 794
Decided Apr 1, 2005

No. 146A02

Filed 7 April 2005

1. Jury — capital selection — peremptory challenges — *Batson* claim

The trial court did not err in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by allowing the State's exercise of its peremptory challenges against two African-American prospective jurors even though defendant alleged racial discrimination, because: (1) the shared race of the involved parties tended to contradict an inference of purposeful discrimination by prosecutors; (2) one of the prospective jurors expressed serious reservations about recommending the death penalty and two of the other prospective juror's children were prosecuted for serious offenses by the same district attorney office; and (3) responses elicited from one prospective juror were in a manner that was similar to the questioning of all other prospective jurors and from the other prospective juror in a manner tailored to address her unique circumstances.

2. Jury — capital selection — voir dire — views on death penalty — hypothetical questions — sympathy for defendant — passing judgment on defendant

The trial court did not abuse its discretion in a capital trial by concluding that the prosecutor did not ask improper questions during voir dire regarding how jurors would vote during the sentencing phase, whether jurors' decisions would be based upon the law or their personal feelings, whether jurors had sympathy for defendant, and whether jurors understood they were not being asked to pass judgment on defendant, because: (1) the prosecutor's general questions represented a legitimate attempt to elicit prospective jurors' personal views on capital punishment, did not tend to commit prospective jurors to a specific future course of action, and helped to clarify whether the prospective jurors' personal beliefs would substantially impair their ability to follow the law; (2) although the form of some of the prosecutor's questions were hypothetical, these questions also did not commit jurors to a specific future
329 course of action in *329 defendant's case, the questions were not aimed at indoctrinating jurors with views favorable to the State, and the questions were simple and clear without a propensity for confusing jurors; (3) the prosecutor's questions did not address definable qualities of defendant's appearance or demeanor, and in fact the pertinent question concerned jurors' feelings toward defendant notwithstanding his courtroom appearance or behavior; and (4) in regard to the prosecutor's statement that the jurors were not being asked to pass judgment upon defendant, our Supreme Court has declined to extend application of the plain error doctrine to situations where a party has failed to object to statements made by the other party during jury voir dire.

3. Evidence — photographs — testimony — physical evidence

The trial court did not abuse its discretion in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting into evidence an autopsy photograph of the victim, two photographs of the car in which the victim was shot, and the victim's clothing, nor did the trial court commit plain error by admitting blood-stained seat material seized from the car and testimony of three law enforcement officers describing the car's interior and the victim's wounds, because: (1) the trial court admitted each photograph for illustrative purposes only, and two witnesses used the photographs to explain relevant portions of their testimony; (2) the autopsy photograph tended to explain and support a witness's expert opinion as to the cause of the victim's death, and the photographs of the car's interior corroborated an officer's testimony describing the crime scene and showed the location at which the victim sustained the gunshot wound; (3) an officer's testimony carried significant probative value tending to show the location and circumstances of the victim's death, and the probative value was not outweighed by danger of unfair prejudice; (4) the testimony of a former evidence and crime technician concerning the fabric swatch was introduced by prosecutors solely to inform the jury that stains on the car's rear seat had been tested for blood and that the stains were in fact blood, the evidence was probative of the location and circumstances of the victim's death, and the probative value was not outweighed by danger of unfair prejudice; (5) the victim's clothing was not published to the jury and was minimally discussed during the direct examination of a former
330 evidence and crime *330 scene technician whose testimony served to authenticate the

items, and the technician's testimony that he picked up the victim's clothing from the gurney that the victim was lying on was relevant and admissible for authentication purposes; and (6) a detective's testimony describing the victim's body in the hospital emergency room was probative of the cause and nature of the victim's death, and its probative value was not outweighed by danger of unfair prejudice.

4. Evidence — hearsay — not offered for truth of matter asserted — course of conduct

The trial court did not err in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting alleged hearsay evidence during the direct
331 examination of a detective who testified from his notes concerning his interview with defendant, because: (1) defendant did not preserve an assignment of constitutional error for review; (2) defendant's statement to the detective was admissible as the statement of a party opponent; (3) the words of an unidentified caller contained within defendant's statement to the detective were not hearsay since they were not offered to prove the truth of the matter asserted, but instead the phone call was admitted to show defendant's response to receiving the call; and (4) the testimony was relevant to explain defendant's course of conduct following the shooting and the statement was not unfairly prejudicial.

5. Evidence — prior consistent statements — corroboration

The trial court did not err in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting a detective's testimony that he overheard defendant's coparticipant tell his mother that he was tired of lying and he was going to tell the police the truth during a phone call that the coparticipant made from the police interview room, because: (1) the testimony was admissible to corroborate the coparticipant's earlier testimony as a State's witness; and (2) the testimony was admissible as a prior consistent statement which tended to strengthen the coparticipant's credibility regarding his testimony that although he initially lied to law enforcement, he decided to tell the truth after speaking to his mother.

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6. Evidence — hearsay — caught in lie — not offered for truth of matter asserted

The trial court did not err in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting three statements made by a detective on direct examination about his interview with defendant's coparticipant concerning officers checking out the coparticipant's story about staying with two ladies and finding the statement to be true, that there were statements made at the ladies' apartment that the coparticipant was aware of the pertinent shooting, and that officers had information that the coparticipant stayed the night with the two ladies, because: (1) the central purpose for offering the detective's statements was to show the coparticipant's response to being caught in a lie during his second police interview; (2) the statements challenged by defendant were not offered to prove the truth of the matter asserted; and (3) defendant's constitutional assignment of error on this matter has been waived.

7. Evidence — testimony — witness testified truthfully — testimony of witness's attorney

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The trial court did not err or commit plain error in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting the statements of defendant's coparticipant that he testified truthfully during direct and redirect examinations after his credibility was attacked, by admitting the coparticipant's testimony that he was represented and advised by counsel during the formalization of a plea agreement related to the victim's death, and by admitting the testimony of the coparticipant's attorney that the coparticipant was represented by counsel during plea negotiations on charges related to the victim's death, because: (1) it cannot be said that the coparticipant's responses probably altered the outcome of the trial; (2) the coparticipant's redirect testimony was properly allowed to explain impeaching evidence elicited by defense counsel on cross-examination; and (3) the coparticipant's attorney was properly called to corroborate the coparticipant's testimony after he was impeached on cross and recross-examinations, and the attorney's testimony substantially corroborated the coparticipant's testimony by explaining why he pled guilty to second-degree murder.

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8. Appeal and Error — preservation of issues — failure to raise constitutional issues at trial

Although defendant contends the trial court violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting a detective's testimony that defendant surrendered to law enforcement officers in the presence of his family and his attorney, and that after taking defendant into custody the detective did not conduct an interview with defendant, this assignment of error is overruled because constitutional error will not be considered for the first time on appeal.

9. Criminal Law — prosecutor's arguments — right to remain silent — personal belief on truthful witnesses — misstatement of law — hypothetical factual scenario

The trial court did not err by failing to intervene ex mero motu in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting during opening and closing arguments the prosecutors' statements that defendant contends commented on defendant's right to remain silent, asserted that the State's witnesses were truthful, and misstated the law regarding felony murder, nor did it err by allowing the prosecutor to argue an alleged irrelevant hypothetical factual scenario to the jury, because: (1) the prosecutor's closing argument explained the circumstantial nature of evidence tending to show premeditation and deliberation without encouraging jurors to infer guilt from defendant's silence, any reference to defendant's failure to testify was indirect, and there was no reference to defendant's decision to exercise his right to silence during the prosecutor's opening statements; (2) under the circumstances where defense counsel impeached each witness with a prior inconsistent statement and also elicited information from each witness which supported an inference of bias, prosecutors were entitled to argue why and how the witnesses came to tell law enforcement various versions of events and that the sequence of events advanced by the State should be credited by the jury; (3) although the prosecutor's argument applying the law of felony murder to the facts of defendant's case was oversimplified, the prosecutor's statements were not inaccurate or confusing to a degree requiring ex mero motu intervention by the trial court; and (4) the prosecutor's hypothetical example accurately illustrated the law of felony murder.

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10. Homicide — attempted first-degree murder — first-degree murder — motion to dismiss — sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the attempted first-degree murder and first-degree murder charges at the close of all the evidence, because the State presented substantial evidence to support a conclusion that defendant acted with premeditation, deliberation, and specific intent to kill including evidence of: (1) defendant's motive, preparation, and conduct and statements during the events surrounding the shooting; (2) the multiple gunshots fired by defendant; (3) the total lack of provocation for defendant's actions; and (4) defendant's attempt to conceal his involvement in the shooting.

11. Homicide — first-degree murder — failure to instruct on lesser-included offense of second-degree murder

The trial court did not err in a capital first-degree murder case by refusing to instruct the jury on second-degree murder, because: (1) the State presented sufficient evidence to prove premeditation, deliberation, and specific intent to kill; (2) defendant's statement that he was going to shoot the car and the fact that these shots were fired at night and between two moving vehicles in no way negated the State's evidence of mens rea; (3) there was no indication from the State's evidence that defendant was intoxicated to a degree sufficient to negate mens rea; and (4) defendant did not present evidence during the guilt-innocence phase of borderline mental retardation or any mental or emotional disturbance, and common sense compels that evidence which is not presented until the capital sentencing proceeding cannot serve as the basis of a trial court's ruling during the guilt-innocence phase.

12. Homicide — first-degree murder — instruction — specific intent to kill

The trial court did not err in a capital first-degree murder and attempted first-degree murder case by refusing to supplement its specific intent to kill instruction with defendant's special requested instruction that "it is not enough that defendant merely committed an intentional act that resulted in the victim's death" because this requested instruction was unsupported by the evidence when there was no evidence presented at trial to negate the State's evidence of mens rea.

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13. Homicide — first-degree murder — instructions — three theories — submission of not guilty verdict

The trial court did not fail to submit a not guilty verdict in its instructions on first-degree murder where the court submitted three separate theories of first-degree murder to the jury: (1) malice, premeditation and deliberation, (2) felony murder based upon attempted first-degree murder, and (3) felony murder based upon discharging a firearm into occupied property; the trial court omitted language after its instruction for felony murder based upon attempted first-degree murder that if the jury did not find certain matters, then jurors should not return a verdict of guilty under that theory; and at the conclusion of the trial court's mandate on all three theories of first-degree murder, the court instructed the jurors that if they did not find defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation and if they did not find defendant guilty of first-degree murder under the felony murder rule, it would be their duty to return a verdict of not guilty.

14. Homicide — felony murder — discharging firearm into occupied vehicle — motion to dismiss — sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree felony murder based upon the felony of discharging a firearm into an occupied vehicle, because the State presented sufficient evidence of defendant's intent to kill an occupant of the vehicle.

15. Sentencing — death penalty vacated — defendant under eighteen years old

Defendant's death sentence in a first-degree murder case is vacated pursuant to the United States Supreme Court's recent decision in *Roper v. Simmons,* ___ U.S. ___, ___ L. Ed. 2d ___ (2005), because defendant was not yet eighteen years old at the time he murdered the victim.

Justice NEWBY did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Jerry Cash Martin on 2 November 2001 in Superior Court, Johnston County, upon a jury verdict finding defendant guilty of first-degree murder. On 21 February 2003, this Court allowed defendant's motion to
335 bypass *335 the Court of Appeals as to his appeal of additional judgments. On 1 April 2004, this Court allowed defendant's motion to hold decision pending the United States Supreme Court's decision in *Roper v. Simmons,* 112 S.W.3d 397 (Mo. 2003), *cert. granted,* 540 U.S. 1160, 157 L. Ed. 2d 1204 (2004). Heard in the Supreme Court of North Carolina 17 November 2003.

Roy Cooper, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State. Staples Hughes, Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender and Kelly D. Miller, Assistant Appellate Defender, for defendant-appellant.

BRADY, Justice.

Seleana Ceana Nesbitt was fatally shot in the head on 9 July 2000, while riding with her friend, Brandy Raquel Smith, in the back seat of a car on the way home from a nightclub. On 24 July 2000, a Johnston County grand jury indicted defendant LeMorris J. Chapman for the first-degree murder of Ms. Nesbitt and attempted first-degree murder of Ms. Smith. On 9 July 2001, a second Johnston County grand jury returned an additional indictment against defendant for discharging a firearm into occupied property.

Defendant was tried capitally before a jury at the 8 October 2001 Criminal Session of the Johnston County Superior Court. On 29 October 2001, a jury returned a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. The jury also found defendant guilty of attempted first-degree murder and discharging a firearm into occupied property. On 2 November 2001, following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction, and the trial court entered judgment accordingly. The trial court also sentenced defendant to consecutive prison terms of 157 months to 198 months for attempted first-degree murder and 25 to 39 months for discharging a firearm into occupied property.

Defendant appealed his death sentence to this Court, and on 21 February 2003, the Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of the noncapital convictions and judgments. This Court heard oral argument in defendant's case on 17 November 2003. On 1 April 2004, the Court allowed defendant's motion to hold decision pending the
336 United States Supreme Court's *336 decision in *Roper v. Simmons,* 112 S.W.3d 397 (Mo. 2003), *cert. granted,* 540 U.S. 1160, 157 L. Ed. 2d 1204 (2004). The United States Supreme Court issued its opinion in *Roper* on 1 March 2005. ___ U.S. ___, ___ L. Ed. 2d ___, 2005 U.S. LEXIS 2200 (Mar. 1, 2005) (No. 03-633). After consideration of the assignments of error raised by defendant on appeal and a thorough review of the transcript, record on appeal, briefs, oral arguments, and *Roper v. Simmons,* we find no error in the guilt-innocence phase of defendant's trial but vacate defendant's death sentence as "cruel and unusual" consistent with *Roper.*

FACTUAL BACKGROUND

Evidence presented by the State at trial tended to show that on 7 July 2000, defendant's ex-girlfriend Alecia Doughty drove past an apartment where defendant was attending a cookout. Doughty was driving a Nissan Sentra that belonged to Greg Brooks, and Brooks was riding in the passenger seat. Later that night defendant spoke to Doughty by phone and asked about Brooks. Defendant then told Doughty to come pick him up. Doughty did so, and defendant and Doughty spent the night together. On the following day, Doughty dropped defendant off at another house, where defendant called Doughty on the phone and told her, "I ain't f____g with you no more."

On 8 July 2000, defendant and five of his friends decided to go to Club 39, a nightclub near Mudcat Stadium in Wake County. The group included Lee Green, DaJuan Morgan, Jared Clemmons, Donald Lamont Dennis, and Shamarh McNeil. Because they could not all fit into defendant's Honda, the group decided to borrow a vehicle from another friend, Garry Yarborough. Clemmons, McNeil, and Dennis drove defendant's Honda to Yarborough's home in Wilson Mills to exchange it with Yarborough's white Cadillac Seville. There the group talked with Yarborough's wife Mya, as well as defendant's brother, Chris Chapman, and Chris' fiancée, Shenita. Before the group left, Yarborough gave Clemmons a loaded Soviet era SKS Carbine, semiautomatic rifle "for protection in case something happens at the club tonight." Clemmons handed the rifle to McNeil, who placed it in the trunk of Yarborough's Cadillac.

That evening Clemmons drove defendant, Green, Dennis, Morgan and McNeil to Club 39 in the Cadillac. As they approached the club, the group saw security guards stopping vehicles in the club's driveway and checking for weapons. Clemmons
337 turned the car around and *337 defendant told Clemmons to drive into the nearby Mudcat Stadium parking lot. Clemmons testified that upon their arrival at the stadium, defendant called his brother Chris. The group waited, and after approximately fifteen minutes, Chris Chapman arrived at the stadium parking lot. Defendant got out of the Cadillac and spoke with Chris. When defendant returned to the Cadillac, he handed

Dennis a brown McDonald's bag containing a black .45 caliber ACP, semi-automatic handgun. McNeil testified that he was not surprised to see Chris Chapman in the stadium parking lot because the meeting had been pre-arranged.

On the way back to the club, defendant instructed Clemmons to stop the car. Then defendant and Dennis stepped out of the vehicle, opened the trunk, and removed the SKS rifle. Defendant and Dennis concealed the rifle and handgun in a ditch beside a light pole in a wooded area. Thereafter, the group proceeded to Club 39, arriving sometime after 10:00 p.m.

Defendant saw Doughty at the club and tried unsuccessfully to speak with her. Brooks, who was also at the club, had not previously met defendant, but spoke with him and shook his hand. Defendant and his friends stayed at the club until after it closed at 3:00 a.m. Brooks, his cousin Lavires Richardson, Seleana Nesbitt, and Brandy Smith left at the same time in Brooks' blue Nissan Sentra. Green testified at trial that he did not speak to Ms. Nesbitt at the club because he knew she was with Brooks. Green also testified that he knew Brooks drove a Nissan Sentra and that he had seen Seleana standing next to that car in the parking lot before leaving the club.

On the way home from the club, defendant and his friends stopped to retrieve the hidden SKS rifle and handgun, placing both weapons in the passenger area. Clemmons drove; defendant rode in the front passenger seat, and Green, Morgan, Dennis, and McNeil sat in the back. After they reached Highway 39, defendant instructed Clemmons to speed up and to pass certain vehicles. As they approached Brooks' car from behind, one of the passengers said, "[T]hat's them right there." Defendant replied, "[L]et's get that m____rf____r." Then defendant told Clemmons not to pass Brooks' car. While the Cadillac was behind Brooks' vehicle, defendant called his brother and instructed him not to pass the car in front of them because defendant was "about to shoot up this car." Defendant began firing the SKS rifle out of the front passenger side window while DaJuan Morgan fired the handgun out of the rear left window. Defendant shot the rifle six to eight
338 times, and Morgan fired the handgun *338 three to four times. Then defendant boasted to his friends that "we wet the car up, the m____rf____r."

After the shooting, defendant told Clemmons to park the Cadillac at Percy Flowers' store, where defendant had seen Garry Yarborough sitting outside. Defendant and his friends, who appeared excited, told Yarborough what had just happened. Defendant and Dennis hid the rifle and handgun in Yarborough's yard and after riding together briefly, the group went their separate ways.

Seleana Nesbitt and Brandy Smith, who were back seat passengers in Brooks' car, were both shot. Brooks immediately drove to Johnston Memorial Hospital in Smithfield, where Ms. Smith was treated for her wounds and Ms. Nesbitt was pronounced dead.

Additional relevant facts will be presented when necessary to resolve specific assignments of error raised by defendant.

JURY SELECTION

In his first argument, defendant assigns error to the State's exercise of peremptory challenges against prospective jurors, Linda Thorne Barbour and Amanda Flonard, in violation of *Batson v. Kentucky,* 476 U.S. 79, 90 L. Ed. 2d 69 (1986). Defendant objected to both peremptory challenges during *voir dire.* In ruling on each *Batson* objection, the trial court concluded that "there has not been a prima facie showing by the defendant that the State is exercising a peremptory challenge to exclude jurors on account of race." Defendant contends that the *prima facie* requirement was met and requests a new trial or, alternatively, an evidentiary hearing. We affirm the trial court's ruling as to both prospective jurors.

In *Batson v. Kentucky,* the United States Supreme Court reaffirmed the principle first announced in *Strauder v. West Virginia,* 100 U.S. 303, 25 L. Ed. 664 (1880), that purposeful exclusion of African-Americans from participation as jurors solely on account of race violates a defendant's rights under the Equal Protection Clause of the United States Constitution. *Batson,* 476 U.S. at 85-86, 90 L. Ed. 2d at 80. The Court defined a three-part test for determining whether a juror has been impermissibly excused on the basis of race. *Id.* at 96-98, 90 L. Ed. 2d at 87-89. To establish a viable *Batson* challenge, a defendant must first show that he is a member of a "cognizable racial group" and that the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the jury panel. *Id.* at 96, 90 L. Ed. 2d at
339 87. If such a showing is made, "the burden *339 shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question." *Hernandez v. New York,* 500 U.S. 352, 358-59, 114 L. Ed. 2d 395, 405 (1991). To prevail, "the defendant must show that these facts and *any other relevant circumstances* raise an inference that the prosecutor used that practice to exclude the [prospective jurors] . . . on account of their race." *Batson,* 476 U.S. at 96, 90 L. Ed. 2d at 87-88 (emphasis added). In making this showing, a defendant is "entitled to rely on the fact" that peremptory challenges "permit 'those to discriminate who are of a mind to discriminate.'" *Id.* at 96, 90 L. Ed. 2d at 87 (quoting *Avery v. Georgia,* 345 U.S. 559, 562, 97 L. Ed. 1244, 1247-48 (1953)). Moreover, "relevant circumstances" may include, but are not limited to, the race of the defendant and the victim(s), the race of key witnesses, a "'pattern' of strikes" against African-American jurors, and a "prosecutor's questions and statements during *voir dire* examination and in exercising his challenges." *Id.* at 97, 90 L. Ed. 2d at 88; *see also State v. Barden,* 356 N.C. 316, 343-44, 572 S.E.2d 108, 126-27 (2002), *cert. denied,* 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003); *State v. King,* 353 N.C. 457, 468-69, 546 S.E.2d 575, 586 (2001), *cert. denied,* 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002). "The trial court must [then] determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez,* 500 U.S. at 359, 114 L. Ed. 2d at 405 (citing *Batson,* 476 U.S. at 98, 90 L. Ed. 2d at 88-89); *King,* 353 N.C. at 469-70, 546 S.E.2d at 586-87.

Trial judges, who are "experienced in supervising voir dire," and who observe the prosecutor's questions, statements, and demeanor firsthand, are well qualified to "decide if the circumstances concerning the prosecutor's use of peremptory challenges create a prima facie case of discrimination against black jurors." *Batson,* 476 U.S. at 97, 90 L. Ed. 2d at 88. The trial court's findings will be upheld on appeal unless the "'reviewing court on the entire evidence [would be] left with the definite and firm conviction that a mistake ha[d] been committed.'" *Hernandez,* 500 U.S. at 369, 114 L. Ed. 2d at 412 (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 92 L. Ed. 746, 766 (1948)). Thus, the standard of review is whether the trial court's findings are clearly erroneous. *State v. Barnes,* 345 N.C. 184, 210, 481 S.E.2d 44, 58 (1997), *cert. denied,* 523 U.S. 1024, 140 L. Ed. 2d 473 (1998); *King,* 353 N.C. at 470, 546 S.E.2d at 587.

The record in the case *sub judice* indicates that Ms. Barbour is an African-American female who was the seventh prospective juror peremptorily
340 challenged by the State. At the time of Ms. *340 Barbour's challenge, the prosecutor had exercised five peremptory challenges against prospective Caucasian jurors and two peremptory challenges against prospective African-American jurors. Apart from Ms. Barbour, only one other prospective African-American juror had not been excused for cause, but that juror was excused peremptorily by the State after he expressed personal beliefs in opposition to capital punishment.

During *voir dire,* the prosecutor asked Ms. Barbour questions that were similar to those asked of other prospective jurors. When questioned about her feelings regarding the death penalty, Ms. Barbour answered that she doesn't "believe in the death penalty" and has felt that way all her life. Ms. Barbour described her feelings as "[p]retty strong," but she stated that she could vote to recommend a death sentence if the law required. Shortly thereafter, the prosecutor exercised peremptory challenges as to Ms. Barbour and a
341 Caucasian individual who had also indicated apprehension over recommending a death sentence.

Following the prosecutor's exercise of a peremptory challenge against Ms. Barbour, defendant made a motion pursuant to *Batson.* In support of a *prima facie* showing defendant noted the following: (1) Ms. Barbour identified herself as African-American on her jury questionnaire, (2) defendant is African-American, (3) defendant is entitled to rely on a presumption that peremptory challenges "permit those to discriminate who are of a mind to discriminate," and (4) Ms. Barbour's responses were the same or similar to those of prospective Caucasian jurors whom the prosecution did not challenge.

The trial court found that defendant and Ms. Barbour are African-American, as were the decedent Seleana Nesbitt, and the other three victims present in Brooks' car when the shootings occurred. The court also found the State had exercised seven peremptory challenges, five as to prospective Caucasian jurors and one as to a prospective African-American juror. Finally, the trial court stated:

> The [c]ourt does not find that there's anything about the manner in which the jurors have been selected which would tend to indicate discrimination as to race. The [c]ourt finds that there has not been a repeated use of preemptory [sic] challenge[s] against a black prospective juror, that it tends to establish a pattern of strikes against blacks in the venire.
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> *341
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> The [c]ourt concludes that the defendant has not shown any relevant circumstances to raise an inference that the prosecuting attorney is using preemptory [sic] challenges to exclude veniremen on this jury on account of their race.

With regard to Ms. Flonard, the record indicates that she is an African-American female who was the next prospective juror peremptorily challenged by the prosecutor following Ms. Barbour. During *voir dire* Ms. Flonard was also asked questions that were similar to the questions asked of other prospective jurors. However, Ms. Flonard was questioned in greater detail about her children, two of whom were incarcerated at the time of defendant's trial. One of them had been previously prosecuted by the same district attorney's office that was currently prosecuting defendant, and the other one had been charged with a crime in the area. The prosecutor asked Ms. Flonard whether she remembered that he had prosecuted one of her sons for robbery. Ms. Flonard was also asked specifically about her other son's criminal history and where he had been incarcerated, and about the locations and occupations of her remaining children. Ms. Flonard stated that she felt her family had been treated fairly by law enforcement and the court system and that she would be able to set aside her past experiences in deciding defendant's case. Thereafter, the State peremptorily challenged Ms. Flonard.

Following the prosecution's peremptory challenge of Ms. Flonard, defendant made a second motion pursuant to *Batson.* In support of a *prima facie* showing, defendant stated that (1) this was the prosecution's third exercise of a peremptory challenge against a prospective African-American juror, (2) the only African-American jurors who were not removed for cause were challenged by the prosecution peremptorily, (3) Ms. Flonard's responses during *voir dire* were similar to those of prospective Caucasian jurors who were not challenged, and (4) no prospective Caucasian jurors were questioned in detail as to their family members' criminal records. The State responded that it had exercised five peremptory challenges against individuals who were not minorities and that "there's not been another juror like Ms. Flonard in that it appears that we have prosecuted both of her sons in this county for very serious charges."

The trial court found that

> there has not been a disproportionate use of peremptory challenges to excuse jurors. As to whether the excuse [sic] by peremptory challenge of three black jurors
342 when only three black *342 jurors have been in the jury panel who were not excused by cause establishes a pattern, the court is of the view that there is no pattern of strikes of minority or black jurors.
>
> If there is a pattern it's certainly not evident by the matter brought forward in the voir dire, nor the manner of selection including the questions and statements used by the prosecuting attorney.
>
> The court concludes at this point that there has not been a prima facie showing by the defendant that the State is exercising a peremptory challenge to exclude jurors on account of race.

We acknowledge, as did the trial court, that no African-American was selected to serve on defendant's jury and that the three African-American jurors who were not excused for cause were challenged peremptorily by the State. However, numerical analysis that may be interpreted to show a pattern of challenges against African-American jurors is just one of many relevant circumstances to be considered in determining the existence of a *prima facie* case of discrimination. *Barden,* 356 N.C. at 344, 572 S.E.2d at 127 (emphasizing that numerical analysis is "not necessarily dispositive" when determining whether a defendant has established a *prima facie* showing of discrimnation). Numbers do not tell the whole story. After a thorough review of the jury selection process and careful examination of all relevant facts and circumstances, we cannot say that the trial court's findings were "clearly erroneous."

Although defendant and the challenged prospective jurors were African-American, the victims and several of the State's key witnesses were African-American as well. For this reason, the shared race of the involved parties tends to contradict an inference of purposeful discrimination by prosecutors. *See State v. Blakeney,* 352 N.C. 287, 309, 531 S.E.2d 799, 815 (2000), *cert. denied,* 531 U.S. 1117, 148 L. Ed. 2d 780 (2001) (noting "both defendant and the victim in this case were African-Americans, 'thus diminishing the likelihood that "racial issues [were] inextricably bound up with the conduct of the trial"'") (quoting *State v. Robbins,* 319 N.C. 465, 491, 356 S.E.2d 279, 295, *cert. denied,* 484 U.S. 918, 98 L. Ed. 2d 226 (1987)), *quoted in State v. Davis,* 325 N.C. 607, 620, 386 S.E.2d 418, 424 (1989), *cert. denied,* 496 U.S. 905, 110 L. Ed. 2d 268 (1990) (alteration in original).

Moreover, this Court has held that responses of prospective jurors during *voir dire* are relevant
343 circumstances which may be considered *343 to determine whether a defendant has established a *prima facie* showing under *Batson. State v.*

Nicholson, 355 N.C. 1, 23, 558 S.E.2d 109, 126, *cert. denied,* 537 U.S. 845, 154 L. Ed. 2d 71 (2002). Here, Ms. Barbour expressed serious reservations about recommending the death penalty and two of Ms. Flonard's children were apparently prosecuted for serious offenses by the Johnston County District Attorney's Office. While these circumstances proved insufficient to support challenges for cause, they provided obvious non-racial reasons for peremptory challenge. Finally, these responses were elicited from Ms. Barbour in a manner that was similar to the questioning of all other prospective jurors and from Ms. Flonard in a manner tailored to address her unique circumstances. In summary, we find no indication in the record before us of questions, comments, or other conduct by prosecutors during *voir dire* that would lead to an inference of discrimination.

For these reasons, we affirm the trial court's ruling as to both prospective jurors and conclude from a review of all facts and relevant circumstances that defendant's argument to the trial court did not give rise to an inference of purposeful discrimination by prosecutors. Thus, defendant did not establish a *prima facie* case as defined and required by *Batson.* This assignment of error is overruled.

In his second assignment of error, defendant argues that the prosecutor asked prospective jurors four types of improper questions during *voir dire*: (1) how jurors would vote during the sentencing phase, (2) whether jurors' decisions would be based upon the law or their personal feelings, (3) whether jurors had sympathy for defendant, and (4) whether jurors understood they were not being asked to pass judgment on defendant. Defendant contends that these questions were "improper, inaccurate, and misleading" and that the questions were prejudicial to his defense. Therefore, defendant requests a new trial.

Because *voir dire* is a continuous dialogue the meaning and effect of an individual question upon prospective jurors is best determined in consideration of counsel's entire *voir dire. See* N.C.G.S. § 15A-1214(c) (2003) (providing that each party "may personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge"). Accordingly, this Court reviews counsel's questions during *voir dire* in context.
344 *State v. Jones,* 347 N.C. 193, 203, *344 491 S.E.2d 641, 647 (1997). We consider the prosecutor's questions seriatim and conclude that, when reviewed in context, the questions were permissible in this case.

First, defendant argues that the prosecutor improperly asked two prospective jurors, Ms. Herring and Mr. Geiger, "Do you know right now how you would vote for punishment in this case?," and a third prospective juror, Ms. Matheny, "Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?" Although defendant objected to all three questions at trial, the trial court overruled defendant's objections. Defendant contends that "[t]hese questions could not possibly have elicited pertinent information about juror qualifications" and that the questions "explicitly asked jurors how they would vote for punishment in this case."

The record reveals that Ms. Herring was questioned at length by both parties, after which defendant challenged Ms. Herring for cause on the grounds that her personal beliefs regarding capital punishment would substantially interfere with her ability to apply the law as instructed by the judge. The trial judge acknowledged that throughout *voir dire* Ms. Herring had "slowly evolve[d] in [her] understanding" of capital punishment. The judge stated, "I see a conflict, as well, between the questions — or her responses to the questions asked of her" and then offered each party an opportunity to further question Ms. Herring. The exchange challenged by defendant occurred during the prosecutor's attempt to rehabilitate Ms. Herring.

Mr. Geiger stated similar reservations about recommending a death sentence, explaining, "It's a pretty likelihood [sic] that I would not be able to follow the law." Shortly thereafter, the prosecutor asked Mr. Geiger to think about "that part of the law that talks about being fairly able to consider the death penalty" and inquired, "As you sit here now, do you know how you would vote at the penalty phase . . . regardless of the facts or circumstances in the case?" Mr. Geiger responded, "I can't say I know with a hundred percent certainty, but I think a good probability."

With regard to Ms. Matheny, the prosecutor asked, "Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?" Ms. Matheny responded that she "probably would lean more" towards recommending a sentence of life in prison. Shortly before asking this question, the
345 prosecutor *345 explained to Ms. Matheny, "No one is trying to ask you what you will do because no one knows," adding, "It's not a fair question." In response, Ms. Matheny stated that she was "not sure" whether she could equally consider capital punishment and life imprisonment as possible sentences.

"Both the defendant and the State have the right to question prospective jurors about their views on capital punishment." *State v. Brogden,* 334 N.C. 39, 43, 430 S.E.2d 905, 908 (1993). Such questions are appropriate when they test a prospective juror's ability to follow the law as instructed by a trial judge notwithstanding that juror's personal opinions concerning the propriety of capital punishment. *Wainwright v. Witt,* 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985); *State v. Brown,* 327 N.C. 1, 14, 394 S.E.2d 434, 442 (1990). While a party may not ask questions which tend to "stake out" the verdict a prospective juror would render on a particular set of facts, *Jones,* 347 N.C. at 201-04, 491 S.E.2d at 646-48, counsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence, N.C.G.S. § 9-15 (2003) (counsel is entitled to "make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror"). A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. *Wainwright,* 469 U.S. at 424, 83 L. Ed. 2d at 851-52.

Here, the prosecutor's questions, when viewed in context, represent a legitimate attempt to elicit prospective jurors' personal views on capital punishment. These general questions did not tend to commit prospective jurors to a specific future course of action. Instead, the questions helped to clarify whether the prospective jurors' personal beliefs would substantially impair their ability to follow the law. Such inquiry is not only permissible, it is desirable to safeguard the integrity of a fair and impartial jury for the benefit of both the prosecution and the defense. Accordingly, this assignment of error is overruled.

Second, defendant contends that the prosecutor improperly asked prospective jurors, "Can you imagine a set of circumstances in which . . . your personal beliefs conflict with the law? In that situation, what would you do?" The prosecutor asked these questions, to which defendant objected, after several prospective jurors stated personal beliefs against the death penalty. Defendant argues that these are "purely speculative hypothetical questions" through which
346 the *346 prosecutor "was attempting to 'fish' without any basis" and that the questions tended to "'stake out'" prospective jurors.

Regulation of the form of *voir dire* questions is vested within the sound discretion of the trial court, and "[t]he exercise of such discretion constitutes reversible error only upon a showing by the defendant of harmful prejudice and clear abuse of discretion by the trial court." *Jones,* 347 N.C. at 203, 491 S.E.2d at 647. Hypothetical questions are generally prohibited because they

may be "'confusing to the average juror'" and "'tend to "stake out" the juror and cause him to pledge himself to a future course of action.'" *Id.* at 202, 491 S.E.2d at 647 (quoting *State v. Vinson,* 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated,* 428 U.S. 902, 49 L. Ed. 2d 1206 (1976)). This Court has explained that "[c]ounsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts." *Vinson,* 287 N.C. at 336, 215 S.E.2d at 68. "Hypothetical questions that seek to indoctrinate jurors regarding potential issues before the evidence has been introduced and before jurors have been instructed on applicable principles of law are similarly impermissible." *Jones,* 347 N.C. at 203, 491 S.E.2d at 647.

Although the form of the prosecutor's questions was hypothetical, these questions did not tend to commit jurors to a specific future course of action in defendant's case, nor were the questions aimed at indoctrinating jurors with views favorable to the State. The questions, "Can you imagine a set of circumstances in which . . . your personal beliefs conflict with the law?" and "In that situation, what would you do?," do not advance any particular position. Rather, the inquiry is designed to prompt one of two answers: (1) "I would follow the law," or (2) "I would follow my personal beliefs." Because jurors must be able to apply the law as instructed, sometimes *despite* their own personal views, the prosecutor's question addresses a key criterion of juror competency. Finally, the questions are simple and clear, without a propensity for confusing jurors. For these reasons, we determine that the trial judge did not abuse his discretion in overruling defendant's objections. This assignment of error is overruled.

Third, defendant contends that the prosecutor improperly asked prospective jurors, "Would you feel sympathy towards the defendant simply because you would see him here in court each day of the trial?" Defendant argues that this question improperly tended to "'stake out'" jurors to believe that they "could not consider defendant's appearance and humanity in capital sentencing."

347 *347

In *State v. Brown,* 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied,* 484 U.S. 970, 98 L. Ed. 2d 406 (1987), this Court stated that jurors may consider a defendant's demeanor in recommending a sentence. However, we cannot agree with defendant that this *voir dire* question posed by the prosecutor "improperly tended to 'stake out' jurors to believe that they could not consider defendant's appearance and humanity in capital sentencing." The prosecutor's question does not address definable qualities of defendant's appearance or demeanor. The question concerns jurors' feelings toward defendant, *notwithstanding* his courtroom appearance or behavior. This Court has upheld challenges to similar *voir dire* questions in *State v. Walls,* 342 N.C. 1, 38-39, 463 S.E.2d 738, 757 (1995), *cert. denied,* 517 U.S. 1197, 134 L. Ed. 2d 794 (1996) and *State v. Smith,* 328 N.C. 99, 128-29, 400 S.E.2d 712, 728-29 (1991). We see no compelling reason to depart from our previous holdings. Accordingly, this assignment of error is overruled.

Fourth, defendant contends that the trial court should have intervened *ex mero motu* when the prosecutor asked prospective jurors, "Do you understand as a juror you're not being asked to judge or pass judgment upon the defendant?" Our review reveals that the complete question actually posed by the prosecutor was:

> At this time, I would just ask, does everyone on the jury panel understand that, as a juror, you're not being asked to pass judgment upon the defendant. Do you understand that your role is to sit and listen and observe the evidence, compare that evidence with the definitions of the crime that the Judge will give you, and then see if you're satisfied, beyond a reasonable doubt, that a crime was committed, and that the defendant is the person responsible for those crimes? Does everyone understand that that's your role as a juror?

The prosecutor repeatedly asked prospective jurors this question during *voir dire,* but defendant did not object and now asserts plain error. However, this Court has "decline[d] to extend application of the plain error doctrine to situations where a party has failed to object to statements made by the other party during jury *voir dire.*" *State v. Cummings,* 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000), *cert. denied,* 532 U.S. 997, 149 L. Ed. 2d 641 (2001). Accordingly, we determine that defendant failed to preserve this issue for appellate
348 review. *348

For the reasons stated above, defendant's second argument which assigns error to four types of *voir dire* questions is hereby overruled.

GUILT-INNOCENCE PHASE

In his third argument, defendant assigns error to the trial court's admission into evidence of an autopsy photograph of the victim Seleana Nesbitt, two photographs of the Nissan Sentra in which Ms. Nesbitt was shot, testimony of three law enforcement officers describing the Nissan's interior and Ms. Nesbitt's wounds, blood-stained seat material seized from the Nissan, and Ms. Nesbitt's clothing. Defendant argues that he is entitled to a new trial because the testimony, photographs, and physical evidence were irrelevant and unfairly prejudicial.

At trial, defendant objected to admission of the photographs and Ms. Nesbitt's clothing but did not object to the testimony of the law enforcement officers or the admission of seat material taken from the Nissan. We hold that the trial court properly overruled defendant's objections and properly admitted the otherwise unchallenged testimony and evidence.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2003). Relevant evidence is generally admissible, but "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Id.* § 8C-1, Rules 402, 403 (2003). """Unfair prejudice," as used in Rule 403, means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one."'" *State v. Cagle,* 346 N.C. 497, 506, 488 S.E.2d 535, 542 (1997), *cert. denied,* 522 U.S. 1032, 139 L. Ed. 2d 614 (1997) (quoting N.C.G.S. § 8C-1, Rule 403 cmt. (Supp. 1985)), *quoted in State v. DeLeonardo,* 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986).

Rulings under North Carolina Rule of Evidence 403 are discretionary, and a trial court's decision on motions made pursuant to Rule 403 are binding on appeal, unless the dissatisfied party shows that the trial court abused its discretion. *State v. Garcia,* 358 N.C. 382, 417, 597 S.E.2d 724, 749 (2004), *cert. denied,* ___ U.S. ___, 161 L. Ed. 2d 122, 73 U.S.L.W. 3495 (2005). The test for abuse of discretion is whether the trial court's "ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a
349 *349 reasoned decision.'" *State v. Hyde,* 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000), *cert. denied,* 531 U.S. 1114, 148 L. Ed. 2d 775 (2001) (quoting *State v. Hennis,* 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)) (alteration in original). However, our review of those matters to which defendant did not object at trial is limited to plain error. N.C.R.

App. P. 10(b)(1), (c)(4); *Cummings,* 352 N.C. at 613, 536 S.E.2d at 47 (explaining that plain error review will be applied only to matters of evidence and jury instructions); *see also State v. Greene,* 351 N.C. 562, 566, 528 S.E.2d 575, 578 (2000). Plain error is error "'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Parker,* 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999), *cert. denied,* 528 U.S. 1084, 145 L. Ed. 2d 681 (2000) (quoting *State v. Bagley,* 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied,* 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)). Accordingly, we review admission of the photographs and Ms. Nesbitt's clothing for abuse of discretion and admission of the seat material and the law enforcement officers' testimony for plain error.

First, defendant challenges an autopsy photograph (State's exhibit no. 2) that was admitted during the testimony of forensic pathologist Robert L. Thompson, M.D. and two photographs of Greg Brooks' Nissan (State's exhibits nos. 11 and 12) that were admitted during the testimony of Bobby W. Massey, a former Special Agent with the North Carolina State Bureau of Investigation. Dr. Thompson testified that State's exhibit no. 2 was a fair and accurate depiction of Seleana Nesbitt's body at the time of the autopsy. Agent Massey testified that State's exhibits nos. 11 and 12 were fair and accurate depictions of the interior of the Nissan Sentra in which Ms. Nesbitt was a passenger when she was shot. Both witnesses also testified that using the photographs would help illustrate their testimony to the jury, but defendant objected to admission of each photograph on the ground that the photographs were irrelevant and unfairly prejudicial. In overruling defendant's objection as to the autopsy photograph, the trial court gave a limiting instruction, stating that the photograph was admissible only "to explain and illustrate the testimony of [Dr. Thompson]." The trial court further instructed jurors, "You may not consider [this] photograph for any other purpose." Likewise, the trial court admitted photographs of the Nissan into evidence for "illustrative purposes" only.

Dr. Thompson, who performed the autopsy on Seleana Nesbitt, testified that State's exhibit no. 2 350 showed the back of Ms. Nesbitt's *350 head and illustrated the path of the bullet. From this photograph, Dr. Thompson pointed out the location of the entry of the bullet, the track of the bullet, the final location of the bullet, and the overall wound from which he recovered bullet fragments. Thereafter, Dr. Thompson gave his expert opinion that the cause of Ms. Nesbitt's death was this "gunshot wound of the head."

Special Agent Massey's responsibility was to collect bullet fragments and blood samples from the Nissan in which Ms. Nesbitt was riding at the time she was shot. Agent Massey testified that he took the two photographs of the vehicle's interior that are challenged by defendant. Both photographs depict the rear passenger seat behind the driver's seat and were taken from the front passenger side door. During publication of the photographs to the jury, Agent Massey testified that State's exhibit no. 11 showed the driver's side rear seat cushion and floor, including several music tapes and other items which had accumulated there. State's exhibit no. 12 also showed the rear passenger seat cushion, but with the tapes and other items removed. Large blood stains were visible in both photographs. Earlier in his testimony, Agent Massey described the Nissan's interior as "relatively clean" except for "what appeared to be apparent blood and brain tissue . . . heavy in and around the driver side rear seat and floor area."

"'Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed *solely* at arousing the passions of the jury.'" *Blakeney,* 352 N.C. at 309-10, 531 S.E.2d at 816 (quoting *Hennis,* 323

N.C. at 284, 372 S.E.2d at 526) (emphasis added). In particular, photographs may be used "to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree." *Hennis,* 323 N.C. at 284, 372 S.E.2d at 526; *see also Blakeney,* 352 N.C. at 310, 531 S.E.2d at 816. In the past, this Court has affirmed a trial court's admission of autopsy photographs which corroborated the cause of death, *see State v. Goode,* 350 N.C. 247, 259, 512 S.E.2d 414, 421-22 (1999), and admission of crime scene photographs which show the location and circumstances of death, *see State v. Haselden,* 357 N.C. 1, 14-15, 577 S.E.2d 594, 603, *cert. denied,* 540 U.S. 988, 157 L. Ed. 2d 382 (2003).

After thorough review of the exhibits and transcript, we conclude that the trial court did not abuse its discretion by admitting the autopsy photograph of Ms. Nesbitt and two photographs of
351 the *351 Nissan's interior. The trial court admitted each photograph for illustrative purposes only, and both Dr. Thompson and Agent Massey used the photographs to explain relevant portions of their testimony. In particular, the autopsy photograph tended to explain and support Dr. Thompson's expert opinion as to the cause of Seleana Nesbitt's death. The photographs of the Nissan's interior corroborated Agent Massey's testimony describing the crime scene and showed the location at which Ms. Nesbitt sustained the gunshot wound. Thus, the record demonstrates that the challenged photographs were not introduced *solely* to inflame the passions of the jury.

We determine that each photograph carried significant probative value to illustrate and corroborate a witness's testimony. Because this probative value was not substantially outweighed by danger of unfair prejudice, we affirm the trial court's rulings admitting these photographs into evidence. This assignment of error is overruled.

Second, defendant assigns plain error to Agent Massey's statements that "blood and brain tissue was heavy in and around the driver side rear seat and floor area" of the Nissan and that the Nissan's rear seat was blood-stained "to the point it has soaked through the cloth itself to where if you pushed it, it would just come back out, like a sponge." Agent Massey further stated, "And, of course, all these items, tapes, et cetera, are covered with the same red stains." Agent Massey made these statements in connection with State's exhibits nos. 11 and 12, while describing those images to the jury. Like the corresponding photographs, we find that these statements carry significant probative value tending to show the location and circumstances of Seleana Nesbitt's death. Similarly, this probative value is not outweighed by danger of unfair prejudice. For these reasons, the admission of Agent Massey's testimony was not error, much less plain error. We affirm the trial court's admission of Agent Massey's testimony.

Third, defendant challenges the testimony of former evidence and crime scene technician Monroe Enzor and the trial court's admission of blood-stained seat cushion fabric from the Nissan. Mr. Enzor testified that on 9 July 2000, he was employed by the Johnston County Sheriff's Office, where his responsibilities were to "observe, collect and preserve, [and] store" evidence. Mr. Enzor further testified that he collected "blood stain material . . . from the driver side rear vertical seat corner" while processing the Nissan with Agent Massey. Mr. Enzor identified State's exhibit no. 33 as seat cushion fabric which he received from
352 Agent Massey, bagged, and labeled. Agent *352 Massey later testified that he removed the fabric from the seat cushion as a "blood sample." When the State moved to introduce exhibit no. 33 into evidence, defendant did not object; therefore, defendant may prevail only upon a showing of plain error. N.C.R. App. P. 10(b)(1), (c)(4).

Our review of the record indicates that the fabric swatch was introduced by prosecutors solely to inform the jury that stains on the Nissan's rear seat had been tested for blood and that the stains were in fact blood. We find this evidence to be

probative of the location and circumstances of Seleana Nesbitt's death and further find that this probative value is not outweighed by danger of unfair prejudice. Accordingly, admission of Mr. Enzor's statement that he collected "blood stain material" and admission of the material itself was not error, plain or otherwise.

Fourth, defendant challenges Mr. Enzor's testimony that he "went by the morgue to collect some items of clothing from the gurney that Ms. Nesbitt was laying on." Mr. Enzor stated that he placed Ms. Nesbitt's clothing in a sealed box which was then stored in an evidence room. Defendant objected to Mr. Enzor's opening of the box in front of the jury and to admission of Ms. Nesbitt's clothing into evidence. The trial court heard counsel's arguments outside the presence of the jury and permitted the State to conduct *voir dire* during which Mr. Enzor opened the box, identified the articles of clothing contained therein, and affixed a label to each item. Following *voir dire* the prosecutor moved to introduce Ms. Nesbitt's clothes into evidence without publishing them to the jury. The trial court ruled that the State had laid sufficient foundation for admissibility, that the clothing was relevant under this Court's decision in *State v. Gaines,* 345 N.C. 647, 483 S.E.2d 396, *cert. denied,* 522 U.S. 900, 139 L. Ed. 2d 177 (1997), and that the clothing's probative value was not outweighed by the danger of unfair prejudice. Thereafter, the jury returned to the courtroom, and at the State's request, Mr. Enzor briefly listed the labeled items without removing them from the box.

In *State v. Gaines,* this Court held that the trial court did not abuse its discretion by admitting a victim's bloody police uniform, gun, and radio into evidence. 345 N.C. at 665-66, 483 S.E.2d at 407. In doing so, the Court stated, "'Bloody clothing of a victim that is corroborative of the State's case, is illustrative of the testimony of a witness, or throws any light on the circumstances of the crime is relevant and admissible evidence at trial.'" *Id.,* 345 N.C. at 666, *353 483 S.E.2d at 407 (quoting *State v. Knight,* 340 N.C. 531, 559, 459 S.E.2d 481, 498 (1995)). Moreover, it is well established that "'[a]rticles of clothing identified as worn by the victim at the time the crime was committed are competent evidence.'" *State v. Lloyd,* 354 N.C. 76, 100, 552 S.E.2d 596, 615 (2001) (quoting *State v. Rogers,* 275 N.C. 411, 430, 168 S.E.2d 345, 356 (1969), *cert. denied,* 396 U.S. 1024, 24 L. Ed. 2d 518 (1970)) (alteration in original).

We hold that the clothing worn by Seleana Nesbitt at the time of her death is relevant and admissible under our prior case law. Here, the clothing was not published to the jury and was minimally discussed during the direct examination of Mr. Enzor, whose testimony served to authenticate the items. Under these circumstances danger of unfair prejudice does not substantially outweigh the probative value of the clothing. Accordingly, the trial court did not abuse its discretion in admitting Ms. Nesbitt's clothing and we affirm the trial court's ruling.

Defendant also assigns plain error to Mr. Enzor's testimony that he picked up Ms. Nesbitt's clothing "from the gurney that Ms. Nesbitt was laying on." This testimony tends to identify the clothing in question as belonging to Ms. Nesbitt and as being worn by Ms. Nesbitt at the time of her death. Accordingly, Mr. Enzor's testimony was relevant and admissible for authentication purposes. We do not find the statement to be unfairly prejudicial under North Carolina Rule of Evidence 403. Therefore, the trial court did not err by admitting Mr. Enzor's statement.

Fifth, defendant challenges the testimony of Detective Wayne Sinclair of the Johnston County Sheriff's Department that he observed Seleana Nesbitt's body in the hospital emergency room at 5:00 a.m. on 9 July 2000, where Nesbitt "had a cervical collar around her neck . . . [and an] incubating [sic] tube down — entering her mouth." Detective Sinclair described Nesbitt's

injury as "a gaping head wound with brain matter showing." However, defendant did not object to Detective Sinclair's description at trial.

Again, this evidence is probative of the cause and nature of Ms. Nesbitt's death. Because we do not find that the testimony's probative value is substantially outweighed by danger of unfair prejudice, we find no error, much less plain error, in its admission.

For the reasons stated above, we affirm the trial court's rulings admitting an autopsy photograph of
354 Seleana Nesbitt, two photographs *354 of the Nissan's interior, and the clothing worn by Ms. Nesbitt on the night of her death. We further conclude that the trial court did not err by admitting the challenged testimony of Agent Massey, Mr. Enzor, and Detective Sinclair or by admitting a blood-stained fabric swatch removed from the Nissan. Accordingly these assignments of error are overruled.

In his fourth argument, defendant assigns error to the trial court's admission of hearsay evidence during the direct examination of State's witness Detective Wayne Sinclair. Detective Sinclair testified that he interviewed defendant on 12 July 2000. Detective Sinclair then read a statement made by defendant during that interview to the jury. Defendant contends that Detective Sinclair's testimony contained hearsay within hearsay, which violated North Carolina Rules of Evidence 802 and 805. Defendant further contends that the testimony was irrelevant and unfairly prejudicial in violation of North Carolina Rules of Evidence 401, 402, and 403. Also, defendant argues for the first time on direct appeal that admission of the testimony violated the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. We conclude that the challenged portion of Detective Sinclair's testimony is relevant and that it does not contain impermissible hearsay and is not unfairly prejudicial. We further conclude that defendant did not preserve an assignment of constitutional error for review. *Lloyd,* 354 N.C. at 86-87, 552 S.E.2d at 607 ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."); *Cummings,* 352 N.C. at 613, 536 S.E.2d at 47 (explaining that plain error review is limited to matters of evidence and jury instruction). Accordingly, we affirm the trial court's ruling allowing Detective Sinclair to read defendant's statement in full.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801 (c) (2003). "'If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay.'" *State v. Irick,* 291 N.C. 480, 498, 231 S.E.2d 833, 844-45 (1977) (quoting 1 *Stansbury's N.C. Evidence* § 141 (Brandis Rev. 1973) at 467-71). Additionally, a defendant's own statement is admissible when offered against him at trial as an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 801(d) (2003).

On direct examination, Detective Sinclair testified from his notes of defendant's interview. During the
355 interview, defendant told *355 Detective Sinclair that he and Lee Green stayed at an apartment in Selma with two females named Candy and Keama on the night of the shooting. The following morning, defendant and Mr. Green went to the home of Garry Yarborough, where defendant slept. When Detective Sinclair read a part of defendant's statement that an unknown individual called Mr. Yarborough's house around noon on the day following the shooting, defendant objected and asked to be heard outside the presence of the jury. The trial court directed that Detective Sinclair read the remainder of defendant's statement into the record: "Around noon, somebody called and said they were going to kill whoever was in the house over Seleana Nesbitt's death. Mr. Chapman then left and went to [Lee] Green's house."

Defendant's attorney conceded that "[t]he statement of the defendant, obviously, is not hearsay," but argued that "what somebody else said, I believe, is hearsay and does not come under any exceptions." The trial court overruled defendant's objection, finding defendant's own statement to be admissible as the statement of a party-opponent and further finding that the unidentified caller's statement fell within an exception to the hearsay rules. The trial court then requested for the jury to return, and Detective Sinclair completed his testimony regarding the phone call.

"Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule." *Id.* § 8C-1, Rule 805 (2003). Here, the statement of defendant to Detective Sinclair is clearly admissible as the statement of a party opponent. *Id.* § 8C-1, Rule 801(d). Further, words of the unidentified caller contained within defendant's statement to Detective Sinclair are not hearsay because they were not offered to prove the truth of the matter asserted. *Irick,* 291 N.C. at 498, 231 S.E.2d at 844. Evidence of the phone call was admitted to show defendant's response to receiving the call, not to prove that the caller would actually harm the people in Mr. Yarborough's house. Thus, the phone call was admissible to explain defendant's subsequent conduct in leaving Mr. Yarborough's house. Because neither portion of defendant's statement contains inadmissible hearsay, we affirm the trial court's ruling admitting Detective Sinclair's testimony.

Defendant also contends that the challenged portions of Detective Sinclair's testimony were irrelevant and unfairly prejudicial under North Carolina Rules of Evidence 401 and 403. However, defendant did not base his objection
356 before the trial court on grounds *356 of irrelevancy or unfair prejudice. Moreover, defendant devotes no more than one sentence to this argument in his brief, stating in conclusory fashion that "the evidence was irrelevant under Evidence Rules 401-403 because what the caller said on July 9 did not have any tendency to make the existence of any consequential fact in this case more or less probable and was unfairly prejudicial." *Cf.* N.C.R. App. P., Rule 28(a) (2005) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned"). Under these circumstances, we conclude that Detective Sinclair's testimony was relevant to explain defendant's course of conduct following the shooting and that the statement was not unfairly prejudicial.

For the reasons stated above, defendant's fourth argument and all assignments of error contained therein are overruled.

In his fifth argument, defendant assigns error to Detective Sinclair's testimony that he overheard Lee Green tell his mother, "I'm tired of lying and I'm going to tell them the truth" during a phone call that Green made from the police interview room. Defendant contends that the testimony in question was noncorroborative and prejudicial. We determine that Detective Sinclair's testimony was admissible to corroborate the earlier testimony of State's witness, Lee Green, and affirm the trial court's ruling admitting Detective Sinclair's statement.

Detective Sinclair interviewed each passenger of the Cadillac Seville on 12 July 2000, including defendant and Lee Green. Defendant told Detective Sinclair that he and Green had stayed with two females named Candy and Keama on the night of the shooting. Based upon this and other information, Detective Sinclair asked Detective Tommy Beasley, who was also assigned to the investigation, to drive to Selma and confirm defendant's statements. Detective Beasley traveled to Selma while Detective Sinclair completed Green's interview. During the interview Green gave a statement denying any knowledge of the shooting.

Detective Beasley returned from Selma with Candy and Keama at the same time Detective Sinclair finished his interview with Green. Green was left alone in the interview room while Detective Sinclair went to confer with Detective Beasley. Green testified that he believed Detective Sinclair had gone to speak with Candy and Keama. In response to the prosecutor's questions, Detective Sinclair testified to the following exchange, which occurred when he re-entered the
357 interview room: *357

> Q. What did you tell Mr. Green?
>
> A. I reapproached Mr. Green. I told Mr. Green that that was very true what he had told me in the interview, that he had stayed the night with two young ladies, because we had checked that out. And, also, there were statements made at that house that night of him being aware of the shooting that occurred on —
>
> [DEFENSE COUNSEL]: Objection.
>
> A. — on 39 highway.
>
> THE COURT: Objection overruled, then.
>
> Q. And what, if any, reaction did you observe in Mr. Green?
>
> A. Mr. Green got upset and started to cry.
>
> Q. Had he exhibited this type of emotional state up until that point?
>
> A. No, sir, he had not.
>
> Q. What happened next?
>
> A. Mr. Green was allowed to use the telephone.
>
> Q. How did that subject come up?
>
> A. Mr. Green asked me if he could use the telephone.
>
> Q. Did he tell you who he wanted to call?
>
> A. Mr. Green told me he wanted to call his mother.

Thereafter, Detective Sinclair testified that he was able to hear Green's portion of the phone conversation. Detective Sinclair also confirmed that his interview with Green continued "as a result of that phone call."

When the prosecutor asked Detective Sinclair, "What did you hear in terms of Mr. Green's end of the conversation?," defendant objected. The trial court initially sustained defendant's objection but agreed to hear arguments from counsel outside the presence of the jury at the State's request. The prosecutor argued that the challenged testimony was being offered "to corroborate prior testimony of Mr. Green" and that the testimony was alternatively admissible as a present sense impression, excited utterance, or then existing mental, emotional, or physical condition. The trial judge requested an offer of proof to determine
358 whether the statements were corroborative, *358 which the State provided. During the offer of proof, Detective Sinclair testified that he heard Green say, "[M]ama . . . I'm tired of lying. I'm going to tell them the truth."

Defense counsel responded, conceding that the statement "probably does come under the [hearsay] exceptions of the present sense or then existing mental state" and that "[i]t might even be a statement against penal interest." Then defense counsel clarified, "Our objection was based upon his offer of corroboration, not the other." The trial court overruled defendant's objection, ruling "the statement of Detective Sinclair concerning what Lee Green stated to him is admissible for corroboration." Before Detective Sinclair's testimony continued, the trial court issued a limiting instruction to the jury, explaining that the statement in question could be considered "together with all other facts and circumstances bearing upon the witness, Lee Green['s], truthfulness, in deciding whether you will believe or disbelieve his testimony at trial." Following this

limiting instruction, Detective Sinclair testified that during the phone call he heard Mr. Green say, "I'm tired of lying and I'm going to tell them the truth."

Corroboration is the "'process of persuading the trier of facts that a witness is credible.'" *State v. Burton,* 322 N.C. 447, 449, 368 S.E.2d 630, 632 (1988) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 49 (2d ed. 1982)). Corroborative evidence "'tends to strengthen, confirm, or make more certain the testimony of another witness.'" *Lloyd,* 354 N.C. at 103, 552 S.E.2d at 617 (quoting *State v. Rogers,* 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980)). Prior consistent statements of a witness are admissible to corroborate the testimony of a witness whose truthfulness has been impeached. *State v. Gell,* 351 N.C. 192, 204, 524 S.E.2d 332, 340, *cert. denied,* 531 U.S. 867, 148 L. Ed. 2d 110 (2000). It is "well established that the corroborative testimony may contain 'new or additional information when it tends to strengthen and add credibility to the testimony which it corroborates.'" *Burton,* 322 N.C. at 450, 368 S.E.2d at 632 (citation omitted). We determine that Detective Sinclair's testimony that he overheard Green state "I'm tired of lying and I'm going to tell them the truth" is admissible as a prior consistent statement which tends to strengthen Green's credibility.

Earlier during the trial, the State called Lee Green to testify. Green described his interviews at the police station and stated that he had given an initial statement to Detective Beasley, but that statement had been a lie. Green said that in this
359 first statement, "I told *359 them what I was told to say, everything but the shooting." After waiting for a short time, Detective Sinclair entered the room and asked to question Green a second time. Green testified that during this second interview, "At first I was still lying. . . . I told the first story that I made about everything but the shooting."

Green further explained:

> And then I think Keama and Candy walked in. And I think Sinclair, he told me to wait, to hold on a minute.
>
> . . . .
>
> I guess they had to talk to Keama or something, Keama and Candy, and then he came back to me. And that's when I broke down and asked to call my mom, and I told the truth.

Green stated, "I told [my mother] that I knew something about the shooting. And she told me — well, she just told me to tell what I know, so I did."

Detective Sinclair's testimony adds "strength and credibility" to Green's testimony that, although he initially lied to law enforcement, he decided to tell the truth after speaking to his mother. For this reason, we agree with the trial court that Detective Sinclair's testimony was "generally corroborative of Lee Green's testimony" and affirm the trial court's ruling admitting Green's statement. This assignment of error is overruled.

In his sixth argument, defendant assigns error to three statements made by Detective Sinclair about his interview with Green on direct examination: (1) that law enforcement had "checked . . . out" Green's story about staying with Candy and Keama and found it to be "very true," (2) that "there were statements made" at Candy and Keama's apartment that Green was "aware of the shooting that occurred on . . . 39 highway," and (3) law enforcement had information that Green "stayed the night with" Candy and Keama. Defendant contends that Detective Sinclair's testimony contained inadmissible hearsay and violated the Sixth Amendment to the United States Constitution.

As explained above, "'[A] statement . . . offered for any purpose other than that of proving the truth of the matter stated . . . is not objectionable as hearsay.'" *Irick,* 291 N.C. at 498, 231 S.E.2d at
360 844 *360 (citation omitted). Here, the central

purpose for offering Detective Sinclair's statements was to show Green's response to being caught in a lie during his second police interview. Whether Detective Sinclair actually confirmed the information he shared with Green was tangential to the State's case. The record reveals that upon hearing Detective Sinclair's statements, Green "broke down" in tears and asked to call his mother, after which Green told law enforcement a different story. Because we conclude that the statements challenged by defendant were not offered "to prove the truth of the matter asserted," we find that Detective Sinclair's testimony was not hearsay and was, therefore, properly admitted.

Finally, defendant states in his brief that admission of the challenged portions of Detective Sinclair's testimony violated the Sixth Amendment of the United States Constitution. However, the record reflects that defendant did not state a constitutional basis for his objections at trial. As discussed above, constitutional arguments will not be considered for the first time on appeal. *Lloyd,* 354 N.C. at 86-87, 552 S.E.2d at 607; *Cummings,* 352 N.C. at 613, 536 S.E.2d at 47 (explaining that plain error review will be applied only to matters of evidence and jury instructions). Accordingly, we determine that defendant's constitutional assignment of error on this matter has been waived. For the reasons stated above, defendant's sixth argument is overruled.

In his seventh argument, defendant assigns error to the State's witness Jared Clemmons' statements that he testified truthfully during direct and redirect examinations. Defendant contends that these statements were irrelevant and unfairly prejudicial and thus inadmissible. Also, in his eighth argument, defendant assigns error to admission of Clemmons' testimony that he was represented and advised by counsel during the formalization of a plea agreement related to Seleana Nesbitt's death. Defendant further assigns error to admission of the testimony of State's witness Thomas Manning, Clemmons' attorney, arguing that evidence Clemmons was represented by counsel during plea negotiations on charges related to Nesbitt's death is "totally irrelevant to any substantive issue in these cases" and constitutes "improper 'vouching' for Clemmons' credibility." Because our resolution of defendant's seventh and eighth arguments is dependent upon the same facts, we address these issues together.

On direct examination, Jared Clemmons testified that he drove the Cadillac Seville from which defendant and DaJuan Morgan fired their weapons on the night of Seleana Nesbitt's death. Clemmons
361 *361 further testified that on 10 April 2001, he pled guilty to the second-degree murder of Ms. Nesbitt in exchange for imposition of a sentence in the range of eight to twenty years. Clemmons stated that he was not sentenced on 10 April 2001, rather the court entered a prayer for judgment to be continued until the State's cases against defendant and Morgan were resolved. The terms of Clemmons' plea agreement required that "[i]f called upon, [Clemmons] shall testify truthfully in State v. LaMorris Chapman. . . . The presiding trial judge in these matters shall be the arbiter as to the truthfulness of [Clemmons'] testimony. In exchange for his truthful testimony, [Clemmons] shall receive an active sentence in the court's discretion." Clemmons confirmed he understood the need to testify truthfully to uphold the terms of his plea agreement and that he had been truthful during his interview with Detective Sinclair and during his testimony before the trial court.

During cross-examination, defense counsel devoted considerable effort to impeaching Clemmons' credibility, implying that Clemmons lied to the court by pleading guilty to second-degree murder, even though Clemmons did not believe he had committed that crime. Counsel's questioning on this point fills at least seven pages of trial transcript, and the most pointed exchange follows:

> Q. According to your testimony, you didn't do anything wrong, did you?
>
> A. No, I didn't?

Q. You didn't?

A. No, I didn't.

Q. But you pled guilty to second-degree murder?

A. Yeah. Because I was told if I took it to trial I would have lost.

Q. Well, you were asked specifically by the judge, according to [your plea agreement], are you, in fact, guilty. And you said yes, I am guilty.

A. I had to say that.

Q. Beg your pardon.

A. I had to say that. If I took it to trial, I would have lost.

Q. But that wasn't true, was it? I mean, you're not even guilty, are you?

362 *362

A. You know what I'm saying, I'm charged with first-degree murder, but I didn't kill anybody.

Q. Well, I understand that. But you don't believe you're guilty of murder, do you?

A. No, I do not.

Q. Well, then, when the judge specifically asked you on this plea transcript are you in fact, guilty, you said yes. You weren't telling the truth, were you?

363

A. Because I had to pled [sic] guilty to that.

Q. You had to pled [sic] guilty to that. You had to say that on this so that it would benefit you; isn't that right?

A. Yes.

Q. Likewise, you have to testify according to what they want you to testify to, be truth, and say it's truthful, otherwise, it won't benefit you?

. . . .

A. I'm telling you the truth.

Q. Were you telling the judge the truth on April 10?

A. I had to be forced to say I was guilty.

Q. The question was, sir, were you telling the judge the truth on April 10?

A. Yeah. Telling the truth about what?

Q. That you were, in fact, guilty?

A. I had to say I was guilty. I had to.

Q. So, I mean, you did not tell the judge the truth?

A. I didn't say that. I said I had to go plead guilty to second-degree murder or else I went to trial and lost at trial.

Q. And you would be facing the death penalty?

A. Could of been, or life without parole.

Q. So you're willing to tell the judge on April 10 something that wasn't true so that you would get the deal that you got, right?

*363

A. No.

Q. Well, then, why did you not tell the judge the truth on April 10?

A. What do you mean, I didn't tell him the truth?

Q. Right.

A. I had to plead guilty to that. I had no choice but to plead guilty to that.

Defense counsel posed similar questions on re-cross-examination.

On redirect, the prosecutor sought to rehabilitate Clemmons by asking, "Did your lawyer advise you on this plea?" and later, "So you had an understanding after you had talked to your lawyer why you were pleading guilty?" The prosecutor also asked Clemmons, "Have you told the truth since you've taken the stand?" to which Clemmons responded, "Yes, I have."

Later, the State called Clemmons' attorney, Mr. Thomas Manning, to "explain why [Clemmons] says I didn't do anything wrong, but I had to plead guilty." The record reflects that Clemmons waived attorney-client privilege as to this issue. On direct examination, Mr. Manning testified to his legal background, including the length of his practice, his field of specialization, and his "AV" Martindale-Hubbell rating. Mr. Manning also stated in general terms that he discussed with Clemmons the elements of crimes for which Clemmons had been charged and the theories of law concerning those crimes, as well as possible punishments and plea offers made by the State. Mr. Manning testified that he advised Clemmons on a course of action based upon his professional knowledge and experience. We conclude Clemmons' testimony that he had testified truthfully was not plain error and that Clemmons' testimony regarding his legal representation, as well as the testimony of Mr. Manning, was permissible in defendant's case.

"The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon,* 340 N.C. 212, 221, 456 S.E.2d 778, 784, *cert. denied,* 516 U.S. 996, 133 L. Ed. 2d 438 (1995). In *State v. Skipper,* 337 N.C. 1, 39, 446 S.E.2d 252, 273 (1994), *cert. denied,* 513 U.S. 1134, 130 L. Ed. 2d 895 (1995), this Court affirmed the trial court's ruling sustaining a prosecutor's objection to defense
364 counsel's question on direct examination, *364 "Are you telling this jury the truth?" The following year, this Court affirmed trial court rulings sustaining objections to two analogous questions also posed by defense counsel: (1) whether the defendant "had accurately pointed out to the prosecutor all the places in his prior statements that were untrue," and (2) whether a witness "knew she was under oath." *Solomon,* 340 N.C. at 220-21, 456 S.E.2d at 784. Therefore, under our prior case law it is improper for defense counsel to ask a witness (who has already sworn an oath to tell the truth) whether he has in fact spoken the truth during his testimony.

However, unlike the above-mentioned cases, the error cited by defendant involves the prosecutor's questions to the State's witness after that witness's credibility had been attacked. Moreover, defendant did not object to the prosecutor's questions concerning Clemmons' truthfulness at trial; thus, defendant must show plain error to prevail on appeal. N.C.R. App. P. 10(b)(1), (c)(4). As stated earlier, plain error is error "'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *Parker,* 350 N.C. at 427, 516 S.E.2d at 118 (citation omitted). After thorough review of the record, we cannot say that Clemmons' responses probably altered the outcome of the trial.

First, Clemmons' statements that his testimony was true were plainly self-serving. The interested nature of Clemmons' averment of truth is especially apparent in light of the terms of Clemmons' plea agreement and defense counsel's impeachment of Clemmons on cross-examination. In addition to constituting the separate crime of perjury, false testimony by Clemmons would void the terms of his plea agreement. Second, inasmuch as Clemmons testified only after taking an oath or affirmation to tell the truth in accordance North Carolina Rule of Evidence 603, the challenged testimony was redundant. Under these circumstances, the admission of Clemmons' testimony was not plain error.

We next consider Clemmons' testimony that he was represented and advised by counsel during entry of his guilty plea to second-degree murder and the testimony of Mr. Manning, Clemmons' attorney. Defendant acknowledges that "where evidence of bias is elicited on cross-examination the witness is entitled to explain, if he can, on redirect examination, the circumstances giving rise to bias so that the witness may stand in a fair and just light before the jury." *State v. Patterson,* 284 N.C. 190, 196, 200 S.E.2d 16, 20 (1973). Here, 365 defendant *365 impeached Clemmons on cross-examination, asking questions which tended to show that Clemmons lied during the entry of his plea and that Clemmons had a motive to lie again while testifying at defendant's trial. Clemmons' redirect testimony that Mr. Manning had advised him regarding the guilty plea and that he understood he bore some responsibility for Ms. Nesbitt's death because he was driving the Nissan, counterbalances the impeachment. We determine that Clemmons' redirect testimony was properly allowed to explain impeaching evidence elicited by defense counsel on cross-examination. Accordingly, the trial court did not err by admitting the challenged testimony.

We further conclude that Mr. Manning was properly called to corroborate Clemmons' testimony after Clemmons was impeached on cross and re-cross-examinations. In *State v. Westbrook,* 279 N.C. 18, 181 S.E.2d 572 (1971), *sentence vacated on other grounds by,* 408 U.S. 939, 33 L. Ed. 2d 761 (1972), this Court affirmed the trial court's admission of a police officer's testimony under similar circumstances. In that case, the defendant was tried and convicted of first-degree murder. *Id.* at 23, 181 S.E.2d at 575. Evidence presented at trial showed that the defendant acted in concert with a man named Johnny Frazier. *Id.* at 33, 41, 181 S.E.2d at 581, 586. The State called Frazier to testify during its case-in-chief, and on direct examination, Frazier described his and the defendant's course of conduct before, during, and after the murder. *Id.* at 23, 33-34, 181 S.E.2d at 575, 581. On cross-examination, defense counsel impeached Frazier with a prior inconsistent statement which recounted a different series of events. *Id.* at 34-35, 181 S.E.2d at 581-82. Thereafter, the State called a police officer to whom Frazier made statements consistent with his trial testimony. *Id.* at 35, 181 S.E.2d at 582. This Court affirmed the trial court's admission of the police officer's testimony, finding that the testimony tended to corroborate Frazier's statements during direct examination and that there was no error in permitting the jury to consider whether the testimony corroborated the statements in question. *Id.* In so doing, the Court held that "[w]here the testimony offered to corroborate a witness does so substantially, it is not rendered incompetent by the fact that there is some variation." *Id.*

Here, defendant argues that Mr. Manning's testimony "did *not* meet defendant's impeachment and was *not* probative of Clemmons' truthfulness; accordingly, it was irrelevant and inadmissible." While we agree that rehabilitative evidence must correspond directly to the impeaching inference 366 raised by the opposing party, our decision in *366 *Westbrook* makes clear that the test for admissibility is not rigid — rehabilitative evidence need not correlate fact-to-fact with impeaching evidence. Because we conclude that Mr. Manning's testimony *substantially* corroborates Clemmons' testimony by explaining why Clemmons pled guilty to second-degree murder, we affirm the trial court's ruling admitting Mr. Manning's statements.

In his ninth argument, defendant assigns error to the testimony of State's witness Detective Wayne Sinclair that defendant surrendered to law enforcement officers in Benson on 14 July 2000 "in the presence of his family and his attorney, Gerald Hayes" and that after taking defendant into custody, Detective Sinclair "did not conduct an interview with the defendant." Although defendant did not object to Detective Sinclair's testimony at

trial, defendant now contends that these statements violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Again, constitutional error will not be considered for the first time on appeal. *Lloyd,* 354 N.C. at 86-87, 552 S.E.2d at 607; *Cummings,* 352 N.C. at 613, 536 S.E.2d at 47 (explaining that plain error review will be applied only to matters of evidence and jury instructions). Because defendant did not raise these constitutional issues at trial, he has failed to preserve them for appellate review and they are waived. Accordingly, this assignment of error is overruled.

In his tenth argument, defendant assigns error to four classes of statements made by prosecutors during guilt-phase opening statement and closing argument. Specifically, defendant contends that prosecutors improperly (1) commented on defendant's right to remain silent, (2) asserted that the State's witnesses were truthful, (3) misstated the law, and (4) argued an irrelevant "hypothetical factual scenario and an equally hypothetical application of law to that scenario." Defendant further contends that prosecutors' statements were prejudicial error and that he is entitled to a new trial.

Defendant did not object at trial to the first three classes of statements that he now challenges on appeal. "When a defendant fails to object to an allegedly improper closing argument, the standard of review is whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu.*" *State v. Roseboro,* 351 N.C. 536, 546, 528 S.E.2d 1, 8, *cert. denied,* 531 U.S. 1019, 148 L. Ed. 2d 498 (2000). "'[T]he trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds
367 of propriety *367 as to impede defendant's right to a fair trial.'" *State v. Smith,* 351 N.C. 251, 269, 524 S.E.2d 28, 41, *cert. denied,* 531 U.S. 862, 148 L. Ed. 2d 100 (2000) (quoting *State v. Atkins,* 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998), *cert. denied,* 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999)). The same standard applies when a defendant fails to object to an opening statement. *State v. Gladden,* 315 N.C. 398, 417, 340 S.E.2d 673, 685, *cert. denied,* 479 U.S. 871, 93 L. Ed. 2d 166 (1986). We consider the prosecutor's challenged statements seriatim and determine that each was permissible in this case.

First, defendant argues that prosecutors made improper references to defendant's exercise of the right to remain silent during opening and closing statements. With regard to opening statements, defendant assigns error to the prosecutor's forecast that jurors would "hear from the three occupants of the Cadillac — Lee Green, Shamarh McNeil and Jared Clemmons, three occupants of the Cadillac — I point out to you, three friends of the defendant." With regard to closing argument, defendant assigns error to two prosecutors' explanations of the elements of premeditation, deliberation, and specific intent to kill. In particular, defendant challenges one prosecutor's argument that

> premeditation and deliberation are generally established from the circumstances of a killing, such as vicious or brutal killing. And you may infer premeditation and deliberation from the circumstances of the killing. Why? Because premeditation and deliberation are something which the State can seldom ever prove directly. *It would be nice if you could have a piece of evidence with the defendant coming up here and saying yes, I intended to kill him and then he shoots him. We don't have that statement from the defendant where he said that to somebody or that he's admitted to that.* You've heard all the evidence.

Also, defendant challenges a second prosecutor's request that jurors

> [l]isten closely. Intent is a mental attitude seldom provable by direct evidence. Again, as [my co-counsel] said, *it's not every day you have somebody that says to everybody within the sound of my voice, I'm letting it be known I'm going to kill that person.* It just doesn't happen. It must ordinarily be proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.

368 *368

Defendant contends that through these three statements, "the prosecutor promised the jury it would 'hear' from interested State witnesses Green, Clemmons, and McNeil and then repeatedly urged the jury to credit Green, Clemmons, and McNeil because it had 'heard' and 'seen' them testify 'on that witness stand in this courtroom in this case.'" Moreover, defendant contends that these statements contain direct and indirect comments on defendant's constitutional right to remain silent.

Section 8-54 of the North Carolina General Statutes states that "[i]n the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him." N.C.G.S. § 8-54 (2003). This Court has consistently interpreted section 8-54 to prohibit the State from referring to or commenting upon a defendant's failure to testify at trial. *State v. Taylor,* 289 N.C. 223, 228, 221 S.E.2d 359, 363 (1976); *Gragg v. Wagner,* 77 N.C. 186, 187-88 (1877). However, within the confines of section 8-54, counsel for both sides are entitled to argue "the whole case as well of law as of fact" to the jury. N.C.G.S. § 7A-97 (2003); *State v. Thomas,* 350 N.C. 315, 354, 514 S.E.2d 486, 510, *cert. denied,* 528 U.S. 1006, 145 L. Ed. 2d 388 (1999).

Here, the prosecutor's closing argument explains that the State may seek to prove premeditation and deliberation by circumstantial evidence because direct proof of those elements of first-degree murder and first-degree attempted murder is often unavailable. This accurate statement of law, *State v. Smith,* 357 N.C. 604, 616, 588 S.E.2d 453, 461 (2003), *cert. denied,* ___ U.S. ___, 159 L. Ed. 2d 819 (2004) ("Premeditation and deliberation, both processes of the mind, must generally be proven by circumstantial evidence"), was directly relevant to the State's theory of prosecution in defendant's case. Although a juror might infer that defendant had exercised his right to remain silent from the prosecutor's statements, that inference is tangential to the State's clear purpose in making this argument.

As this Court determined in *State v. Taylor,* when challenged portions of closing argument "taken in context" do not "encourage the jury to infer guilt from the defendant's silence, . . . they [do] not amount to gross impropriety requiring the trial court to intervene *ex mero motu.*" 337 N.C. 597, 614, 447 S.E.2d 360, 371 (1994) (citation omitted). Further, in *State v. Prevatte,* we
369 concluded that "if a prosecutor's *369 comment on a defendant's failure to testify was not extended or was a 'slightly veiled, indirect comment on [a] defendant's failure to testify,' there was no prejudicial violation of the defendant's rights." 356 N.C. 178, 248, 570 S.E.2d 440, 479 (2002), *cert. denied,* 538 U.S. 986, 155 L. Ed. 2d 681 (2003) (quoting *State v. Mitchell,* 353 N.C. 309, 326, 543 S.E.2d 830, 841, *cert. denied,* 534 U.S. 1000, 151 L. Ed. 2d 389 (2001)) (alterations in original). Because the prosecutor's argument in the case *sub judice* simply explained the circumstantial nature of evidence tending to show premeditation and deliberation without encouraging jurors to infer guilt from defendant's silence and because any reference to defendant's failure to testify was

indirect, we conclude that the trial court did not err by failing to intervene *ex mero motu* during the prosecutor's closing arguments. Accordingly, this assignment of error is overruled.

Further, with regard to the prosecutor's opening statement, we find no reference, "veiled" or otherwise, to defendant's decision to exercise his right to silence. For the reasons stated above, we determine that the challenged statements do not constitute reversible error.

Second, defendant asserts that the prosecutor improperly told jurors that State's witnesses Green, McNeil, and Clemmons would "tell the truth" at trial and that these witnesses in fact "told the truth." During opening statement, the prosecutor introduced Green, McNeil, and Clemmons saying:

> The detectives talked to several occupants of the Cadillac — Lee Green, Jared Clemmons and Shamarh McNeil. Initially, these three all stick to their story. They admit to being together and going to Club 39 and going to Selma, but they deny any knowledge of a shooting on Highway 39.
>
> . . .
>
> Three days after the shooting, the hard, tireless work of the Johnston County Sheriff's Department pays off. Lee Green is the first occupant of the Cadillac to add to his story, to tell the whole story *and to tell the truth.* He does that on July 12. Shamarh McNeil is the next occupant of the Cadillac to add to his story, to tell the whole story *and to tell the truth* about what happened. . . .
>
> . . . .
>
> 370 *370
>
> . . . Jared Clemmons, you will hear, has added to his story and told the whole story *and told the truth. Just as did Lee Green and just as did Shamarh McNeil.*

(Emphasis added.)

During closing argument the prosecutor stated:

> After the fine investigation of the Johnston County Sheriff's Department got well underway, you see a different side of these young people. You see the youth of Lee, Shamarh and Jared. You see a group of scared kids. Scared because of what happened and scared because of what might happen to them, but they also know what is right and they know what is wrong. And despite the strongest amount of peer pressure, these three young people *came to tell not just part of the story, but they came to tell the whole story and they came to tell the truth. They told the truth* when confronted with the reality of life and when confronted with the reality of death.

(Emphasis added.) Defendant contends that these portions of the prosecutor's opening and closing statements improperly expressed the prosecutor's personal opinion that the State's witnesses had given truthful statements to law enforcement and testified truthfully at trial.

"During a closing argument to the jury an attorney may not . . . express his personal belief as to the truth or falsity of the evidence." N.C.G.S. § 15A-1230 (2003). "An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." *Id.*

Here, defendant placed the credibility of State's witnesses Green, McNeil, and Clemmons in issue during cross-examination. Defense counsel's trial strategy was to show that Green, McNeil, and Clemmons were interested witnesses who were present during the shooting and who might benefit from a jury verdict convicting defendant as a shooter. Defense counsel also sought to portray the witnesses as perpetually untruthful, giving multiple false statements to law enforcement. For example, defense counsel asked Green:

> Q. How many statements have you given to Detective Sinclair here that weren't true?
>
> A. I'm not for sure.

371 *371

> Q. There was more than one, wasn't it?
>
> A. Yes, sir.
>
> Q. More than two, wasn't it?
>
> A. Yes, sir.
>
> Q. More than three, actually, wasn't it?
>
> A. Yes, sir. But the third one was the truth. I didn't tell everything. I started remembering things.
>
> Q. The third statement you gave you say was the truth?
>
> A. If I can recall, it was the truth, but I didn't tell him everything.
>
> Q. Well, now, in the third statement didn't you say that Jared Clemmons stopped in front of the club and let me out while they left to go do something.
>
> A. Yes, I did.
>
> Q. That wasn't true, was it?
>
> A. No, it wasn't.

Defense counsel impeached each witness with a prior inconsistent statement and also elicited information from each witness which supported an inference of bias. Under these circumstances, prosecutors were entitled to argue why and how the witnesses came to tell law enforcement a second, or in Green's case a third, version of events. The prosecutor was also entitled to argue that, among the numerous statements, the sequence of events advanced by the State should be credited by the jury.

This Court affirmed similar prosecutorial argument in *State v. Wiley,* 355 N.C. 592, 565 S.E.2d 22 (2002), *cert. denied,* 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). In *Wiley,* prosecutors responded to the defendant's "attacks" on a witness by arguing that the witness "came forward and began to tell the truth and has told pretty much the truth." *Wiley,* 355 N.C. at 621, 565 S.E.2d at 43. Likewise, we determine that the prosecutor's statements were permissible in the case *sub judice.*

Third, defendant contends that the prosecutor improperly misstated the law of felony murder
372 when he told jurors: *372

> If you find that the defendant shot into that Nissan Sentra and that it was occupied and that Seleana Nesbitt was killed, then that is felony murder. You don't have to find premeditation, deliberation. You don't have to find malice. Like robbery, discharging a weapon into an occupied vehicle as well as attempted murder are underlying felonies upon which consideration of first-degree [murder] may be predicated.

Defendant argues that the prosecutor's description "completely omitted to state many essential elements of felony murder." Although we agree with defendant that the prosecutor's argument applying the law of felony murder to the facts of defendant's case was oversimplified, we conclude that the prosecutor's statements were not inaccurate or confusing to a degree requiring *ex mero motu* intervention by the trial court.

Finally, defendant contends that the prosecutor argued an irrelevant hypothetical example to the jury, stating:

> This theory of law under the felony murder rule might be a little easier to understand if you could consider the example of a murder committed during the course of another, one of the enumerated felonies under the felony murder rule. Let's take the felony of armed robbery, for example.

> I walk into the local Dash Inn. I've taken a gun with me. I enter and pull the gun out of my coat, point it at the clerk. I demand that the clerk give me all the money in the cash register, the clerk does so, and then suddenly I pull the trigger and kill the clerk. I am guilty of first-degree murder. . . . under the felony murder rule, and under the felony murder rule even the driver of my get-a-way [sic] car outside at the Dash Inn is guilty of first-degree murder so long as the driver of that car shared in the specific intent of robbing the store.

Defendant contends that the prosecutor "traveled far outside the record" and argued facts not in evidence by presenting this hypothetical example to the jury. We note at the outset that hypothetical examples, by their very nature, are fictional and do not purport to contain facts of record or otherwise. Thus, it is unlikely that jurors were misled to believe that the robbery events recited by the prosecutor were perpetrated by defendant.

Moreover, "[i]n jury trials the whole case as well of *law* as of fact may be argued to the jury." N.C.G.S. § 7A-97 (emphasis added). *373 As this Court has noted in the past, "[t]he origins of this provision are obscure but in *State v. Miller,* 75 N.C. 73, 74 (1876), Justice Reade said:

> Some twentyfive years ago a circuit judge restrained a lawyer from arguing the *law* to the *jury,* suggesting that the argument of the law ought to be addressed to the court, as the jury had to take the law from the court. Umbrage was taken at that, and the Legislature passed an act allowing counsel to argue both the law and the facts to the jury."

State v. McMorris, 290 N.C. 286, 287, 225 S.E.2d 553, 554 (1976) (alteration in original).

Here, by analogy, the prosecutor's example accurately illustrated the law of felony murder. We have allowed a similar presentation of legal argument as reflected in previous cases permitting counsel to support his view of the applicable law with reported decisions of this Court. *Thomas,* 350 N.C. at 355, 514 S.E.2d at 510; *Wilcox v. Glover Motors, Inc.,* 269 N.C. 473, 479, 153 S.E.2d 76, 81 (1967); *Horah v. Knox,* 87 N.C. 443, 445-46, 87 N.C. 483, 486-87 (1882). Consistent with our previous case law and because the prosecutor's remarks were accurate statements directly explaining the law of felony murder, an offense with which defendant was charged, we determine that the prosecutor's statements were permissible in this case.

Defendant's tenth argument and all assignments of error contained therein are overruled.

In his eleventh argument, defendant assigns error to the trial court's denial of his motion to dismiss the attempted first-degree murder and first-degree murder charges at the close of all guilt-phase evidence. In support of his motion, defendant argued to the trial court that the State had presented insufficient evidence of specific intent to kill, premeditation, and deliberation to support his convictions on these charges.

The trial court denied defendant's motion to dismiss and instructed the jury on three theories of first-degree murder: (1) malice, premeditation, and deliberation; (2) felony murder based upon the attempted first-degree murder of Brandi Smith; and (3) felony murder based on discharging a firearm into an occupied vehicle. The trial court also instructed the jury on the attempted first-degree murder of Brandi Smith, on acting in concert, and on transferred intent. We affirm the trial court's denial of defendant's motion to dismiss. *374

In reviewing the trial court's ruling on a defendant's motion to dismiss a charge of first-degree murder, this Court evaluates the evidence presented at trial in the light most favorable to the State. *State v. Walters,* 275 N.C. 615, 623, 170 S.E.2d 484, 490 (1969). The Court considers whether the State presented "substantial evidence"

in support of each element of the charged offense. "Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion." *State v. King,* 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). Such evidence may be direct, circumstantial, or both. *Id.* Circumstantial evidence alone "'may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.'" *State v. Warren,* 348 N.C. 80, 102, 499 S.E.2d 431, 443, *cert. denied,* 525 U.S. 915, 142 L. Ed. 2d 216 (1998) (quoting *State v. Stone,* 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)).

Here, defendant challenges the sufficiency of evidence presented to support two elements of first-degree murder: premeditation and deliberation. Defendant also challenges the sufficiency of the evidence presented to support a finding that he had the specific intent to kill a passenger in the Nissan Sentra.

Premeditation and deliberation are "processes of the mind" which are generally proved by circumstantial evidence. *Smith,* 357 N.C. at 616, 588 S.E.2d at 461. "'Premeditation means that [the] defendant formed the specific intent to kill the victim for some length of time, however short, before the actual killing.'" *Cagle,* 346 N.C. at 508, 488 S.E.2d at 543 (quoting *State v. Arrington,* 336 N.C. 592, 594, 444 S.E.2d 418, 419 (1994)) (alteration in original). "'Deliberation' means that the defendant formed the intent to kill in a cool state of blood and not as a result of a violent passion due to sufficient provocation." *State v. Truesdale,* 340 N.C. 229, 234, 456 S.E.2d 299, 302 (1995). "Specific intent to kill is an essential element of first degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation." *State v. Jones,* 303 N.C. 500, 505, 279 S.E.2d 835, 838-39 (1981). "Thus, proof of premeditation and deliberation is also proof of intent to kill." *Id.,* at 505, 279 S.E.2d at 838-39. After thorough review of the transcript and for the reasons stated below, we conclude that the State presented substantial evidence to support a conclusion that defendant acted with premeditation, deliberation, and specific intent to kill.

First, the State presented evidence from which jurors could conclude that defendant was upset by
375 seeing his ex-girlfriend, Alecia *375 Doughty, with Greg Brooks in Brooks' car; thus, defendant had a motive to harm Brooks. While evidence of motive is not essential to a determination of premeditation and deliberation, evidence of motive for the commission of a crime is relevant to that determination and is admissible. *State v. Alston,* 307 N.C. 321, 328, 298 S.E.2d 631, 637 (1983). Moreover, the prosecution may offer evidence of motive to help prove its case when "'the existence of a motive is . . . a circumstance tending to make it more probable that the person in question did the act.'" *State v. White,* 340 N.C. 264, 292, 457 S.E.2d 841, 857, *cert. denied,* 516 U.S. 994, 133 L. Ed. 2d 436 (1995) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 83 (3d ed. 1988)) (alterations in original), *quoted in State v. Hightower,* 331 N.C. 636, 642, 417 S.E.2d 237, 240-41 (1992).

Second, the State presented evidence that defendant acquired one firearm, the .45 caliber handgun, at a pre-arranged meeting with his brother, Chris Chapman, and that defendant and his friend Dennis concealed the handgun, together with an SKS rifle, near the roadside before entering Club 39. On the way home defendant and his friends stopped to retrieve the hidden SKS rifle and handgun; thus, defendant's actions in acquiring firearms show preparation to commit a violent crime. "A defendant's conduct before . . . the killing is a circumstance to be considered in determining whether he acted with premeditation and deliberation." *State v. Leary,* 344 N.C. 109, 121, 472 S.E.2d 753, 760 (1996). As described above, defendant's conduct on the evening of 8 July 2000 supports an inference of premeditation and deliberation. Just hours before the shooting, defendant hid and later retrieved the murder

weapons. The close proximity in time between obtaining these firearms and committing the shooting tends to show that defendant sought out the rifle and handgun with the purpose of shooting the occupants of Brooks' Nissan.

Third, the State presented evidence that defendant saw Doughty at Club 39 and tried to speak with her. Brooks, who was also at the club, had not met defendant before, but spoke with him and shook his hand. Although defendant met Brooks at The club, no one in Brooks' vehicle did anything to provoke the attack from defendant or Morgan. This Court has consistently held that "'[lack] of provocation'" is a "[c]ircumstance from which premeditation and deliberation may be inferred." *State v. Robinson,* 355 N.C. 320, 337, 561 S.E.2d 245, 256, *cert. denied,* 537 U.S. 1006, 154 L. Ed. 2d 404 (2002) (quoting *Gladden,* 315 N.C. at 430-31, 340 S.E.2d at 693) (alteration in original), *quoted in State v. Keel,* 337 N.C. 469, 489, 447
376 S.E.2d 748, 759 *376 (1994), *cert. denied,* 513 U.S. 1198, 131 L. Ed. 2d 147 (1995). Accordingly, defendant's prior peaceful interaction with Brooks on the night of the shooting supports an inference of premeditation and deliberation.

Fourth, the State presented evidence that, upon leaving the club, defendant instructed Clemmons to pass several vehicles but not to pass Brooks' Nissan Sentra. At some point, one of the passengers said, "[T]hat's them right there." As Greg Brooks drove by, defendant replied, "[L]et's get that m____rf____r." When the Cadillac was behind Brooks' car, defendant called his brother and told him not to pass the car in front of them because he was "about to shoot up this car."

"'[D]eclarations of the defendant before and during the . . . occurrence giving rise to the death of the deceased'" are also "[c]ircumstances from which premeditation and deliberation may be inferred." *Robinson,* 355 N.C. at 337, 561 S.E.2d at 256 (quoting *Gladden,* 315 N.C. at 431, 340 S.E.2d at 693) (alterations in original), *quoted in Keel,* 337 N.C. at 489, 447 S.E.2d at 759. In the case *sub judice,* the exclamation "that's them right there" gives rise to a reasonable inference that defendant and his friends had found a specific vehicle, Greg Brooks' blue Nissan Sentra. Defendant's response, "[L]et's get that m____rf____r," supports an inference that defendant intended harm to an occupant of the Nissan. This is further evidence from which jurors could find that defendant acted with premeditation and deliberation.

Fifth, the State presented evidence that defendant fired the SKS rifle at Brooks' Nissan six to eight times. Premeditation and deliberation may be inferred from the multiple shots fired by defendant. *State v. Ruof,* 296 N.C. 623, 637, 252 S.E.2d 720, 729 (1979); *State v. Smith,* 290 N.C. 148, 164, 226 S.E.2d 10, 20, *cert. denied,* 429 U.S. 932, 50 L. Ed. 2d 301 (1976).

Sixth, the State presented evidence that after the shooting, defendant and Dennis hid the rifle and handgun in Yarborough's yard. "A defendant's conduct . . . after the killing is a circumstance to be considered in determining whether he acted with premeditation and deliberation." *Leary,* 344 N.C. at 121, 472 S.E.2d at 760. Here, defendant's attempt to cover up his participation in the shooting by hiding the rifle and handgun is evidence from which premeditation and deliberation may be inferred. *State v. Trull,* 349 N.C. 428, 448, 509 S.E.2d 178, 191-92 (1998),
377 *cert. denied,* 528 U.S. 835, 145 L. Ed. 2d 80 *377 (1999) ("[A]ttempts to cover up involvement in the crime are among other circumstances from which premeditation and deliberation can be inferred.").

After a thorough review of the transcript, we determine that the State made a sufficient showing to support inferences of defendant's premeditation, deliberation, and specific intent to kill by presenting evidence of: defendant's motive, preparation, and conduct and statements during the events surrounding the shooting; the multiple gunshots fired by defendant; the total lack of

provocation for defendant's actions, and defendant's attempt to conceal his involvement in the shooting. Accordingly, we affirm the trial court's denial of defendant's motion to dismiss the charges of first-degree murder and attempted first-degree murder. This assignment of error is overruled.

In his twelfth argument, defendant assigns error to the trial court's refusal to instruct the jury on second-degree murder.

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps,* 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). If the State's evidence

> is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, *and there is no evidence to negate these elements other than defendant's denial that he committed the offense,* the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson,* 317 N.C. 193, 344 S.E.2d 775 (1986).

Defendant contends that the State did not present sufficient evidence to prove premeditation, deliberation, and specific intent to kill. However, this Court has determined that the State met its burden as to those elements. Accordingly, the only remaining consideration is whether there is evidence to negate the State's case on these points.

Defendant contends that there is substantial contrary evidence, arguing that his statement about shooting "the car" shows that he was not thinking about the people inside the car and did
378 not intend *378 to kill a human being. Defendant also argues that he "had not had prior difficulty with" the occupants of the blue Nissan, and that the shooting occurred at night, between two moving vehicles at some distance. Defendant states that he was intoxicated at the time of the shooting, that he is borderline mentally retarded, and that he has had many mental and emotional disturbances.

We find defendant's arguments unconvincing. All the evidence presented at trial tended to show that defendant obtained, hid, and retrieved the murder weapons, stalked Brooks by searching out his vehicle on Highway 39, and stated an intent to "get that m____rf____r." Then defendant fired six to eight shots from an SKS rifle into the confined space of Brooks' occupied vehicle. Defendant's statement that he was going to shoot "the car" and the fact that these shots were fired at night and between two moving vehicles in no way negate the State's evidence of *mens rea.*

Although defendant elicited evidence during the State's case-in-chief that he was intoxicated on the night of the shooting,

> [a] defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the [S]tate, of his intoxication. *Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.*

State v. Mash, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988) (emphasis added).

As described above, voluntary intoxication is an affirmative defense and the burdens of production and persuasion as to each element of that defense are on the defendant. *Id.* at 346, 372 S.E.2d at 536. However, defendant elected not to put on evidence during the guilt-innocence phase of trial, and there is no indication from the State's evidence that defendant was intoxicated to a degree sufficient to negate *mens rea*.

This Court affirmed a trial court's refusal to submit instructions on second-degree murder under similar circumstances in *State v. Hunt,* 345 N.C. 720, 483 S.E.2d 417 (1997). In *Hunt,* the
379 defendant *379 consumed beer and liquor, smoked marijuana, and became "pretty high" before killing the victim. Under those circumstances, this Court held that "[e]ven viewed in the light most favorable to defendant, [the] evidence tended to show only that defendant was intoxicated; and it was insufficient to show that defendant was '"utterly incapable of forming a deliberate and premeditated purpose to kill."'" *Id.* at 727-28, 483 S.E.2d at 422 (quoting *State v. Medley,* 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978)), *quoted in State v. Strickland,* 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987). As in *Hunt,* we conclude that evidence of defendant's voluntary intoxication was insufficient to negate the State's evidence of *mens rea.*

Finally, defendant did not present evidence during the guilt-innocence phase of borderline mental retardation or any mental or emotional disturbance. Common sense compels that evidence which is not presented until the capital sentencing proceeding cannot serve as the basis of a trial court's ruling during the guilt-innocence phase. For the reasons stated above, the trial court properly denied defendant's request for submission of a second-degree murder charge to the jury. This assignment of error is overruled.

In his thirteenth argument, defendant assigns error to the trial court's refusal to instruct the jury with a special requested instruction defining specific intent to kill. Defendant moved the trial court to supplement the "specific intent to kill" instruction with the following language: "[I]t is not enough that the defendant merely committed an intentional act that resulted in the victim's death." The trial court denied defendant's request and instructed the jurors with the pattern jury instruction instead.

"[I]f a 'request be made for a [special] instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance.'" *State v. Lamb,* 321 N.C. 633, 644, 365 S.E.2d 600, 605-06 (1988) (quoting *State v. Hooker,* 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956)) (alteration in original). The State concedes that defendant's requested instruction was correct in law, but argues there was no evidence presented from which the jury could have found defendant "merely committed an intentional act that resulted in the victim's death." Because we have concluded that there was no evidence presented at trial to negate the State's evidence of *mens rea,* it follows that this requested instruction was also unsupported by the evidence. Accordingly, the trial court did not err in refusing to grant the special instruction. This assignment of error is
380 overruled. *380

In his fourteenth argument, defendant assigns error to the trial court's jury instruction on first-degree murder. Defendant contends that he is entitled to a new trial because the trial court "fail[ed] to submit a not-guilty verdict in the jury instruction mandate in the first-degree felony murder case." We find that the trial court did submit the not-guilty verdict; thus, we affirm the trial court's instructions.

Every criminal jury must be "instructed as to its right to return, and the conditions upon which it should render, a verdict of not guilty." *State v. Howell,* 218 N.C. 280, 282, 10 S.E.2d 815, 817 (1940). Such instruction is generally given during the final mandate after the trial court has

instructed the jury as to elements it must find to reach a guilty verdict. *State v. Ward,* 300 N.C. 150, 156-57, 266 S.E.2d 581, 585-86 (1980).

Here, the trial court submitted three separate theories of first-degree murder to the jury: (1) malice, premeditation and deliberation, (2) felony murder based upon attempted first-degree murder, and (3) felony murder based upon discharging a firearm into occupied property. While it is true that the trial court omitted language after its instruction for felony murder based upon attempted first-degree murder, the omitted language did not contain circumstances under which the jury should find defendant not guilty. Instead, the omitted language stated that if the jury does not find certain matters, then jurors should not return a verdict of guilty under that theory. At the conclusion of the trial court's mandate on all three theories of first-degree murder, the trial judge instructed the jurors as follows: "If you do not find the defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation and if you do not find the defendant guilty of first-degree murder under the felony murder rule, it would be your duty to return a verdict of not guilty."

Because defendant confuses the trial court's instructions on the three separate theories of first-degree murder with instructions on first-degree murder itself, and because the trial court gave a proper mandate at the closure of the first-degree murder instruction, we determine that the trial court instructed the jury that it could find defendant not guilty of first-degree murder. Accordingly, this assignment of error is overruled.

In his fifteenth argument, defendant assigns error to the trial court's denial of his motion to dismiss the charge of first-degree felony murder based upon the felony of discharging a firearm into an occupied vehicle. Defendant contends that there
381 was *381 insufficient evidence from which reasonable jurors could infer that he had the specific intent to shoot "into" the vehicle, rather than simply "at" the vehicle. After a thorough examination of the record, and in light of our earlier determination that the State presented sufficient evidence of defendant's intent to kill an occupant of the vehicle, we conclude that this argument is meritless. This assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

On 26 January 2004, the United States Supreme Court issued a writ of certiorari to review the question of whether imposition of the death penalty on a person who commits a murder at age seventeen is "cruel and unusual punishment" and thus barred by the Eighth and Fourteenth Amendments to the United States Constitution. *Roper v. Simmons,* 112 S.W.3d 397 (Mo. 2003), *cert. granted,* 540 U.S. 1160, 157 L. Ed. 2d 1204 (2004). Defendant LeMorris Chapman, who was 17 years and 210 days old at the time he murdered Ms. Nesbitt, raised the same issue in his written brief to this Court and also filed a motion to hold this Court's decision pending the United States Supreme Court's decision in *Roper.* This Court allowed defendant's motion on 1 April 2004.

On 1 March 2005, the United States Supreme Court issued its opinion, *Roper v. Simmons,* ___ U.S. ___, ___ L. Ed. 2d ___, 2005 U.S. LEXIS 2200 at *1 (Mar. 1, 2005) (No. 03-633). Applying *Trop v. Dulles,* 356 U.S. 86, 2 L. Ed. 2d 630 (1958) (plurality opinion), the Court considered "'evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper,* 2005 U.S. LEXIS 2200 at *18 (quoting *Trop,* 356 U.S. at 101, 2 L. Ed. 2d at 642). The United States Supreme Court held that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the states from imposing a death sentence on offenders who were younger than eighteen years of age when they committed their crime. *Id.* at *43. Because defendant was not yet eighteen years old at the

time he murdered Ms. Nesbitt, we vacate defendant's death sentence pursuant to the United States Supreme Court's recent decision in *Roper v. Simmons.*

CONCLUSION

For the reasons stated above, we find no error in the guilt-innocence phase of defendant's trial and
382 remand this case to *382 Johnston County Superior Court for imposition of a sentence consistent with this opinion.

NO ERROR IN GUILT-INNOCENCE PHASE; DEATH SENTENCE VACATED; REMANDED FOR NEW SENTENCING PROCEEDING.

Justice NEWBY did not participate in the consideration or decision of this case.

No. 249A84
Supreme Court of North Carolina

State v. Freeland

316 N.C. 13 (N.C. 1986) · 340 S.E.2d 35
Decided Feb 1, 1986

No. 249A84

Filed 18 February 1986

1. Criminal Law 89.1 — mother of rape victim — character evidence improperly admitted — no prejudice Though the trial court in a rape case erred in allowing the seven-year-old victim's mother to give opinion testimony vouching for the veracity of her daughter and to testify to specific acts by the victim as indicative of her character, defendant failed to show that there was a reasonable possibility that, had the evidence been excluded, a different result would have been reached at trial, and admission of the evidence was therefore not prejudicial, since the victim gave a detailed and accurate description of defendant, corroborated by her father; she gave clear and consistent testimony at trial; and defendant failed to impeach her credibility in any way. *14

2. Constitutional Law 76; Criminal Law 48.1 — evidence of defendant's post-arrest silence — prejudice cured by instruction The trial court's curative instruction was sufficient to cure the prejudicial effect of testimony by a detective that defendant requested a lawyer and asserted his right to silence after being arrested and informed of his constitutional rights, since the prosecutor was not attempting to capitalize on defendant's silence or his request for counsel when the detective made his statements but was instead merely attempting to elicit from the detective the facts and circumstances surrounding a tape-recorded interview the detective had had with the victim on the night of the assault; immediately after the statements concerning defendant's exercise of his constitutional rights, defendant's counsel objected and moved to strike; the trial court immediately sustained defendant's objection and instructed the jury to disregard the statements and not to consider them in their deliberations; the jurors indicated by raising their hands that they could follow the instruction; and the evidence of defendant's guilt was very strong.

3. Constitutional Law 34; Criminal Law 26.5 — conviction for first degree kidnapping and first degree rape — double jeopardy Defendant was placed in double jeopardy by being convicted of first degree kidnapping based on removal of the victim to facilitate a sexual assault as well as being convicted of first degree rape and first degree sexual offense.

4. Constitutional Law 34; Criminal Law 26.5 — same conduct violating two statutes — double jeopardy — amount of punishment — intent of legislature When a defendant is tried in a single trial for violations of two statutes which punish the same conduct, the amount of punishment allowable under the double jeopardy clause of the Federal Constitution and the law of the land clause of the N.C. Constitution is determined by the intent of the legislature; therefore, if the legislature has specifically authorized cumulative punishment for the same conduct under two statutes, the prosecutor may seek and the trial court may impose cumulative punishment under such statutes in a single trial, but if cumulative punishment is not so authorized, a defendant may be punished under only one statute.

APPEAL by defendant as a matter of right pursuant to N.C.G.S. 7A-27(a) from the judgments entered by Hobgood, J., at the 6 February 1984 Criminal Session of ALAMANCE County Superior Court. Judgments entered 16 February 1984.

Lacy H. Thornburg, Attorney General, by David S. Crump, Special Deputy Attorney General, for the State.

Adam Stein, Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for
16 defendant-appellant. *16

Justices EXUM, MARTIN and FRYE concur in the result.

Defendant was convicted of first degree rape, first degree sexual offense and first degree kidnapping. Following the sentencing hearing Judge Hobgood sentenced defendant to terms of life imprisonment for first degree rape and first degree sexual offense, the sentences to run concurrently, and to a thirty-year term of imprisonment for first degree kidnapping, that sentence to run consecutively
15 with the life sentences. *15

The State's evidence tended to show that defendant approached Elizabeth Boyd, the seven year old victim, while she was playing near her home. Defendant convinced her to accompany him to a nearby wooded area where he inserted his finger in her vagina. Subsequent to this act he raped her. Semen, consistent with defendant's blood type, was found on the victim's underwear.

Elizabeth told her mother, Ellen Boyd, that her assailant was a white male who was wearing a dark blue baseball cap and T-shirt, each with white lettering, a pair of blue jeans and a pair of blue and white Nike tennis shoes. She also recalled that he was carrying a radio-tape player. Wilson Boyd, Elizabeth's father, had seen defendant walking on the road in front of his house prior to the assault. Steve Johnson, who lived near the Boyd residence, saw an individual matching Elizabeth's description of her assailant cut through his yard shortly after the assault had taken place. At trial in defendant's presence Johnson stated that he did not see that individual in the courtroom.

After Elizabeth recounted what had happened to her Mrs. Boyd called the Sheriff's Department, told them her daughter had been raped, and described the assailant. Shortly after the Sheriff's Department received this description of the assailant, defendant, who matched the description, was spotted by Lieutenant Perkins along Highway 87 and stopped. Lieutenant Perkins asked that defendant accompany him to the Boyd residence to clear up a certain matter and defendant agreed. Upon their arrival Elizabeth was brought outside and identified defendant as her assailant. He was then arrested.

Defendant took the stand in his own behalf and gave alibi testimony which was corroborated by several witnesses. He denied any knowledge of the assault on Elizabeth.

BRANCH, Chief Justice.

Defendant assigns as error the admission of certain opinion and character testimony by Mrs. Boyd offered to bolster the credibility of Elizabeth. Defendant further challenges the trial court's failure to declare a mistrial following testimony by Detective Ron Overman that defendant asserted his right to silence following his arrest. We hold that the trial court ruled correctly on the second issue and find no prejudicial error in the first issue. Defendant also assigns as error the entry of judgment on the charge of first degree kidnapping based on a sexual assault when judgment had already been entered against him for the two sexual assaults he committed. We agree and remand for a new sentencing hearing.

Because this case was tried before 1 July 1984 the North Carolina Rules of Evidence will not be addressed.

I

Defendant first argues that the trial court impermissibly allowed Elizabeth's mother to give opinion testimony vouching for the veracity of her daughter and to testify to specific acts by Elizabeth as indicative of her character.

Following cross-examination of Elizabeth during which she admitted that she sometimes told lies, the State called Mrs. Boyd to the stand. She testified that Elizabeth had indeed told stories or lies in the past. The prosecution then asked Mrs. Boyd what she would do in those instances and she testified as follows:

> A. I can look at her face and tell whether she's telling me the truth or not. And I'll look down at her, `Now, Beth, are you sure that's right?'

And then she tells me the truth.

MR. MOSELEY: I object; move to strike.

THE COURT: Overruled; denied.

> Q. (Mr. Hunt) What has been your experience as Beth's mother regarding fantasizing?

A. Beth has never, you know —

17 MR. MOSELEY: I object. *17

THE COURT: Overruled.

> THE WITNESS: She's never — she knows the difference between reality —

MR. MOSELEY: Object.

THE WITNESS: — and fantasy.

THE COURT: Overruled.

> THE WITNESS: Now, when she's playing, she'll play with her dolls and she will play school, for instance. And she'll be the teacher, and she'll be the students and all. But that is a play-type situation. She knows who she is.

MR. MOSELEY: Object. Move to strike.

THE COURT: Overruled; denied.

We agree with defendant that this evidence was improperly admitted but hold that its admission was harmless error.

It is the general rule in this jurisdiction that an impeaching or sustaining character witness "may testify concerning a person's character only after he qualifies himself by affirmatively indicating that he is familiar with the person's general character and reputation." State v. Cox, 303 N.C. 75, 80, 277 S.E.2d 376, 380 (1981). The witness's opinion of the character of another is inadmissible, State v. Brown, 306 N.C. 151, 175, 293 S.E.2d 569, 585, cert. denied, 459 U.S. 1080, 74 L.Ed.2d 642 (1982), as is his testimony concerning specific acts indicative of character, State v. Denny, 294 N.C. 294, 298, 240 S.E.2d 437, 439 (1978). In the instant case the trial court erred in allowing Mrs. Boyd to refer to specific acts and occurrences tending to show that Elizabeth has a good character for truthfulness and can distinguish fantasy from reality.

Errors relating to rights that do not arise under the Federal Constitution are prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" at trial. N.C.G.S. 15A-1443(a) (1977) (codifying our rule set forth in State v. Turner, 268 N.C. 225, 150 S.E.2d 406 (1966)). In this case we hold that there is no reasonable possibility that a different result would have been reached at trial had the error not

18 occurred. The substance of the *18 evidence in question was that Mrs. Boyd could tell when Elizabeth was lying, that when confronted by her mother Elizabeth would tell the truth and that she could distinguish between reality and fantasy. At no point did Mrs. Boyd express an opinion that her daughter was telling the truth when she testified at trial. It is important to note that the jury would naturally assume that Mrs. Boyd was prejudiced in favor of her daughter and believed

that her daughter was telling the truth. Any testimony by Mrs. Boyd indicating that it was her opinion that Elizabeth was telling the truth would not materially enhance the effect of her character testimony.

Defendant's reliance on State v. Coble, 63 N.C. App. 537, 306 S.E.2d 120 (1983), is misplaced. In Coble, a character witness testified over objection that in her opinion the State's sole eyewitness to the crime was a truthful person. Id. at 541, 306 S.E.2d at 122. The Court of Appeals held that admission of this improper testimony could not be considered harmless when combined with the fact that the defendant was effectively precluded from presenting his defense by the trial court's erroneous exclusion of evidence favorable to him. Id. at 541-42, 306 S.E.2d at 123. In the instant case defendant was able to fully develop his defense of alibi.

In view of the victim's detailed and accurate description of defendant, corroborated by her father, her clear and consistent testimony at trial and defendant's failure to impeach her credibility in any meaningful way, we hold that defendant has failed to show that there is a reasonable possibility that had Mrs. Boyd's testimony been excluded a different result would have been reached at trial. Therefore, its admission into evidence was harmless error.

II

Defendant next assigns as error the trial court's failure to declare a mistrial following the testimony by Detective Overman that defendant requested a lawyer and asserted his right to silence after being arrested and informed of his constitutional rights. Use of a defendant's exercise of his right to silence after he has been arrested and informed of his constitutional rights for impeachment purposes is a violation of the due process clause of the fourteenth amendment.
19 Doyle v. Ohio, 426 U.S. 610, 619, *19 49 L.Ed.2d 91, 98 (1976). The prosecution may use a defendant's pre-arrest silence for impeachment purposes. Jenkins v. Anderson, 447 U.S. 231, 239-40, 65 L.Ed.2d 86, 95-96 (1980). Courts have also condemned reference by the prosecution to an accused's exercise of his right to counsel. See United States v. Daoud, 741 F.2d 478 (1st Cir. 1984). Under the facts and circumstances of this case we hold that the trial court's curative instruction was sufficient to cure the prejudicial effect of Detective Overman's testimony.

"Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt." State v. Taylor, 280 N.C. 273, 280, 185 S.E.2d 677, 682 (1972); N.C.G.S. 15A-1443(b) (1977).

In contrast with the cases relied on by defendant and many of those that our own research has discovered, the prosecutor in this case was not attempting to capitalize on defendant's silence or his request for counsel. See Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91; State v. Lane, 301 N.C. 382, 271 S.E.2d 273 (1980); United States v. McDonald, 620 F.2d 559 (5th Cir. 1980); State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974). Rather, the prosecutor simply asked Detective Overman whom he had seen when he went to the Alamance County Sheriff's Department on the night of the offense. At that point the detective made the improper statement indicating that defendant had asserted his right to counsel and to remain silent. In his next question the prosecutor asked specifically if the detective had talked with Elizabeth Boyd that night and what Elizabeth had told him. It is clear that the prosecutor was merely attempting to elicit from Detective Overman the facts and circumstances surrounding the tape recorded interview the Detective had had with Elizabeth on the night of the assault.

Immediately after Detective Overman made the statement concerning defendant's exercise of his constitutional rights, defendant's counsel objected

and moved to strike the testimony. The trial court immediately sustained defendant's objection and instructed the jury to disregard Detective Overman's statement and not to consider it in their deliberations. The jurors were then asked to raise
20 their right hands if they could follow the *20 instruction. All did so. In denying defendant's motion for mistrial the trial judge noted that he had been facing the jury box during Detective Overman's testimony and did not detect any change of expression or show of emotion on the faces of the jurors that might indicate that the testimony had had a significant effect on them. This is to be contrasted with the cases cited by defendant in which the evidence was admitted over objection and no curative instructions were given. See State v. Lane, 301 N.C. 382, 271 S.E.2d 273; State v. Castor, 285 N.C. 286, 204 S.E.2d 848.

When these factors are considered along with the very strong evidence of defendant's guilt and the presumption that the jury will follow the trial court's instructions that it disregard improperly admitted evidence, Wands v. Cauble, 270 N.C. 311, 154 S.E.2d 425 (1967), we hold that Detective Overman's objectionable statement was harmless error beyond a reasonable doubt. See United States v. Milstead, 671 F.2d 950 (5th Cir. 1982) (per curiam) (passing reference to defendant's retention of counsel followed by strong curative instruction not prejudicial error).

III

In his final assignment of error defendant argues that he was placed in double jeopardy by being convicted of first degree kidnapping based on removal of the victim to facilitate a sexual assault as well as being convicted of first degree rape and first degree sexual offense. We agree.

Section 14-39(b) of the General Statutes of North Carolina provides that:

> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

The language of N.C.G.S. 14-39(b) states essential elements of the crime of first degree kidnapping. State v. Jerrett, 309 N.C. 239, 261, 307 S.E.2d
21 339, 351 (1983). *21

In his final mandate during the charge on first degree kidnapping the trial judge, among other things, instructed the jury that in order to find defendant guilty it must find that he had sexually assaulted Elizabeth Boyd. The only sexual assaults committed by defendant against Elizabeth were the rape and sexual offense for which he was separately convicted. Therefore, in finding defendant guilty of first degree kidnapping the jury must have relied on the rape or sexual offense to satisfy the sexual assault element. As a result defendant was unconstitutionally subjected to double punishment under statutes proscribing the same conduct. See State v. Price, 313 N.C. 297, 327 S.E.2d 863 (1985) (proof of the rape not necessary to satisfy sexual assault element because defendant committed a separate sexual assault for which he was not prosecuted).

The general rule is that the double jeopardy clause of the Federal Constitution protects an individual "'from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" Missouri v. Hunter, 459 U.S. 359, 365, 74 L.Ed.2d 535, 542 (1983) (quoting Green v. United States, 355 U.S. 184, 187, 2 L.Ed.2d 199, 204 (1957)). When a defendant is tried in a single

trial for violations of two statutes that punish the same conduct the amount of punishment allowable under the double jeopardy clause of the Federal Constitution and the law of the land clause of our State Constitution is determined by the intent of the legislature. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986). If the legislature has specifically authorized cumulative punishment for the same conduct under two statutes "'the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.'" Id. at 460-61, 340 S.E.2d at 712 (quoting Missouri v. Hunter, 459 U.S. at 368-69, 74 L.Ed.2d at 544). If cumulative punishment is not so authorized, a defendant may only be punished under one statute. Id. Since defendant's conviction of the rape or the sexual offense is a necessary element of first degree kidnapping in this case, the trial judge erred in sentencing defendant for all three crimes unless the legislature specifically authorized cumulative punishment. Since we find nothing in the pertinent statutes explicitly authorizing cumulative punishment, we must apply the Gardner test for determining legislative intent by examining the
22 subject, *22 language and history of the statutes. Gardner, 315 N.C. at 461, 340 S.E.2d at 712. Because N.C.G.S. 14-27.2 and N.C.G.S. 14-27.4 do not refer to kidnapping we will concentrate on N.C.G.S. 14-39.

From 1933 to 1975 kidnapping was not divided into degrees and was punishable by life imprisonment. 1933 N.C. Sess. Laws ch. 542, 2. In 1975 the legislature completely rewrote N.C.G.S. 14-39. 1975 Sess. Laws ch. 843, 1. Subsection (b) of the revised statute set the punishment for kidnapping at not less than twenty-five years imprisonment and not more than life imprisonment unless the victim was released by the defendant in a safe place and had not been sexually assaulted or seriously injured. N.C.G.S. 14-39 (1975) (now amended). If that was the case, punishment was set at not more than twenty-five years imprisonment, or a fine of not more than ten thousand dollars, or both. Id. Prior to the Supreme Court's ruling in Missouri v. Hunter, 459 U.S. 359, 74 L.Ed.2d 535, we held that a defendant could be given the maximum sentence allowed for kidnapping based on the fact that the victim was sexually assaulted as well as being separately punished for the rape that was used to establish that a sexual assault occurred. State v. Williams, 295 N.C. 655, 664-69, 249 S.E.2d 709, 716-19 (1978). See State v. Banks, 295 N.C. 399, 405-07, 245 S.E.2d 743, 748-49 (1978). This decision was based on our determination that the then existing version of N.C.G.S. 14-39 did not divide kidnapping into two degrees. Williams, 295 N.C. at 664-65, 249 S.E.2d at 716-17. Rather, the absence of sexual assault or serious injury to the victim combined with the release of the victim in a safe place were mitigating circumstances which resulted in a lesser sentence. Id. at 666-69, 249 S.E.2d at 717-19.

The fact that kidnapping was not divided into two degrees in 1978 was significant because of our opinion in State v. Midyette, 270 N.C. 229, 154 S.E.2d 66 (1967), which we relied on in State v. Williams, 295 N.C. 655, 249 S.E.2d 709. The rule of Midyette is as follows: When one is convicted and sentenced for an offense he may "not thereafter be lawfully indicted, convicted and sentenced a second time for that offense, or for any other offense of which it, in its entirety, is an essential element." Midyette, 270 N.C. 229, 233, 154 S.E.2d 66, 70 (emphasis added). "What the State cannot do by separate indictments returned successively and tried successively, it cannot do
23 by separate indictments returned *23 simultaneously and consolidated for simultaneous trial." Id at 234, 154 S.E.2d at 70. In Midyette we held that a defendant convicted of assault with a deadly weapon could not also be convicted of resisting a public officer when it was alleged that the assault was the means by which the public officer was resisted. Id. In State v. Williams we concluded that the rule of Midyette did not apply because a sexual assault on the victim was not an

element of the single offense of kidnapping established by N.C.G.S. 14-39 or an aggravating factor that would result in a greater sentence. 295 N.C. at 669, 249 S.E.2d at 719.

State v. Williams was filed 28 November 1978. The legislature passed the present version of N.C.G.S. 14-39 on 4 June 1979. 1979 N.C. Sess. Laws ch. 760, 5. This new version of N.C.G.S. 14-39(b) divided kidnapping into two degrees and made the commission of a sexual assault on the victim an element of the crime of first degree kidnapping. See State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339. The Williams decision had made it clear that under a kidnapping statute drafted in this manner a defendant could not be convicted of both first degree kidnapping and a sexual assault that raised the kidnapping to first degree. Therefore, we can only conclude that in revising the statute the legislature did not intend that defendants be punished for both the first degree kidnapping and the underlying sexual assault. In reaching this conclusion we find it important that Williams and State v. Banks were the first decisions of this Court to deal with the issue of double punishment under former N.C.G.S. 14-39 and that following our opinion in those cases the legislature promptly revised the statute.

We recognize that by adopting the United States Supreme Court's decision in Missouri v. Hunter, 459 U.S. 359, 74 L.Ed.2d 535, State v. Gardner, 315 N.C. 444, 340 S.E.2d 701, has overruled that portion of the holding of State v. Midyette, 270 N.C. 229, 154 S.E.2d 66, which stated that what the State may not do by separate indictments returned successively and tried successively, it may not do by separate indictments returned simultaneously and consolidated for simultaneous trial. However, Williams and Midyette were the law of this State in 1979, and in determining the intent of the legislature when it revised N.C.G.S. 14-39(b) in 1979, we must assume that the legislature was aware of this fact. Therefore,
24 defendant was erroneously subjected to double *24 punishment, and it will be necessary to remand this case to the trial court for a new sentencing hearing.

The trial court may arrest judgment on the first degree kidnapping conviction and resentence defendant for second degree kidnapping or it may arrest judgment on one of the sexual assault convictions.

For the reasons stated this case is remanded to the trial court for a new sentencing hearing.

Remanded for new sentencing hearing.

Justices EXUM, MARTIN and FRYE concur in the result.

No. COA08-1385
North Carolina Court of Appeals

State v. Giddens

681 S.E.2d 504 (N.C. Ct. App. 2009) · 199 N.C. App. 115
Decided Aug 18, 2009

Heard in the Court of Appeals 9 April 2009.

505 *505 Appeal by Defendant from judgment entered 9 September 2008 by Judge C. Philip Ginn in Superior Court, Macon County.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Pitman, for the State.

Parish, Cooke & Condlin, by James R. Parish, Fayetteville, for Defendant.

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504 *504

STEPHENS, Judge.

A jury found Defendant guilty of two counts of first degree sex offense, one count of taking indecent liberties with a child, and one count of first degree rape on 4 June 2008. The trial court entered judgment in accordance with this verdict on 9 September 2008, and sentenced Defendant to a term of 288 to 355 months imprisonment. From this judgment, Defendant appeals.

I. Facts and Procedural History

The State's evidence presented at trial tended to show that Defendant and Amanda Biringer (" Amanda") were married on 21 February 1998. Defendant and Amanda had one daughter, V.G., who was ten years old at the time of trial. Defendant also became the stepfather to Amanda's son, J.B., who was fourteen years old at the time of trial.

J.B. testified at trial to the following: J.B. stated he did not like Defendant because Defendant had abused and sexually abused him on a daily basis. Defendant touched J.B. in his " private areas[,]" and Defendant made " [J.B.] put [J.B.'s] mouth on [Defendant's] penis and put his penis in between [J.B.'s] legs and [Defendant] would try to put his penis up [J.B.'s] butt." Defendant put his penis in J.B.'s mouth between five and ten times. Defendant would also put lotion on J.B.'s legs and simulate intercourse. Defendant always did this with J.B. in Defendant's bedroom and when Amanda and V.G. were out of the house. Defendant sexually abused J.B. from the time J.B. was in fourth grade until he was in sixth grade. J.B. testified that Defendant tried to insert his penis into J.B.'s anus when J.B. was in fourth grade. Defendant told J.B. that if he told anyone what happened, Defendant would kill Amanda.

V.G. testified that she felt disappointed with Defendant because he raped her. V.G. described what she meant by " raped" by stating " [Defendant] placed his wrong private place in mine." Defendant " forced [V.G.'s clothes] off" and removed his own clothes during these times. V.G. testified Defendant committed these acts " maybe two" times over the course of approximately one year. V.G. did not tell anyone when Defendant was abusing her because Defendant threatened to kill Amanda if she did, and V.G. believed Defendant's threats.

Amanda and Defendant separated on 16 January 2006. On or about 10 November 2006, Amanda was going through the clothes in the backpack V.G. frequently took to visit Defendant, when Amanda and Misty Birch (" Birch") found a

pair of torn panties. Amanda asked V.G. what happened to the panties, and V.G. began to cry and then said Defendant had torn the panties. Amanda also testified that she had seen Defendant smack J.B. on the head and push J.B. down. Amanda further testified that she finally left Defendant because " it was getting too dangerous for the kids" and Defendant would not stop drinking and doing drugs.

Amanda contacted Amy Stewart (" Stewart"), the Detective Sergeant over juvenile investigations at the Macon County Sheriff's Department, after hearing what Defendant did to V.G. Stewart testified at trial that she met with Amanda, V.G., and J.B. at their home within a week of receiving Amanda's initial phone call. Stewart first spoke with J.B., and J.B. told her that Defendant had made him " snort white powder up his nose and that it hurt his nose when he did it." J.B. also told Stewart Defendant would make J.B. suck his penis almost every day when Amanda was not home.

Stewart also spoke to V.G., who informed Stewart that Defendant would take off all of V.G.'s clothes and remove his own clothes when no one else was home. V.G. also told Stewart that Defendant kept pictures of children in his safe, and the children were naked and crying. V.G. told Stewart that Defendant " would rub his penis on her pee-pee[,]" *506 and that " it went inside and that it hurt." V.G. told Stewart that this happened approximately ten times.

Kay Kent (" Kent"), a child protective services investigator with the Buncombe County Department of Social Services (" DSS"), testified to the following: Kent received a referral on 20 November 2006 from child protective services for J.B. and V.G. Kent was required to respond within twenty-four hours, which she did by making a home visit the following day, on 21 November 2006. During her visit, Kent first interviewed V.G. using a forensic model designed not to lead the child. V.G. described the same events to Kent that she had shared with Stewart. Kent next met with J.B., whose description of Defendant's actions was consistent with the description he provided Stewart. The forensic interview model Kent used to interview V.G. and J.B. is used statewide in order to gather information from children that is not leading and that looks for consistency.

After interviewing V.G. and J.B., Kent arranged for a medical examination to be conducted on the children by Dr. Cindy Brown at Mission Children's Clinic, in Asheville, North Carolina. A child medical exam is twofold. There is another forensic interview such as the one Kent conducted and then also a medical exam in which the child is tested for sexually transmitted diseases and other physical concerns. As a result of her investigation of V.G. and J.B., Kent completed a North Carolina Case Decision Summary/Initial Case Plan, which is a mandatory part of the structured assessment case decision process. This form names all of the children and all of the caregivers involved, followed by a section in which the investigator determines whether each caregiver is substantiated as a perpetrator.

Kent testified that Defendant was substantiated as the perpetrator with regard to both V.G. and J.B. The term " substantiated" means that the examiners " found evidence throughout the course of [their] investigation to believe that the alleged abuse and neglect did occur." In determining that Defendant was substantiated as a perpetrator, Kent and the other investigators looked at the case history involved as well as the specific allegations. Kent also conducted a global assessment which involves examining the level of supervision the children receive and whether the children's mental needs are being met in the home.

Jerri Szlizewski (" Szlizewski"), a child forensic interviewer (" CFI") at Mission Children's Clinic, testified next to the following: A CFI " [interviews] children who are alleged to be abused in a non-threatening, non-judgmental developmentally appropriate manner taking care

not to lead them in any one direction." Szlizewski interviewed J.B. and V.G. in December 2006, and the children provided information consistent with their prior interviews. During their individual interviews with Szlizewski, the children looked at girl and boy diagrams and indicated what Defendant had done to them.

Dr. Cynthia Brown (" Brown"), the Medical Director of the Child Maltreatment Evaluation Program at Mission Children's Clinic, testified as an expert witness for the State. Brown examined J.B. in December 2006, and J.B.'s anal exam was normal. Brown testified that in cases where anal penetration had occurred, it was common to see findings " maybe five percent or less of the time." One reason for this is that children often wait to disclose their injuries, and these injuries heal during that time. Mary Ormand, the nurse practitioner in the Mission Children's Clinic, examined V.G., and Brown then reviewed the photographs taken during that examination. Brown did not observe any injuries from the pictures taken of V.G. Brown stated that in her experience and according to national reports, " very few children have findings even when there is genital to genital, penile to genital contact."

At the close of the State's evidence, Defendant made a motion to dismiss all of the charges, which the trial court denied. Defendant testified on his own behalf, and he denied ever physically or sexually abusing J.B. or V.G. Defendant's mother, Catherine Ledford, and Defendant's former landlord, Clara Ball, also testified on Defendant's behalf. At the close of all evidence, Defendant renewed his motion to
507 dismiss, and this motion was denied. *507
The jury found Defendant guilty of first degree rape of V.G., taking indecent liberties with J.B., and two counts of first degree sex offense with J.B. Defendant renewed his motion to dismiss and made a motion for judgment notwithstanding the verdict. The trial court denied these motions. The trial court consolidated all charges for a single judgment within the presumptive range for a B1 felony, sentencing Level II. The trial court entered judgment sentencing Defendant to a term of 288 to 355 months imprisonment, lifetime registration as a sex offender, and lifetime satellite-based monitoring. From this judgment, Defendant appeals.

II. Admission of Evidence

Defendant argues the trial court committed plain error by allowing Kent to testify that her investigation had substantiated Defendant as the perpetrator of the abuse alleged by J.B. and V.G. For the following reasons, we must agree.

Defendant failed to object to Kent's testimony at trial, and is thus limited to plain error review. *See* N.C. R.App. P. 10(b)(2), 10(c)(4). In criminal trials, plain error review is available for challenges to jury instructions and evidentiary issues. *Dogwood Development and Management Co., LLC v. White Oak Transport Co., Inc.,* 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). " Reversal for plain error is only appropriate where the error is so fundamental that it undermines the fairness of the trial, or where it had a probable impact on the guilty verdict." *State v. Floyd,* 148 N.C.App. 290, 295, 558 S.E.2d 237, 240 (2002).

Defendant argues that Kent's testimony was admitted in error because it resolved the factual issue of Defendant's guilt for the jury by expressing an opinion on J.B.'s and V.G.'s credibility. Defendant contends this case is parallel to our recent opinion in *State v. Couser,* 163 N.C.App. 727, 731, 594 S.E.2d 420, 423 (2004), where we held a medical expert's opinion that the child " probably had been sexually abused" was impermissible and prejudicial because it amounted to an improper opinion on the victim's credibility. In *Couser,* the defendant had been convicted of taking indecent liberties with a child and attempted rape. *Id.* at 729, 594 S.E.2d at 422. The only direct evidence against the defendant was the victim's testimony and corroborative testimony from other witnesses. *Id.* at 731, 594 S.E.2d at 423. " There was no evidence that the victim's

behavior or symptoms following the assault were consistent with being sexually abused." *Id.* The only medical evidence presented was that of abrasions which were not specific to, nor diagnostic of, sexual abuse. *Id.* The results of a rape suspect kit were negative, revealing " that the victim had no semen in her or on her clothing and that neither the victim nor defendant had transmitted hairs to each other." *Id.*

> Without the [medical expert opinion testimony], the jury ... would have been left with only the testimony of the victim and corroborative testimony along with evidence of abrasions not necessarily caused by sexual assault. Thus, the central issue to be decided by the jury was the credibility of the victim. We conclude that the impermissible expert medical opinion evidence had a probable impact on the jury's result because it amounted to an improper opinion on the victim's credibility, whose testimony was the only direct evidence implicating defendant.

Id.

Unlike *Couser,* however, Kent was not qualified as an expert witness. Thus, Kent's testimony did not constitute an impermissible expert opinion regarding the victims' credibility. The State contends that Kent's testimony merely served to corroborate the testimony of V.G. and J.B. " One of the most widely used and well-recognized methods of strengthening the credibility of a witness is by the admission of prior consistent statements." *State v. Locklear,* 320 N.C. 754, 761-62, 360 S.E.2d 682, 686 (1987) (citation omitted). However, the conclusion reached by DSS was not based solely on the children's accounts of what happened, and thus, was not merely a corroboration of their testimony. Rather, DSS conducted its own investigation to determine whether any of the children's caregivers were participants in the alleged abuse. Kent described
508 DSS's investigation as follows: *508 We look at case history being involved and I was investigating these specific allegations that were reported and then I also do a global assessment. I mean I don't just go in and ask about allegations. I ask about anything from their mental needs being met in the home, supervision. Based on all the information I gathered during the course of the investigation I never had any information to substantiate that Misty or Amanda were abusive or neglectful.

The cumulative effect of Kent's testimony was to tell the jury that based upon a thorough investigation, DSS concluded that of the children's three caregivers, Defendant had sexually abused them.

The dissent contends that the present case is analogous to *State v. O'Hanlan,* 153 N.C.App. 546, 570 S.E.2d 751 (2002), in which a law enforcement officer testified that he did not perform a more thorough investigation because the victim had survived her attack and was able to describe and identify the defendant as her attacker. *Id.* at 562, 570 S.E.2d at 761. This Court held that the context in which the law enforcement officer's testimony was given made it clear that he was not offering an opinion as to the defendant's guilt, but rather that he was explaining why he did not conduct further scientific testing of the physical evidence. *Id.* Thus, even if the officer's testimony was admitted in error, any resulting prejudice did not amount to plain error. *Id.* at 563, 594 S.E.2d at 762.

In the present case, however, Kent's testimony was clearly improper, as she testified that DSS had concluded Defendant was guilty of the alleged criminal acts. Our case law has long held that a witness may not vouch for the credibility of a victim. *See State v. Freeland,* 316 N.C. 13, 16, 340 S.E.2d 35, 36 (1986) (harmless error where mother of victim was allowed to give opinion testimony vouching for the veracity of her daughter); *State v. Teeter,* 85 N.C.App. 624, 355 S.E.2d 804 (nurse who interviewed mentally

retarded victim about alleged rape should not have been allowed to testify that she believed victim's statement), *appeal dismissed and cert. denied,* 320 N.C. 175, 358 S.E.2d 67 (1987). Kent's testimony that DSS had " substantiated" Defendant as the perpetrator, and that the evidence she gathered caused DSS personnel to believe that the abuse alleged by the children did occur, amounted to a statement that a State agency had concluded Defendant was guilty. DSS is charged with the responsibility of conducting the investigation and gathering evidence to present the allegation of abuse to the court. Although Kent was not qualified as an expert witness, Kent is a child protective services investigator for DSS, and the jury most likely gave her opinion more weight than a lay opinion. Thus, it was error to admit Kent's testimony regarding the conclusion reached by DSS.

" In deciding whether an error by the trial court constituted plain error, ‘ the appellate court must examine the entire record and determine if the ... error had a probable impact on the jury's finding of guilt.’ " *State v. Pullen,* 163 N.C.App. 696, 701, 594 S.E.2d 248, 252 (2004) (quoting *State v. Odom,* 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983)). In *Couser,* this Court held that the improperly admitted testimony had a probable impact on the jury's decision where the only other evidence of the defendant's guilt was " the testimony of the victim and corroborative testimony along with evidence of abrasions not necessarily caused by sexual assault." *Couser* at 731, 594 S.E.2d at 423; *see also State v. Delsanto,* 172 N.C.App. 42, 49, 615 S.E.2d 870, 875 (2005) (holding that admission of medical expert's testimony that child was sexually abused by defendant in absence of any physical evidence of abuse constituted plain error); *State v. Ewell,* 168 N.C.App. 98, 105, 606 S.E.2d 914, 919 (holding that it was error for the trial court to allow expert testimony that it was " probable that [the child] was a victim of sexual abuse" when the testimony was not based on physical evidence or behaviors consistent with sexual abuse), *disc. review denied,* 359 N.C. 412, 612 S.E.2d 326 (2005); *State v. Bush,* 164 N.C.App. 254, 259, 595 S.E.2d 715, 718 (2004) (expert's testimony that she diagnosed the victim as having been sexually abused by the 509 defendant was plain error). *509 However, in *State v. Stancil,* 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002), although expert testimony that sexual abuse had in fact occurred was improperly admitted, the overwhelming evidence against the defendant led our Supreme Court to conclude " that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached." In *Stancil,*

> [a]lthough the Supreme Court did not reveal what evidence it relied upon, the prior Court of Appeals opinion in that case noted in addition to testimony of the victim and other corroborating evidence[,] there were two permissible expert opinions that the victim exhibited characteristics consistent with sexual abuse. *State v. Stancil,* 146 N.C.App. 234, 240, 552 S.E.2d 212, 215-16 (2001), *per curiam modified and aff'd,* 355 N.C. 266, 559 S.E.2d 788. Further, there was evidence that the defendant had performed oral sex upon the victim and thus it was unlikely any physical evidence would have been left and that the rape suspect kit returned inconclusive. *Id.* Moreover, the victim in that case continued to show symptoms of having been sexually abused five days after the incident and showed intense and immediate emotional trauma after the incident. *Id.*

Couser, 163 N.C.App. at 730-31, 594 S.E.2d at 423. Thus, whereas the trial court erred in Stancil, that error did not rise to the level of plain error.

The evidence in the present case more closely resembles the evidence presented in *Couser* in that without Kent's testimony, the jury would have been left with only the children's

testimony and the evidence corroborating their testimony. Thus, as in *Couser,* " the central issue to be decided by the jury was the credibility of the victim[s]." *Id.* at 731, 594 S.E.2d at 423. J.B. and V.G. provided detailed and consistent accounts of the sexual abuse they alleged Defendant inflicted upon them. J.B. testified that Defendant had physically and sexually abused him on a daily basis. V.G. testified that Defendant sexually abused her on two occasions over the course of a year. The children's testimony was corroborated by the testimony of Amanda, the Detective Sergeant from Macon County Sheriff's Department, and the child forensic interviewer from Mission Children's Clinic. Although the children's testimony and the corroborating testimony is strong evidence, our prior case law instructs that this alone is insufficient to survive plain error review of the testimony of a witness vouching for the children's credibility.

Accordingly, we are constrained by our analysis in *Couser* to hold it is probable that Kent's testimony that DSS had concluded the abuse did occur and had substantiated Defendant as the perpetrator impacted the jury's determination. We, therefore, must conclude that it was plain error to admit Kent's testimony, and Defendant is entitled to a new trial. Because we grant Defendant a new trial, we need not address Defendant's arguments regarding the denial of his motion to dismiss and his enrollment in satellite-based monitoring.[1]

[1] Although we do not address Defendant's argument regarding satellite-based monitoring, we note that this Court recently held that " retroactive application of the [satellite-based monitoring] provisions do not violate the *ex post facto* clause." *State v. Bare,* __ N.C.App. __, __, 677 S.E.2d 518, 531 (2009).

NEW TRIAL.

Judge GEER concurs.

Judge BRYANT dissents in a separate opinion.

BRYANT, Judge dissenting.

Because I do not believe the admission of testimony by DSS child protective services investigator Kay Kent amounted to plain error, I respectfully dissent.

> [T]he plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error *510 is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

510

State v. Thornton, 158 N.C.App. 645, 649, 582 S.E.2d 308, 310 (2003) (citation omitted).

Under our North Carolina Rules of Evidence, section 8C-1, Rule 701,

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen.Stat. § 8C-1, Rule 701 (2009).

In *State v. O'Hanlan,* 153 N.C.App. 546, 570 S.E.2d 751 (2002), the defendant challenged the admission of a law enforcement officer's

testimony as improper opinion testimony tantamount to expert testimony. *Id.* at 561, 570 S.E.2d at 761. The defendant argued that the officer improperly bolstered the credibility of the complaining witness by testifying that she had been assaulted, raped, and kidnapped. *Id.* On re-direct examination by the State, following up on cross examination questions regarding why the officer did not perform a more thorough investigation, the officer testified as follows:

> I had a victim that survived her attack. She could positively identify her assailant, the person that kidnapped, raped, and brutally beat her. If she had died ... I would have done more fingerprinting, more checking under fingernails, more fiber transfer, because I wouldn't have known who done it. But she positively told me who done it and I arrested him.

Id. at 562, 570 S.E.2d at 761.

This Court held that the officer was not offering his opinion that the victim had been assaulted, kidnapped, and raped by the defendant but rather was explaining the course of his investigation. In accordance with Rule 701, the testimony was rationally based upon the officer's perception and was helpful to the jury in understanding the investigative process. *Id.* at 562-63, 570 S.E.2d at 761-62.

Here, DSS investigator Kent offered lay witness testimony which defendant argues was tantamount to expert opinion testimony that improperly bolstered J.B. and V.G.'s credibility. Kent testified that when interviewing children she uses a forensic model that does not lead the child, and she establishes that the child knows the difference between a truth and a lie. Kent testified that her role, when speaking with children about sexual abuse, is " [t]o see if we get statements that are consistent with the report to see if they disclose any information of concern. With sexual abuse a big piece of that is consistency." After testifying to the interview process followed with J.B. and V.G., as well as the substance of those individual interviews and consistent with the trial testimony of both J.B. and V.G., Kent testified as follows:

> State: And as a result of your investigation with both of these children, did you fill out a North Carolina Case Decision Summary/Initial Case Plan?
>
> ...
>
> Kent: Yes, that's a mandated form.
>
> ...
>
> State: Okay, and on that where it lists parent/guardian/custodian would you read out who-who's listed underneath that?
>
> Kent: Amanda G[ ], Misty Burch who were the housemates at that time. Also, [defendant]. He was the father and step-father of the children.
>
> ...
>
> You list each of the children and all of the caregivers involved and then there's a perpetrator section which we go down through each of the caregivers listed and we make a decision to substantiate or not substantiate as far as their being a perpetrator.
>
> State: Okay, and did you make a decision on Amanda G[ ]?
>
> 511 ... *511 Kent: We unsubstantiated.
>
> State: And what about Misty Burch?
>
> Kent: We unsubstantiated.
>
> State: And what about [defendant]?
>
> Kent: We substantiated.
>
> State: And was that on both children?
>
> Kent: Yes.

> State: And if you'll explain, please, what substantiated means?
>
> Kent: It means that we found evidence throughout the course of our investigation to believe that the alleged abuse and neglect did occur.

On cross-examination, defendant questioned Kent about the steps taken to insure the veracity of the childrens' statements. In response, Kent stated " [w]e use a forensic interview model that is used Statewide in order to gather information from children that is not leading which they-we look at consistency and we interview everyone separately." Defendant next asked how Kent arrived at the decision to substantiate defendant as a perpetrator and found there was not evidence to substantiate Amanda or Misty Burch.

> We look at case history being involved and I was investigating these specific allegations that were reported and then I also do a global assessment. I mean I don't just go in and ask about allegations. I ask about anything from their mental needs being met in the home, supervision. Based on all the information I gathered during the course of the investigation I never had any information to substantiate that Misty or Amanda were abusive or neglectful.

DSS investigator Kent testified in accordance with Rule 701 based on her perception, in a manner that was helpful to the jury with regard to the process of her DSS investigation. This testimony-in which she explained that the word " substantiated" written on a standardized DSS form mandated for use in a DSS investigation of child sexual abuse-does not amount to error, or error so fundamental that justice cannot have been done. In fact, much of the testimony about which defendant now complains as amounting to plain error was elicited by defendant on cross examination of Kent.

The majority opinion in analyzing prejudice focuses solely on Kent's testimony, testimony that the majority says, " the jury most likely gave ... more weight than a lay opinion." Although acknowledging that Kent was not admitted as an expert witness, the majority nevertheless discusses the probable impact of her testimony as if it were indeed expert testimony.

This is not an exceptional case. This is not a case of fundamental or grave error which amounts to a miscarriage of justice as required in a plain error review. *See Thornton,* 158 N.C.App. at 649, 582 S.E.2d at 310. Even assuming arguendo that it was error, lack of objection by defendant notwithstanding, to admit Kent's testimony that DSS had substantiated abuse of the child victims by defendant, my review of the record does not reveal that the error alleged had a probable impact on the jury's verdict of guilty.

Here, two child victims, J.B. and V.G., took the witness stand and testified fully and completely to the acts of sexual abuse committed upon them by defendant three years before. J.B., fourteen years old at the time of trial, testified to being sexually and physically abused by defendant on a daily basis for about two years. V.G., ten years old at the time of trial, testified that defendant committed forcible sexual acts upon her at least two times over the period of a year. Several other witnesses provided strong corroborating testimony regarding the sexual abuse of the children. Further, medical expert testimony was introduced to show that while there was a lack of physical injuries, this was not uncommon, especially when, as in the present case, children do not immediately disclose the abuse and the injuries heal over time.

In light of the clear, competent, and compelling evidence put before the jury, including evidence elicited by defendant regarding how Kent reached her decision on substantiating a case of child sexual abuse, even if the admission of Kent's testimony was error, " it did not rise to the

level of plain error." *Stancil,* 355 N.C. at 267, 559
512 S.E.2d at 789. *Accord* *512 *Locklear,* 320 N.C. 754, 360 S.E.2d 682; *Teeter,* 85 N.C.App. 624, 355 S.E.2d 804; and *Freeland,* 316 N.C. 13, 340 S.E.2d 35.

For the reasons stated herein, I would find no error in the judgment of the trial court.

NO. COA13-1330
NORTH CAROLINA COURT OF APPEALS

State v. Harris

236 N.C. App. 388 (N.C. Ct. App. 2014) · 763 S.E.2d 302
Decided Sep 16, 2014

No. COA13–1330.

09-16-2014

STATE of North Carolina v. Lynwood Eugene HARRIS, Jr.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State. New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant.

ERVIN, Judge.

305 *305

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant.

389 ERVIN, Judge.*389 Defendant Lynwood Eugene Harris, Jr., appeals from judgments based upon his convictions for misdemeanor sexual battery and contributing to the abuse or neglect of a juvenile. On appeal, Defendant contends that his trial counsel provided him with constitutionally deficient representation by failing to properly preserve his challenge to the sufficiency of the evidence to support his conviction for contributing to the abuse or neglect of a juvenile for the purpose of appellate review, incorrectly instructing the jury concerning the issue of his guilt of contributing to the abuse or neglect of a juvenile, failing to intervene *ex mero motu* for the purpose of addressing certain remarks made during the prosecutor's final argument, and allowing the admission of testimony that was irrelevant and improperly vouched for the prosecuting witness' credibility. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

On 23 June 2012, Diane Phillips had a birthday party at her house. Among those in attendance were Defendant and J.W., Ms. Phillips' eight-year-old granddaughter.[1] As of the date of the party, 390 Ms. Phillips and *390 Defendant had been involved in a romantic relationship for approximately 14 years. On the day of the party, Defendant came and left the house on a regular basis and consumed alcohol throughout the course of the day.

[1] J.W. will be referred to throughout the remainder of this opinion as Jessica, a pseudonym used for ease of reading and to protect J.W.'s privacy.

On the evening of the party, Jessica was lying in Ms. Phillips' bed when Defendant entered the room with a cup full of liquor. Defendant offered Jessica a drink from the cup and tried to hand the cup to her. Jessica claimed that Defendant played with her hair, squeezed her buttocks, and "kept on talking about if I let him suck on my chest they'll

grow up really big and pretty." According to Jessica, Defendant "kept on squeezing [Jessica's] bottom and then he—he stuck his thumb in [her] mouth and said—Suck it, baby. Suck it."

During the evening, Jessica came to the screen door leading to the porch and said that she needed to tell Ms. Phillips something. Jessica told Ms. Phillips that she was scared, that she thought that Defendant had tried to rape her, and that Defendant was "feeling on [her] buttocks," "talking about sucking on [her] breasts," and asking if she would "let [him] suck on [her] breasts so they'll [be] big and pretty when [she got] big." After receiving this information, Ms. Phillips threw Defendant out of the house and threatened to kill him if he ever returned. Subsequently, Ms. Phillips laid down with Jessica and began crying, stating that she "shut down" after her conversation with Jessica because she "was in shock."

Early the next morning, Ms. Phillips called the police. When the investigating officers arrived, Ms. Phillips told them what had happened. After speaking with Ms. Phillips, Officer Tabitha Johnson of the Greenville Police Department interviewed Jessica, who stated that

> [her brother] was asleep and she was watching TV and eating Cheetos, and [Defendant] came into the room. [Defendant] asked her what she was doing. She told him she's eating Cheetos and drinking a Pepsi. He asked her if she wanted something stronger to drink, referring to his alcoholic beverage in his hand. [Jessica] told—stated that she told him no, but he tried to make her drink his beverage. She also reported to me that he said to her, while putting his finger in his mouth

306 *306

> Suck it, baby. Suck it. Started trying to put it in her mouth. I apologize.
>
> She reported that he then began kissing her neck and her face and rubbing and squeezing her butt. [Defendant] asked her to kiss asked her if she could kiss his chest

391 *391

> and saying—If you let me suck on your chest, your breasts will grow in nice and pretty. She said that she moved away, and he grabbed her hand and tried to put it—his hands in his pant—put her hands in his pants near his private. She snatched her hand away. [Defendant] told her—I was just trying to have a little fun with you. And this is her-me quoting what she's saying—and walked out of the room. She said he returned with another alcoholic beverage and put some in a cup and tried—and made [Jessica] drink it. She said she pushed him away but continued to rub on her hair and kiss her neck and telling her just to go to sleep. [Jessica] said she would not to go sleep, and he left out of the room.

B. Procedural History

On 24 June 2012, a warrant for arresting charging Defendant with misdemeanor sexual battery and contributing to the abuse and neglect of a juvenile was issued. On 23 January 2013, Judge David A. Leech found Defendant guilty as charged in the Pitt County District Court. On the following day, Judge Leech entered a judgment sentencing Defendant to a term of 150 days imprisonment based upon his conviction for misdemeanor sexual battery, with this sentence being suspended and with Defendant being placed on supervised probation, subject to certain terms and conditions, for a period of 24 months, and to a consecutive term of 120 days imprisonment based upon his conviction for contributing to the abuse or neglect of a juvenile, with this sentence also being suspended and Defendant being placed on

supervised probation, subject to certain terms and conditions, for a period of 24 months. Defendant noted an appeal to Pitt County Superior Court for a trial *de novo.*

The charges against Defendant came on for trial before the trial court and a jury at the 28 May 2013 session of the Pitt County Superior Court. On 29 May 2013, the jury returned a verdict convicting Defendant as charged. At the conclusion of the ensuing sentencing hearing, the trial court entered a judgment sentencing Defendant to a term of 150 days imprisonment based upon his conviction for misdemeanor sexual battery and to a consecutive term of 120 days imprisonment based upon his conviction for contributing to the abuse or neglect of a minor, with this second sentence being suspended and with Defendant being placed on supervised probation for a period of 18 months, subject to certain terms and conditions. Defendant noted an appeal to this Court from the trial court's
392 judgments.*392 *II. Substantive Legal Analysis*

A. Sufficiency of the Evidence

In his initial challenge to the trial court's judgments, Defendant contends that he received constitutionally deficient representation from his trial counsel based upon his trial counsel's failure to move to have the contributing to the abuse or neglect of a juvenile charge dismissed for insufficiency of the evidence. More specifically, Defendant contends that his trial counsel's failure to move that the contributing to the abuse or neglect of a juvenile charge be dismissed for insufficiency of the evidence fell below an objective standard of reasonableness and that, had such a motion been made, it would have been allowed given that the State failed to prove that Defendant was Jessica's caretaker and that merely offering Jessica an alcoholic beverage did not constitute an act of abuse or neglect. Defendant is not entitled to relief from his conviction for contributing to the abuse or neglect of a juvenile on the basis of this claim.

As Defendant candidly concedes, he failed to move that the contributing to the abuse or neglect of a juvenile charge be dismissed for insufficiency of the evidence at trial. As a general proposition, a defendant's failure to make a dismissal motion after the State's evidence precludes the defendant from challenging the sufficiency of the evidence to support his conviction on appeal. N.C. R.App. P. 10(a)(3). "However, pursuant to N.C. R.App. P.
307 2, we will hear the *307 merits of [D]efendant's claim despite the rule violation because [D]efendant also argues ineffective assistance of counsel based on counsel's failure to make the proper motion to dismiss." *State v. Fraley,* 202 N.C.App. 457, 461, 688 S.E.2d 778, 783 (2010) (quotation marks and citation omitted), *disc. review denied,* 364 N.C. 243, 698 S.E.2d 660 (2010).

"To survive a motion to dismiss in a criminal action, the State's evidence must be substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. The trial court must view all evidence in the light most favorable to the State, including evidence that was erroneously admitted." *State v. Denny,* 179 N.C.App. 822, 824, 635 S.E.2d 438, 440 (2006) (internal quotation marks and citations omitted), *aff'd in part, modified on other grounds in part, and rev'd on other grounds in part,* 361 N.C. 662, 652 S.E.2d 212 (2007). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Tabron,* 147 N.C.App. 303, 306, 556 S.E.2d 584, 585
393 (2001) (quotation marks and citations *393 omitted), *disc. review improvidently granted,* 356 N.C. 122, 564 S.E.2d 881 (2002). "This Court reviews the trial court's denial of a motion to dismiss *de novo.* " *State v. Smith,* 186 N.C.App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams,* 362 N.C.

628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship,* 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). We will now utilize this standard of review to evaluate the validity of Defendant's challenge to the sufficiency of the evidence to support his conviction for contributing to the abuse or neglect of a juvenile.

N.C. Gen.Stat. § 14–316.1 provides that:

> [a]ny person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by [N.C. Gen.Stat. §] 7B–101 and [N.C. Gen.Stat. §] 7B–1501 shall be guilty of a Class 1 misdemeanor.

N.C. Gen.Stat. § 7B–101(1) defines an abused juvenile as "[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker" (1) inflicts or allows to be inflicted upon the juvenile a serious physical injury; (2) creates or allows to be created a substantial risk of serious physical injury to the juvenile; (3) uses or allows to be used on the juvenile cruel or grossly inappropriate procedures or devices to modify behavior; (4) commits, permits, or encourages the commission of a variety of specific sexual assaults, acts of prostitution, and obscenity offenses by, with, or upon the juvenile; (5) creates or allows to be created serious emotional damage to the juvenile evinced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others; (6) encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile; or (7) commits or allows to be committed acts of human trafficking, involuntary servitude or sexual servitude against the child. A neglected juvenile is defined as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

394 *394

N.C. Gen.Stat. § 7B–101(15). Finally, a caretaker, for purposes of the abuse and neglect statutes, is defined as

> [a]ny person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, an adult relative entrusted with the juvenile's care, any person such as a house parent or cottage parent who has primary responsibility for

308 *308

> supervising a juvenile's health and welfare in a residential child care facility or residential educational facility, or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services.

N.C. Gen.Stat. § 7B–101(3).

In seeking to persuade us that the record did not support Defendant's conviction for contributing to the abuse or neglect of a juvenile, Defendant initially argues that the record does not suffice to support a determination that he was Jessica's caretaker. Defendant's argument is, however, simply inconsistent with our recent decision in

State v. Stevens, ——N.C.App. ——, ——, 745 S.E.2d 64, 67, *disc. review dismissed,* 367 N.C. 256, 749 S.E.2d 885, *disc. review denied,* 367 N.C. 256, 749 S.E.2d 886 (2013), in which this Court explicitly held that a finding of guilt for violating N.C. Gen.Stat. § 14–316.1 "does not require a parental or caretaker relationship between a defendant and a juvenile" and stated, instead, that "[d]efendant need only be a person who causes a juvenile to be in a place or condition where the juvenile does not receive proper care from a caretaker or is not provided necessary medical care." *See also State v. Cousart,* 182 N.C.App. 150, 153, 641 S.E.2d 372, 374–75 (2007) (stating that the gravamen of the act of contributing to the delinquency, abuse, or neglect of a minor is "conduct on the part of the accused" in willfully "caus[ing], encourag[ing], or aid[ing]") (alterations in original). As a result, as long as Defendant's conduct placed Jessica in a position in which she did "not receive proper care from a caretaker or is not provided necessary medical care," *Stevens,* ——N.C.App. at ——, 745 S.E.2d at 67, he is subject to the criminal sanction for violating N.C. Gen.Stat. § 14–316.1.

In apparent recognition of the problems with his initial argument, Defendant also contends that the record did not suffice to support a determination that his actions placed Jessica in a position in
395 which she *395 could be found to be abused or neglected. As the record clearly establishes, however, Defendant entered the bedroom in which Jessica was attempting to go to sleep, tried to get her to take a drink from the cup of liquor that he was carrying, played with her hair, and squeezed her buttocks. As Defendant squeezed Jessica's buttocks, he asked her to suck his thumb and requested that she allow him to suck on her chest so "they'll grow up really big and pretty." In view of the fact that a juvenile who found herself in the position that Jessica occupied and was subject to the attentions that Defendant attempted to pay to her was clearly placed in a location in which and subject to conditions under which she could not and did not receive proper care from her caretakers, the State's evidence clearly sufficed, given the test enunciated in *Stevens,* to support Defendant's conviction for contributing to the abuse or neglect of a juvenile.[2] As a result, the record evidence clearly sufficed to support Defendant's conviction for contributing to the abuse or neglect of a juvenile, a fact that necessitates the conclusion that Defendant's ineffective assistance of counsel claim has no
396 merit.[3] *309 *396

[2] As the State notes in its brief, Defendant's conduct as described in Jessica's testimony clearly constituted the taking of an indecent liberty with a minor in violation of N.C. Gen.Stat. § 14–202.1, which is one of the offenses that can underlie an abuse adjudication. N.C. Gen.Stat. § 7B–101(1)(d). In addition, this Court has held that a father's decision to offer marijuana and beer to a child, while not rising to the level of abuse, constituted neglect. *In re M.G.,* 187 N.C.App. 536, 551, 653 S.E.2d 581, 590 (2007), *rev'd on other grounds,* 363 N.C. 570, 681 S.E.2d 290 (2009). Thus, given the absence of any requirement that Defendant be Jessica's parent, guardian, or caretaker and the fact that Defendant's conduct placed Jessica in a position and subject to conditions under which she could be found to be abused or neglected, the relevant statutory provisions and decisions of this Court clearly support Defendant's conviction for contributing to the abuse or neglect of a juvenile.

[3] The warrant charging Defendant with contributing to the abuse or neglect of a juvenile alleged, in pertinent part, that "the defendant named above unlawfully and willfully did knowingly, while at least 16 years of age, cause[ ], encourage, and aid [Jessica], age 8 years, a juvenile, to commit an act, consume alcoholic beverage, whereby that juvenile could be adjudicated abused and neglected." In his brief, Defendant argues, in reliance upon *State v.*

Faircloth, 297 N.C. 100, 107, 253 S.E.2d 890 894 (stating that "[i]t has long been the law of this state that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment"), *cert. denied,* 444 U.S. 874, 100 S.Ct. 156, 62 L.Ed.2d 102 (1979), that the only basis upon which Defendant could lawfully have been convicted of contributing to the abuse or neglect of a juvenile was by encouraging her to consume alcohol. We do not find this argument persuasive for two reasons. First, as this Court held in *Stevens,* —— N.C.App. at ——, 745 S.E.2d at 66, an indictment that fails to allege the exact manner in which the defendant allegedly contributed to the delinquency, abuse, or neglect of a minor is not fatally defective. Unlike the situation at issue in *Faircloth,* in which the State sought to convict the defendant of a completely different offense from the one alleged in the indictment, the State did, in fact, proceed against Defendant on the grounds that he committed the offense of contributing to the abuse or neglect, rather than the delinquency, of a juvenile. *State v. Tollison,* 190 N.C.App. 552, 557, 660 S.E.2d 647, 651 (2008) (stating that, since "a victim's age is not an essential element of first degree kidnapping," "the variance in the indictment was not fatal"). Secondly, and more importantly, Defendant's argument relies upon an unduly narrow reading of the contributing to the abuse or neglect of a juvenile warrant that completely overlooks the context in which Defendant attempted to persuade Jessica to consume alcohol. As a result, Defendant's argument in reliance upon the language of the contributing warrant is not persuasive.

B. Jury Instructions

After the completion of the evidence and the arguments of counsel, the trial court instructed the jury with respect to the issue of Defendant's guilt of contributing to the abuse or neglect of a juvenile as follows:

> The defendant has also been charged with contributing to the abuse and neglect of a juvenile. For you to find the defendant guilty of this offense the State must prove four things beyond a reasonable doubt:
>
> First, that the defendant was at least 16 years old.
>
> Second, that the defendant caused, encouraged, and aided the juvenile to commit an act whereby the juvenile could be adjudicated abused and neglected.
>
> Third, that [Jessica] was a juvenile. An abused and neglected juvenile is a person who has not reached her 18th birthday, and is not married, emancipated, or a member of the armed forces of the United States.
>
> And [f]ourth, that the defendant acted knowingly or willfully.

As Defendant candidly concedes, he failed to object to the trial court's contributing to the abuse or neglect of a minor instruction at or before the time that the jury retired to begin its deliberations, so that our review is limited to determining whether plain error occurred. *State v. Lawrence,* 365 N.C. 506, 518, 723 S.E.2d 326, 334, (2012). A plain error is an error that is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom,* 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *U.S. v. McCaskill,* 676 F.2d 995, 1002 (4th Cir.1982), *cert. denied,* 459 U.S. 1018, 103 S.Ct. 381, 74 L.Ed.2d 513 (1982)). "To establish plain error, defendant must show that the erroneous jury instruction was a fundamental error that the error had a probable impact on the jury verdict." *Lawrence,* 365 N.C. at 518, 723 S.E.2d at 334. As a result, in order to establish the existence of plain error, a "defendant must convince this

397 Court not only that there was error, but *397 that absent the error, the jury probably would have reached a different result." *State v. Jordan,* 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

As Defendant correctly asserts in his brief, the trial court's instructions misstated the applicable law by instructing the jury that it should find that Jessica was an abused or neglected juvenile in the event that it found beyond a reasonable doubt that she had not reached her 18th birthday and had not been married, emancipated, or entered military
310 service.[4] For that reason, the *310 only issue that remains for our consideration is whether Defendant is entitled to relief from his contributing to the abuse or neglect of a juvenile conviction based upon this erroneous instruction. As a result, the ultimate question raised by Defendant's challenge to the trial court's instructions concerning the issue of his guilt of contributing to the abuse or neglect of a minor is the extent to which it is probable that the outcome of Defendant's trial would have been different had the trial court correctly instructed the jury concerning the issue of whether Defendant had placed Jessica in a place or set of circumstances under which she could be adjudicated abused or neglected.

[4] As we have already noted, in order to convict Defendant of the offense made punishable by N.C. Gen.Stat. § 14–316.1 in light of the allegations set out in the warrant that had been issued against him, the jury had to find beyond a reasonable doubt that Defendant caused, encouraged, or aided Jessica to be placed in a location or situation in which she could be adjudicated abused or neglected. A cursory reading of the trial court's instructions establishes that the trial court totally failed to instruct the jury concerning the meaning of the statutory references to abuse or neglect and, in essence, told the jury to find the existence of those prerequisites for a conviction on the sole basis of Jessica's age and the fact that she had not been married, emancipated, or entered military service. Thus, the trial court's instructions, which are consistent with the applicable pattern jury instruction, clearly misstated the applicable law.

The only evidence before the jury concerning the issue of Defendant's guilt of contributing to the abuse or neglect of a minor consisted of Jessica's testimony and evidence concerning statements that Jessica had made to other persons that was offered for corroborative purposes. As we read the record, the argument that Defendant advanced before the jury in support of his request for an acquittal on both the contributing to the abuse or neglect of a minor charge and the misdemeanor sexual battery charge rested on a contention that Defendant had no motivation for engaging in the conduct described in Jessica's testimony, an assertion that Jessica was biased against him, a description of certain inconsistencies in the accounts concerning Defendant's conduct that Jessica provided on different occasions, and a claim that certain statements that Jessica had made were unlikely to be true given other surrounding circumstances.
398 Thus, the ultimate issue presented for the *398 jury's consideration at trial was whether Jessica was a credible witness, an issue that the jury clearly answered in the affirmative.

A careful review of the record satisfies us that, even though the trial court's instructions rested on a clear misstatement of the applicable law, it is not probable that the outcome at trial would have been different in the event that the jury had been correctly instructed. The description of Defendant's conduct contained in Jessica's testimony, which the jury obviously believed, sufficed to support a determination that he contributed to the abuse or neglect of a minor. We are unable to see how the trial court's erroneous instruction in any way enhanced the likelihood that the jury would have resolved the underlying credibility contest in Defendant's favor. Having determined, contrary to the arguments vigorously advanced by Defendant's trial counsel, that

Jessica's testimony was credible, the jury would necessarily have determined that Defendant placed her in a location or set of circumstances under which she "[did] not receive proper care from a caretaker or [was] not provided necessary medical care." *Stevens,* —— N.C.App. at ——, 745 S.E.2d at 67. As a result, given that "the term 'plain error' does not simply mean obvious or apparent error, but rather has the meaning given by the court in" *Lawrence* , *Odom,* 307 N.C. at 660, 300 S.E.2d at 378 (holding that the failure to instruct on the issue of the defendant's guilt of a lesser included offense did not rise to the level of plain error), *see also Lawrence,* 365 N.C. at 519, 723 S.E.2d at 334–35 (holding that the omission of an element from the trial court's instruction to the jury concerning the issue of Defendant's guilt of conspiracy to commit robbery with a dangerous weapon did not rise to the level of plain error), we conclude that the trial court's instructional error did not constitute plain error and that Defendant is not, for that reason, entitled to relief from his conviction for contributing to the abuse or neglect of a minor based upon the trial court's erroneous instruction.

C. Prosecutor's Final Argument

Thirdly, Defendant contends that he is entitled to relief from his convictions based upon remarks that the prosecutor made during his closing argument. More specifically, Defendant contends that the prosecutor's comments to the effect that Defendant had ruined Jessica's childhood and that, in the event that the jury failed to find Jessica's testimony to be credible, it would be sending a message that Jessica would need to be hurt, raped, or murdered before an alleged abuser could be convicted, were improper. Defendant is not entitled to relief from his convictions based upon this set of contentions.*311 *399

Statements made during closing arguments to the jury are to be viewed in the context in which the remarks are made and the overall factual circumstances to which they make reference. *State v. Jaynes,* 353 N.C. 534, 559, 549 S.E.2d 179, 198 (2001) (citation omitted), *cert. denied,* 535 U.S. 934, 122 S.Ct. 1310, 152 L.Ed.2d 220 (2002). As a general proposition, counsel are allowed wide latitude in closing arguments, *State v. Johnson,* 298 N.C. 355, 368–69, 259 S.E.2d 752, 761 (1979) (citations omitted), so that a prosecutor is entitled to argue all reasonable inferences drawn from the facts contained in the record. *State v. Phillips,* 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011) (citations omitted), *cert. denied,* – — U.S. ——, 132 S.Ct. 1541, 182 L.Ed.2d 176 (2012). "Unless the defendant objects, the trial court is not required to interfere *ex mero motu* unless the arguments stray so far from the bounds of propriety as to impede the defendant's right to a fair trial." *State v. Small,* 328 N.C. 175, 185, 400 S.E.2d 413, 418 (1991) (quotation marks and citations omitted). As a result, given that Defendant did not object to the prosecutorial comments that are addressed in his brief, the ultimate issue raised by Defendant's challenge to the prosecutor's closing argument is the extent, if any, to which the challenged comments were so egregiously improper as to necessitate judicial intervention despite the absence of an objection.

In the course of his closing argument, the prosecutor asserted that:

> [The Defendant] has no right to ruin [Jessica's] childhood, because how—what memories is she going to have as—of her eight-year old time? What's going to be the dominant thing in her life when she thinks back to being eight and nine? It's going to be this man groping her, having to come in and testify and face him.
>
> ....
>
> So it comes down to is it sufficient to listen to an eight-year-old girl—convict somebody of this crime? And if it's not, then this case is never going to be—we'll never prove it. Never. So why shouldn't we believe her? Because she's eight? Is that why? Do we say that no eight-year-old is ever going to be believable? ... Now, if you don't believe her because she's eight or because there's no forensic evidence, then what you're saying is—Well, maybe we should let it go a little further so we can get more evidence. Is it fair to tell an eight-year-old—Well, you know, honey, we'd like to help you, but you got to get hurt first. You got to
>
> 400 *400
>
> get hurt first. Now, we've got some evidence then. You get hurt, get raped or murdered, we got some evidence then. But just your word, just your word, nah.

We do not believe that either of the challenged comments necessitated *ex moro motu* intervention on the part of the trial court.

1. Ruining Jessica's Childhood

In arguing that Defendant had ruined Jessica's childhood, the prosecutor simply made a reasonable inference, based upon the record evidence, that Jessica would be traumatized by the events in question. According to the record, Jessica was eight years old at the time of the incident underlying this case. In addition, Jessica told Ms. Phillips that she believed that Defendant, whom she had known for her entire life, was attempting to rape her. Under that set of circumstances, the prosecutor's inference that Jessica had been traumatized by Defendant's actions was a reasonable one. As a result, since the prosecutor's comment to the effect that Defendant had ruined Jessica's childhood represented a reasonable inference drawn from the record, the trial court did not err by failing to intervene *ex mero motu* to address the challenged prosecutorial argument.

Although the Supreme Court has held that an argument that undermines reason and is designed to viscerally appeal to the jurors' passions or prejudices is improper, *see State v. Jones,* 355 N.C. 117, 132–33, 558 S.E.2d 97, 107 (2002) (holding that references to the Columbine school shooting and Oklahoma City bombing during a murder trial was improper, in part, because it attempted to lead jurors away from the evidence by appealing to their sense of passion and
312 prejudice), a prosecutor may argue that *312 the jury should use its verdict to "send a message" to the community. *State v. Barden,* 356 N.C. 316, 367, 572 S.E.2d 108, 140 (2002) (citation omitted), *cert. denied,* 538 U.S. 1040, 123 S.Ct. 2087, 155 L.Ed.2d 1074 (2003) ; *State v. Nicholson,* 355 N.C. 1, 43–44, 558 S.E.2d 109, 138 (citations omitted), *cert. denied,* 537 U.S. 845, 123 S.Ct. 178, 154 L.Ed.2d 71 (2002). Finally, a prosecutor is entitled to argue that the jury should or should not believe a witness and explain the reasons that the prosecutor believes should cause the jury to reach such a credibility-related conclusion in his or her final argument. *See State v. Wilkerson,* 363 N.C. 382, 425, 683 S.E.2d 174, 200 (2009) (citation omitted), *cert. denied,* 559 U.S. 1074, 130 S.Ct. 2104, 176 L.Ed.2d 734 (2010) ; *State v. Augustine,* 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005), *cert. denied,* 548 U.S. 925, 126 S.Ct. 2980, 165 L.Ed.2d 988 (2006) ;

State v. Scott, 343 N.C. 313, 344, 471 S.E.2d 605, 623 (1996) (citation omitted).*401 *2. Jessica's Credibility*

As we have already noted, the ultimate issue before the jury in this case was Jessica's credibility. The obvious purpose of the second set of challenged prosecutorial comments was to urge the jury to find Jessica's testimony to be credible despite the fact that the record did not contain physical evidence that supported her description of Defendant's conduct. Admittedly words like "murder" and "rape" are, without doubt, emotionally charged. Although Defendant attempts to analogize the prosecutor's second set of challenged remarks to those at issue in *Jones,* that analogy is unpersuasive given that the remarks under consideration in *Jones* referred to information outside the record and compared the defendant's conduct with infamous acts committed by others, neither of which is true of the prosecutorial comments at issue here. As a result of the fact that the prosecutorial comments at issue here were grounded in the evidentiary record and represented nothing more than an assertion that the jury should not refrain from believing Jessica because the record did not contain corroborative physical evidence, we conclude that the trial court did not err by failing to intervene *ex mero motu* to address the second set of prosecutorial comments that Defendant has challenged in his brief. Thus, Defendant is not entitled to relief from his convictions based on allegedly improper comments by the prosecutor.

D. Ms. Phillips' Testimony

Finally, Defendant contends that the trial court committed plain error by allowing Ms. Phillips to deliver testimony that, in Defendant's opinion, improperly appealed to the jury's sympathy and impermissibly vouched for Jessica's credibility. According to Defendant, the trial court should have excluded this evidence despite the fact that he failed to object to its admission at trial on the grounds that the evidence in question was irrelevant and constituted impermissible lay opinion testimony. We do not find Defendant's argument persuasive.

1. Relevance

"The admissibility of evidence is governed by a threshold inquiry into its relevance." *State v. Griffin,* 136 N.C.App. 531, 550, 525 S.E.2d 793, 806 (citations omitted), *disc. review denied,* 351 N.C. 644, 543 S.E.2d 877 (2000). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen.Stat. § 8C–1, Rule 401. Evidence that is "not part of the crime charged but pertain[s] to the chain of events explaining the context, motive, and set-up of the crime, is properly admitted if *402 linked in time and circumstances with the charged crime, or if it forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury." *State v. Agee,* 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (quoting *U.S. v. Williford,* 764 F.2d 1493, 1499 (11th Cir.1985)) (internal brackets omitted). A trial court's ruling with respect to relevance issues is "technically ... not discretionary and therefore is not reviewed under the abuse of discretion standard[,]" but is, nevertheless, entitled to great deference on appeal. *Sherrod v. Nash General Hosp. Inc.,* 126 N.C.App. 755, 762, 487 S.E.2d 151, 155 (1997) *313 (quoting *State v. Wallace,* 104 N.C.App. 498, 502, 410 S.E.2d 226, 228 (1991), *appeal dismissed,* 331 N.C. 290, 416 S.E.2d 398, *cert. denied,* 506 U.S. 915, 113 S.Ct. 321, 121 L.Ed.2d 241 (1992)) (internal quotation marks and brackets omitted), *aff'd in part and rev'd in part on other grounds,* 348 N.C. 526, 500 S.E.2d 708 (1998). As a result of the fact that Defendant failed to object to the admission of the challenged evidence at trial, we review Defendant's challenge to the admission of this evidence using a plain error standard of review.

At trial, Ms. Phillips testified that, after Jessica told her about Defendant's conduct, Ms. Phillips "got scared and shut down," "was in shock," laid down with Jessica, and "started crying." Subsequently, Ms. Phillips saw Defendant coming out of the bathroom, "grabbed him by the shirt," "threw him out the screen door," and "told him if he ever come back to [her] house again," she "would kill him, because [she] was mad and scared at the time." Finally, Ms. Phillips also stated that she told Jessica's father about Defendant's actions and "he got up raging."

The challenged portion of Ms. Phillips' testimony was relevant to show what occurred immediately after Defendant's alleged assault upon Jessica. The fact that Jessica reported the incident to Ms. Phillips immediately after it occurred, rather than waiting until a later time to make her accusation, tends to bolster the credibility of her testimony and was relevant for that reason. Similarly, the challenged portion of Ms. Phillips' testimony tends to show that Jessica had given a consistent account of her interaction with Defendant from the time of her first conversation with Ms. Phillips immediately after the incident occurred until she testified at trial. Finally, the challenged portion of Ms. Phillips' testimony, which details her reaction to Jessica's allegations and the events that led up to Defendant's arrest, helped complete the story of Defendant's assault upon Jessica for the jury. As a result, the trial court did not err by failing to exclude the challenged portion of Ms. Phillips' testimony on relevance grounds.*403

403

2. Vouching for Jessica's Credibility

According to N.C. Gen.Stat. § 8C–1, Rule 701, the testimony of a non-expert witness "in the form of opinions or inferences is limited to ... opinions or inferences [that] are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his [or her] testimony or the determination of a fact in issue." The admission of opinion testimony intended to bolster or vouch for the credibility of another witness violates N.C. Gen.Stat. § 8C–1, Rule 701. *State v. Robinson,* 355 N.C. 320, 334–35, 561 S.E.2d 245, 255, *cert. denied,* 537 U.S. 1006, 123 S.Ct. 488, 154 L.Ed.2d 404 (2002). "As long as the lay witness has a basis of personal knowledge for his [or her] opinion, the evidence is admissible." *State v. Bunch,* 104 N.C.App. 106, 110, 408 S.E.2d 191, 194 (1991).

In addition to questioning its relevance, Defendant contends that the challenged portion of Ms. Phillips' testimony impermissibly vouched for Jessica's credibility. However, Ms. Phillips never directly commented on the issue of Jessica's credibility. Put another way, Ms. Phillips never specifically stated whether she believed Jessica or not. Although Defendant argues that the challenged portion of Ms. Phillips' testimony contained an implicit expression of confidence in Jessica's veracity, we are unable to read such an implication into what Ms. Phillips actually said. Finally, even if Ms. Phillips' testimony did, in some manner, amount to an impermissible comment concerning Jessica's credibility, any error that the trial court may have committed by allowing the admission of that testimony did not rise to the level of plain error. In view of the relatively incidental nature of any vouching for Jessica's credibility that might have occurred and the fact that most jurors are likely to assume that a grandmother would believe an accusation of sexual abuse made by one of her own grandchildren, *see State v. Freeland,* 316 N.C. 13, 18, 340 S.E.2d 35, 37 (1986) (stating that a jury would naturally assume that a mother would believe that her daughter was telling the truth concerning a sexual assault allegation); *State v. Dew,* —— N.C.App. ——, ——, 738 S.E.2d 215, 219 *314 (stating that "most jurors are likely to assume that a mother will believe accusations of sexual abuse made by her own children."), *disc. review denied,* 366 N.C. 595, 743 S.E.2d 187 (2013) we are simply unable to conclude that the outcome at Defendant's trial would probably have been different had the trial court refrained from allowing the admission of the challenged portion

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of Ms. Phillips' testimony. As a result, the trial court did not commit plain error by allowing the admission of the challenged portion of Ms. 404 Phillips' testimony.[5] *404 *III. Conclusion*

[5] In his brief, Defendant contends that, even if he is not entitled to relief from his convictions based on a single error, the cumulative effect of the errors that he contends that the trial court committed deprived him of a fair trial. However, given that "the plain error rule may not be applied on a cumulative basis," *State v. Dean,* 196 N.C.App. 180, 194, 674 S.E.2d 453, 463, *disc. review denied,* 363 N.C. 376, 679 S.E.2d 139 (2009), and given that none of Defendant's challenges to the trial court's judgments were properly preserved for purposes of appellate review, we conclude that Defendant is not entitled to relief from the trial court's judgments on the basis of the cumulative error doctrine.

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgments have merit. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO ERROR.

Judge ROBERT N. HUNTER, JR., concurred in the result only prior to 6 September 2014.

Judge DAVIS concurs.

No. 8615SC157
North Carolina Court of Appeals

State v. Holloway

82 N.C. App. 586 (N.C. Ct. App. 1986) · 347 S.E.2d 72
Decided Aug 1, 1986

No. 8615SC157

Filed 19 August 1986

Criminal Law 89.1 — indecent liberties with a child — testimony of pediatrician and psychologist that victim truthful — erroneous The trial court committed plain error in a prosecution for taking indecent liberties with a child where the child testified to the facts alleged in the indictment; the defendant testified to the contrary and presented evidence tending to show a normal relationship with the child; no one but the child and defendant was present when the alleged offense occurred; the child was not physically injured and did not report the alleged incident to her father and stepmother until more than four weeks later; and two witnesses for the State, a pediatrician and a child psychologist, testified that in their opinion the child had testified truthfully. N.C.G.S. 8C-1, Rule 702.

APPEAL by defendant from Farmer, Judge. Judgment entered 16 September 1985 in Superior Court, CHATHAM County. Heard in the Court of Appeals 10 June 1986.

Attorney General Thornburg, by Assistant Attorney General John R. Corne, for the State.

Appellate Defender Hunter, by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of taking indecent liberties with his five-year-old stepdaughter in violation of G.S. 14-202.1 and requests a new trial because of inadmissible and prejudicial testimony that was received into evidence against him. The evidence was not objected to, however, and our consideration of the request is controlled by the "plain error" doctrine adopted by our Supreme Court in State v. Black, 308 N.C. 736, 303 S.E.2d 804 (1983) and State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983). Under that doctrine a "plain error," which justifies relief on appeal though not objected to in the trial court, is more than an obvious error that adversely affects a defendant. A "plain error" is —

> a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," *587 or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "`resulted in a miscarriage of justice or in the denial to appellant of a fair trial'" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." (Emphasis theirs.)

587

United States v. McCaskill, 676 F.2d 995, 1003 (4th Cir.), cert. denied, 459 U.S. 1018, 74 L.Ed.2d 513, 103 S.Ct. 381 (1982), quoted with approval

in both State v. Black, supra, and State v. Odom, supra.

The evidence erroneously used to convict defendant clearly meets that test in our opinion and we order a new trial. Our decision does not require an extended statement of facts or even a recital of the melancholy and sordid details of the charge involved. It is sufficient to say that: The child testified to the facts alleged in the indictment; the defendant testified to the contrary and presented evidence tending to show a normal relationship between him and the child; no one but the child and defendant was present when the alleged offense occurred; the child was not physically injured and did not report the alleged incident to her father and stepmother until more than four weeks later; and two witnesses for the State, a pediatrician and a child psychologist testified that in their opinion the child had testified truthfully. The evidence did not meet the requirements for expert testimony as it concerned the credibility of a witness, a field in which jurors are supreme and require no assistance, rather than some fact involving "scientific, technical or other specialized knowledge." G.S. 8C-1, Rule 702, N.C. Evidence Code. And as character evidence the testimony violated the provisions of G.S. 8C-1, Rules 405 (a) and 608 of the N.C. Evidence Code, as well as the holding in State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986). That this grossly improper testimony unfairly affected defendant's trial seems obvious to us. For a jury trial to be fair it is fundamental that the credibility of witnesses must be determined by them, unaided by anyone, including the judge. Yet, though the State's case depended almost entirely upon the child's credibility as a witness, her credibility in the eyes of the jury was inevitably increased, we
588 *588 believe, by these two learned and prestigious professionals declaring that her testimony was true.

New trial.

Judges WHICHARD and MARTIN concur.

No. 783A85
Supreme Court of North Carolina

State v. Kim

318 N.C. 614 (N.C. 1986) · 350 S.E.2d 347
Decided Nov 1, 1986

No. 783A85

Filed 18 November 1986

1. Rape 4; Criminal Law 87.1 — questioning of rape victim about penetration — no leading question There was no merit to defendant's contention in a prosecution for rape that the trial court erred by allowing the State to ask the victim a leading question during direct examination, since the question with regard to penetration, though it could be answered yes or no, was not a leading question as it did not suggest that the victim choose one answer over the other.

2. Criminal Law 89.3 — prior statements of victim — admissibility for corroboration The trial court in a rape case did not commit plain error by allowing the State to introduce as corroborative evidence prior statements of the victim which contained new and additional information not referred to in the victim's testimony since the testimony as to pretrial statements of the victim clearly tended to add weight or credibility to the victim's trial testimony.

3. Rape 10; Criminal Law 50.1 — child psychologist — examination as to rape victim's truthfulness — error In a prosecution for first degree rape, the trial court erred in allowing an expert witness to testify concerning the victim's truthfulness during the expert's evaluation and treatment of her since the witness's contact with the victim was solely in her role as a child psychologist; the question posed by the prosecutor clearly invoked the witness's status as an expert and sought to establish the credibility of the victim as a witness; the question and answer complained of came immediately after the witness had given lengthy testimony concerning the victim's statements to her about the sexual acts by defendant so that the witness's testimony that the victim had "never been untruthful with me about it" must have been construed by the jury as expert opinion testimony that the victim's accusations against defendant as related to the witness were true; the State's case against defendant hinged almost totally on the credibility of the victim; and the erroneous admission of the expert's testimony demonstrated a reasonable possibility that a different result would have been reached at trial had the error not been committed. N.C.G.S. 8C-1, Rules 405(a) and 608(a).

APPEAL by the defendant from judgment entered on 13 September 1985 by Ross, J., in Superior Court, ROWAN County.

Lacy H. Thornburg, Attorney General, by Michael R. Morgan, Assistant Attorney General, for the State.

Cruse and Spence, by Thomas K. Spence, for defendant-appellant.

Justice MARTIN dissenting.

Justices MEYER and BROWNING join in this dissenting opinion.

The defendant was convicted, upon proper indictments, for five counts of first degree rape.
615 The trial court consolidated the *615 cases for judgment and sentenced the defendant to

imprisonment for life. The defendant appealed to the Supreme Court as a matter of right under N.C.G.S. 7A-27(a). Heard in the Supreme Court on 14 October 1986.

MITCHELL, Justice.

The defendant, Chul Yun Kim, has presented six assignments of error on appeal. He contends inter alia that the trial court erred by allowing the State to ask the victim a leading question during direct examination. He also asserts that it was error for the trial court to allow a police investigator to give corroborative testimony which went beyond the victim's testimony at trial. The defendant further contends that it was error to permit an expert witness to testify about the truthfulness of the victim during her evaluation and treatment resulting from the crimes charged. He also argues that the trial court erred by denying his motion to dismiss at the close of all the evidence.

We agree with the defendant that the trial court erred by allowing an expert witness to testify concerning the truthfulness of the victim. As a result, the defendant is entitled to a new trial.

The State's evidence tended to show that the victim [1] and her younger sister lived with their father. The victim's mother had visitation rights, and the children stayed with her from time to time on weekends and holidays.

[1] Use of the victim's name in this opinion is not necessary to distinguish her from other individuals involved in the case and would add nothing of value. Therefore, in keeping with the practice established by this Court in numerous recent cases, her name has been deleted throughout this opinion to avoid further embarrassment. See, e.g., State v. Hosey, 318 N.C. 330, 332 n. 1, 348 S.E.2d 805, 807 n. 1 (1986) and cases cited therein.

The victim testified that the defendant Chul Yun Kim was her mother's live-in boyfriend. The defendant had sexual intercourse with the victim 616 on many occasions during her visits with *616 her mother in 1984. The victim was either ten or eleven years old on each occasion. Kim was thirty years old in 1984.

On 14 July 1984, the victim's mother and younger sister were shopping and cleaning house, so the victim went with the defendant to his shoeshop in Salisbury. She went to sleep on an army cot in the back room of the shop. While she was asleep, the defendant Kim pulled off her clothes. Kim then awakened the victim and had sexual intercourse with her. He told the victim not to tell anyone, and she complied because she was afraid.

During the weekend of 27-29 July 1984, the victim again went alone with Kim to his shoeshop. He told her to undress, and she did. The defendant again had sexual intercourse with her on the cot.

During the week of 12-19 August 1984, the victim was alone again with the defendant in his shoeshop. At about 5:10 p.m., he turned on a machine, then called the victim's mother to say that he would be late because he had more work to do. He then turned off the machine and had sexual intercourse with the victim.

At the end of August 1984, the victim's mother and younger sister went to the grocery store leaving the victim and the defendant Kim alone in the house. The defendant began to have sexual intercourse with the victim in his bedroom then left and returned with a condom. He put the condom on and completed intercourse with the victim.

The victim's mother later found condoms in Kim's locked briefcase which she had forced open with a screwdriver. She testified that he had never used condoms during sexual intercourse with her.

On 2 November 1984, the victim was awakened when the defendant Kim came into her bedroom and pulled down her underwear in the middle of the night. While the victim pretended to be asleep,

the defendant had sexual intercourse with her. Her younger sister, sleeping next to her in the same bed, did not awaken.

The next morning the victim's mother and younger sister went to the shoeshop while the victim and Kim went to Charlotte. When they returned home from Charlotte, the defendant put on *617 his housecoat and told the victim to put on her mother's housecoat. He then had sexual intercourse with her.

The defendant Kim testified that he came to America from Korea in 1974. He owned a house and worked sixteen hours a day at the shoe repair shop and a mill during 1984. Kim said that he never had sexual relations with the victim, but that she had written him sexually suggestive notes. He also testified that he did not remember having any condoms in the house, and that he had never bought any such things in his life.

The defendant first contends that the trial court erred by allowing the State to ask the victim a leading question during direct examination. Although the defendant acknowledges that he did not object to the question or answer at trial, he contends that admission of the question and answer was such grievous error as to be "plain error" necessitating a new trial See generally, State v. Walker, 316 N.C. 33, 340 S.E.2d 80 (1986); State v. Black, 308 N.C. 736, 303 S.E.2d 804 (1983). We conclude that the trial court committed neither plain error nor any error at all. The exchange at issue was as follows:

> A. . . . and I sat on the bed and he told me to lay down so I laid down and he spread my legs apart and had sexual intercourse with me.
>
> Q. . . . did you know the term sexual intercourse at that time?

A. No.

> Q. Have you learned that in the process of discussion of these matters with other people?

A Yes.

. . . .

Q. You were ten years old at the time?

A. Yes.

. . . .

> Q. When you say he had sexual intercourse with you, did he get his penis inside you?

*618

A. Yes, he did.

EXCEPTION No. 1.

(Emphasis added.)

The question to which the defendant has belatedly taken exception was not a leading question.

> A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no. [Citations omitted.] However, simply because a question may be answered yes or no does not make it leading, unless it also suggests the proper response.

State v. Thompson, 306 N.C. 526, 529, 294 S.E.2d 314, 316-17 (1982) (quoting State v. Britt, 291 N.C. 528, 539, 231 S.E.2d 644, 652 (1977)). The fact that the question in the present case could be answered yes or no did not make it a leading question, since it did not suggest that the victim choose one answer over the other.

The extent to which a question may be deemed suggestive and, as a result, leading "depends not only on the form of the question but also on the context in which it is put." State v. Thompson, 306 N.C. at 529, 294 S.E.2d at 317. When considered in context, the question here did not suggest an answer to the witness, but merely directed her

attention to a proper subject of inquiry without giving her guidance as to whether she should answer affirmatively or negatively. See generally, State v. Thompson, 306 N.C. at 529-31, 294 S.E.2d at 317. The trial court committed no error by allowing either the question or the witness's answer.

Next, the defendant asserts that the trial court committed plain error by allowing the State to introduce as corroborative evidence prior statements of the victim which contained new and additional information not referred to in the victim's testimony. The defendant argues that references to such additional matters rendered the officer's testimony inadmissible for corroborative purposes. We do not agree.

One of the police investigators testified that the victim had used anatomically correct dolls to demonstrate acts of sexual intercourse, cunnilingus, sodomy and fellatio which the defendant had committed with her. The victim had
619 testified at trial only *619 about acts of sexual intercourse. The defendant made no objection to the investigator's testimony in this regard. Therefore, our review is limited to a review for plain error, and we conclude that none occurred.

In order to be admissible as corroborative evidence, the pretrial statement of a witness need not merely relate facts brought out in the witness's testimony at trial. A witness's prior oral and written statements, although including additional facts not referred to in his trial testimony, may be admitted if they tend to strengthen and add credibility to his trial testimony. State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986); State v. Riddle, 316 N.C. 152, 340 S.E.2d 75 (1986); State v. Higgenbottom, 312 N.C. 760, 324 S.E.2d 834 (1985). Here, the testimony as to pre-trial statements of the victim clearly tended to add weight or credibility to the victim's trial testimony and were, therefore, admissible [2] as corroborative evidence. See id.

2 We are not required to decide whether this corroborative evidence could be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C.G.S. 8C-1, Rule 403 (1986). The prosecutor may choose not to use that part of the victim's prior statement containing matters going beyond her trial testimony at the defendant's new trial. Additionally, no such issue is squarely presented by the defendant as a part of this appeal.

The defendant also contends that the trial court erred by allowing an expert witness to testify concerning the victim's truthfulness during the expert's evaluation and treatment of her. We agree and hold that the error entitles him to a new trial.

The testimony complained of was part of an attempt by the prosecutor to rehabilitate the victim as a witness after she had been impeached by cross-examination concerning a prior inconsistent statement. The prosecutor sought to demonstrate her character for truthfulness.

Dr. Sharon Barnette, a child psychologist, was qualified at trial as an expert witness in the field of Rehabilitation and School Psychology. The testimony at issue is the following:

> Q. Dr. Barnette, as you evaluated and treated [the victim], did you ever find her untruthful with you?

620 MR. GERNS: OBJECTION. *620

COURT: OVERRULED.

> A. She's never been untruthful with me about it. Everything she had to say to me somehow I'd find out later that she was telling the truth.

MR. GERNS: MOVE TO STRIKE.

COURT: DENIED.

EXCEPTION No. 5

Rule 608(a) of the North Carolina Rules of Evidence addresses impeachment and rehabilitation of a witness's credibility. It provides in pertinent part:

> (a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

N.C.G.S. 8C-1, Rule 608 (1986). The commentary [3] to Rule 608 emphasizes that "[t]he reference to Rule 405 (a) is to make it clear that expert testimony on the credibility of a witness is not admissible."

> [3] The commentaries printed with the North Carolina Rules of Evidence, N.C.G.S. 8C-1, are not binding authority. However, we do give them substantial weight in our efforts to comprehend legislative intent. State v. Hosey, 318 N.C. 330 337-338 n. 2, 348 S.E.2d 805, 809-810 n. 2 (1986).

The relevant portion of Rule 405, which governs methods of proving character, provides:

(a) Reputation or Opinion. In all cases in which evidence of character . . . is admissible, proof may be made by testimony as to reputation or . . . in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Expert testimony on character or a trait of character is not admissible as circumstantial
621 evidence of behavior. *621 N.C.G.S. 8C-1, Rule 405 (1986) (emphasis added). Rules 608 and 405(a), read together, forbid an expert's opinion testimony as to the credibility of a witness. State v. Heath, 316 N.C. 337, 342, 341 S.E.2d 565, 568 (1986).

We conclude that both the State's question and the expert's answer were improperly allowed. Dr. Barnette's contact with the victim was solely in her role as a child psychologist. Their sessions together began as a result of the acts which resulted in these charges against the defendant. The ten sessions involved psychotherapy to assist the victim in overcoming her negative responses to the incidents. The question posed by the prosecutor clearly invoked Dr. Barnette's status as an expert and sought to establish the credibility of the victim as a witness. Such evidence was inadmissible and should have been excluded. Id.

Additionally, the question and answer complained of came immediately after Dr. Barnette had given lengthy testimony concerning the victim's statements to her about the sexual acts by the defendant. Dr. Barnette's testimony that the victim had "never been untruthful with me about it" must have been construed by the jury as expert opinion testimony that the victim's accusations against the defendant as related to Dr. Barnette were true. In short, Dr. Barnette's answer amounted to an expert opinion that the defendant was guilty of the rapes for which he stood charged. The admission of such evidence clearly was error. State v. Heath, 316 N.C. at 341-42, 341 S.E.2d at 569. The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial — determination of the truth. See United States v. Azure, 801 F.2d 336 (8th Cir. 1986) (applying Federal Rules of Evidence); United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973), cert. denied, 416 U.S. 959, 40 L.Ed.2d 310 (1974) (same).

Having found error in this regard, we must determine whether the error was prejudicial to the defendant. We conclude that it was.

In order to bear his burden of showing that prejudice exists as a result of an error arising other than under the Constitution of the United States, the defendant must show that "there is a reasonable possibility that, had the error in

question not been committed, a different result
622 would have been reached at his *622 trial." N.C.G.S. 15A-1443(a) (1983). In this case, only the defendant and the victim purported to have personal knowledge of whether the rapes charged against the defendant actually had occurred. Each gave testimony absolutely conflicting with the testimony of the other. Therefore, the State's case against the defendant hinged almost totally on the credibility of the victim. Given this situation, we can only conclude that the erroneous admission of the expert's opinion that the victim was telling the truth demonstrates a "reasonable possibility" that a different result would have been reached at trial had the error not been committed. As a result, we hold that the defendant is entitled to a new trial.

The defendant also assigns as error the trial court's denial of his motion to dismiss at the close of all of the evidence at trial. It suffices to say here that the testimony of the victim taken in the light most favorable to the State provided substantial evidence of each element of the offenses charged and substantial evidence that the defendant committed them. This assignment of error is without merit and is overruled.

The defendant has brought forward other assignments of error and supporting contentions. As such purported errors are not likely to recur at a new trial, we find it unnecessary to address them.

For the reasons previously stated herein, the defendant is entitled to a new trial.

New trial.

No. COA11-941
Court of Appeals of North Carolina.

State v. Martin

729 S.E.2d 717 (N.C. Ct. App. 2012) · 222 N.C. App. 213
Decided Aug 7, 2012

No. COA11–941.

2012-08-7

STATE of North Carolina v. Todd Joseph MARTIN.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State. Ryan McKaig for defendant-appellant.

BRYANT

719 *719

Appeal by defendant from judgment entered 7 January 2011 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 14 December 2011. Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State. Ryan McKaig for defendant-appellant.

BRYANT, Judge.

Where the trial court did not abuse its discretion in denying the admission of testimony from a witness defendant proffered for qualification as an expert, we hold no error. Where the restraint of the victim did not extend beyond that inherent in the commission of the sexual assaults and the assault by strangulation, the trial court erred in entering judgment against defendant on the charge of first-degree kidnapping. And, where defendant was not entitled to an instruction on assault on a female as a lesser included offense, we hold no error.

On 3 November 2008, a Carteret County Grand Jury indicted defendant Todd Martin on charges of attempted first-degree murder, assault by strangulation, first-degree kidnapping, first-degree rape, and two counts of first-degree sexual offense. Defendant was initially tried before a jury in Carteret County Superior Court in November 2009. The jury reached a verdict on only one offense, finding defendant guilty of assault by strangulation. The trial court declared a mistrial on the remaining charges. A second trial on the remaining charges was commenced on 3 January 2011.

The evidence admitted during the second trial tended to show the following: defendant and Mary
720 [1] began dating in December 2003 *720 and married in July 2004. The marital union bore two children ages five and three at the time of the second trial. On 11 August 2008, the couple separated. Mary informed defendant during a marital counseling session that she wanted a divorce. Defendant agreed to move out of their home and stay with a friend, though he retained a key to the residence.

[1] We use the pseudonym "Mary" to protect the victim's identity.

Mary testified that on 18 August 2008, defendant joined her and their two children for dinner at their home. After dinner, defendant left. Later that night, Mary awoke to find defendant asleep on the floor beside her bed; "[h]e wasn't wearing anything." Defendant was told that he could not stay. Mary testified that defendant climbed onto the bed, held her down while she struggled, restrained her with novelty handcuffs, forced her

to perform fellatio, removed her shorts, forcibly penetrated her vagina and anus with his penis, threatened to kill her and put her body in a pond near the house, and choked her until she passed out.

After the assault, defendant lay on the bed and fell asleep. At 3:00 a.m., Mary woke her children and drove to a friend's house.

Defendant testified that after dinner he did go back to Mary's house and fell asleep on the bedroom floor. During the night, Mary woke him, and they talked about their relationship and their future. Mary told him that she wanted him back in the house, in her life, and in the lives of their children. Defendant testified that during the early morning hours of 19 August 2008, Mary agreed to reconcile, and they engaged in consensual oral, vaginal, and anal sex. They used handcuffs, and defendant testified that everything they did, they had done on various occasions before. Defendant described the encounter as passionate "make-up sex."

Defendant testified that afterwards, as they continued to talk, defendant "came clean" and admitted he had been talking to another woman. Defendant testified that Mary became very angry and threatened to take the kids away and report his behavior to the Marine Corps. Defendant admitted to grabbing Mary around her neck and choking her for several seconds. Defendant testified that when he released Mary, he said, "if you keep f* * *ing around I'll put your ass in that pond." Defendant said he fell asleep, and when he woke up a few hours later, Mary and the children were gone.

The jury found defendant guilty of first-degree sexual offense, second-degree sexual offense, and first-degree kidnapping. Judgment was entered in accordance with the jury verdict, and defendant was sentenced to an active term of 288 to 355 months for first-degree sexual offense, 100 to 129 months for second-degree sexual offense, and 100 to 129 months for first-degree kidnapping, all sentences to run consecutively. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court erred in (I) excluding the testimony of defendant's proposed expert witness; (II) entering judgment in violation of the double jeopardy clause of the Fifth Amendment; (III) declining to instruct the jury on assault on a female; and (IV) instructing the jury on a theory not supported by the indictment or the evidence.

I

Defendant first argues the trial court erred in refusing to allow defendant's witness to testify as an expert and testify in his defense. We disagree.

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise...." N.C. Gen.Stat. § 8C–1, Rule 702 (2011). "North Carolina case law requires only that the expert be better qualified than the jury as to the subject at hand, with the testimony being 'helpful' to the jury." *State v. Davis,* 106 N.C.App. 596, 601, 418 S.E.2d 263, 267 (1992) (citation omitted). "Furthermore, the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard,* 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).*721

"When reviewing the ruling of a trial court concerning the admissibility of expert opinion testimony, the standard of review for an appellate court is whether the trial court committed an abuse of discretion." *State v. Ward,* 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (citing *Howerton v. Arai Helmet, Ltd.,* 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004)). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned

decision." *State v. Riddick,* 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted). "[I]n North Carolina[,] expert testimony on the credibility of a witness is inadmissible [.]" *Davis,* 106 N.C.App. at 602, 418 S.E.2d at 267 (citations omitted). "When the jury is in as good a position as the expert to determine an issue, the expert's testimony is properly excludable because it is not helpful to the jury." *Braswell v. Braswell,* 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991) (citation omitted).

Here, defendant proffered Brent Turvey, a forensic scientist and criminal profiler, for qualification as an expert. During *voir dire,* Turvey identified what he considered inconsistencies in the victim's version of events leading up to and during the alleged sexual assaults and evidence consistent with what he described as "investigative red flags."

After defendant's voir dire, the trial court stated that it

has reviewed [Turvey's] forensic examination, and from all of that this Court can only conclude that the defendant seeks through Mr. Turvey to offer certain opinions about the investigation that was done in this case about which expert testimony is not needed. He also seeks in his opinions to invade the province of the jury. He also seeks to offer opinions on the evidence involving the credibility of certain witnesses and other evidence, which is totally, totally within the province of the jury; and we don't need expert testimony to show inconsistencies in the evidence, and as such and for other reasons, this Court will not permit the admission of that testimony or his admission as an expert witness.

In response to defendant's objections, the trial court stated that it was not limiting defendant's ability to expose inconsistencies in the evidence and argue them to the jury but expert testimony was not necessary to do so.

[The trial court is] certainly not going to let somebody else come in here and say what the [ ] [p]olice should have done or shouldn't have done. You brought that out and I'm happy for you to argue that to the jury in your final argument about the inconsistencies that exist, and there are inconsistencies in this case. But nobody needs an expert to shows [sic] those inconsistencies.

Here, Turvey's testimony, offered to discredit the victim's account of defendant's action that night, and to comment on the manner in which the criminal investigation was conducted appears to invade the province of the jury. Nevertheless, the trial court specifically acknowledged defendant's objections by stating that defendant would still be allowed to argue the inconsistencies he observed in the State's evidence. Thus, we hold the trial court did not abuse its discretion by excluding the testimony of defendant's expert witness. Accordingly, defendant's argument is overruled.

II

Defendant next argues the trial court violated his right against double jeopardy by entering judgment as to first-degree kidnapping, first-degree sexual offense, and second-degree sexual offense. We agree.

We note that defendant failed to object before the trial court to the sentence now contested on appeal. "Generally, a defendant's failure to enter an appropriate and timely motion or objection results in a waiver of his right to assert the alleged error upon appeal." *State v. McDougall,* 308 N.C. 1, 9, 301 S.E.2d 308, 314 (1983) (citations omitted). "Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court."
722 *722 *State v. Haselden,* 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003) (citations and quotations omitted). However, our General Assembly has listed under General Statutes, section 15A–1446(d), "[e]rrors ... which are asserted to have occurred, [that] may be the subject of appellate review even though no objection, exception or

motion has been made in the trial division." N.C. Gen.Stat. § 15A–1446(d) (2011). Pursuant to section 15A–1446(d)(18), such an error occurs where "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." N.C. Gen.Stat. § 15A–1446(d)(18) (2011).

While General Statutes section 15A–1446(d) lists grounds wherein errors are preserved for appellate review as a matter of law, our Supreme Court has held that "[t]he Constitution of North Carolina provides that '[t]he Supreme Court shall have exclusive authority to make rules of practice and procedure for the Appellate Division.' N.C. Const. Art. IV § 13(2)." *State v. Elam,* 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981). "Pursuant to said constitutional authority our Supreme Court promulgated the Appellate Rules of Procedure." *State v. O'Neal,* 77 N.C.App. 600, 603, 335 S.E.2d 920, 923 (1985) (citing *Elam,* 302 N.C. 157, 273 S.E.2d 661). Considering our Rules of Appellate Procedure, "[w]here there have been conflicts between subsections of G.S. 15A–1446 and Rule 10[—Preservation of issues at trial; proposed issues on appeal], the North Carolina Supreme Court has unequivocably stated that the Rules of Appellate Procedure should control." *Id.* (citing *Elam,* 302 N.C. at 160, 273 S.E.2d at 664).

Rule 10(a) provides generally that an issue may not be reviewed on appeal if it was not properly preserved at the trial level or unless the alleged error has been "deemed preserved" "by rule or law." N.C. R.App. P. 10(a)(1). Here subdivision [N.C.G.S. § 15A–1446](d)(18) states that an argument that "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law" may be reviewed on appeal even without a specific objection before the trial court. This provision does not conflict with any specific provision in our appellate rules and operates as a "rule or law" under Rule 10(a)(1), which permits review of this issue.

State v. Mumford, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010); *see also State v. Moses,* 205 N.C.App. 629, 698 S.E.2d 688 (2010) (holding the defendant's double jeopardy argument preserved pursuant to N.C. Gen.Stat. § 15A–1446(d)(18) (2009)). Thus, we address defendant's argument.

"The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Gardner,* 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986) (citations omitted). Jeopardy attaches "when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn." *State v. Lee,* 51 N.C.App. 344, 348, 276 S.E.2d 501, 504 (1981) (quoting *State v. Shuler,* 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977)).

Defendant contends that the trial court erred by entering verdicts of guilty on the charges of first-degree sexual offense, second-degree sexual offense and first-degree kidnapping in violation of defendant's Fifth Amendment right against double jeopardy. Specifically, defendant alleges that by entering judgments against him for first-degree kidnapping and either of the sexual assaults or the assault by strangulation, the trial court subjected defendant to multiple punishments for the same offense. Defendant requests that we remand the case so that the trial court can arrest judgment as to either the kidnapping conviction or the sexual offense convictions, as the conviction for strangulation was entered in the prior proceeding.

The State concedes the possibility that defendant was subjected to double jeopardy and requests that the matter be remanded for re-sentencing.*723

723

The elements of kidnapping are: (1) confining, restraining, or removing from one place to another; (2) any person sixteen years or older; (3) without such person's consent; (4) if such act was for the purposes of facilitating the commission of a felony. *See*N.C. Gen.Stat. § 14–39(a)(2) (2009). This Court has previously held that "the offense of kidnapping under N.C. Gen.Stat. § 14–39 is a single continuing offense, lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her free will." *State v. White,* 127 N.C.App. 565, 571, 492 S.E.2d 48, 51 (1997). Kidnapping in the first-degree occurs when "the defendant does not release the victim in a safe place or the victim is seriously injured or sexually assaulted." *State v. Morgan,* 183 N.C.App. 160, 166, 645 S.E.2d 93, 99 (2007) (citing N.C. Gen.Stat. § 14–39(b) (2005)).

In situations involving both kidnapping and sexual offense, "[t]he restraint of the victim must be a complete act, independent of the sexual offense." *State v. Oxendine,* 150 N.C.App. 670, 676, 564 S.E.2d 561, 566 (2002) (citation omitted).

It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. [our Supreme Court has held] that G.S. 14–39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes.... We construe the word "restrain," as used in G.S. 14–39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

State v. Ripley, 360 N.C. 333, 337, 626 S.E.2d 289, 292 (2006) (citing *State v. Fulcher,* 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)). "The test of the independence of the act is 'whether there was substantial evidence that the defendant restrained or confined the victim separate and apart from any restraint necessary to accomplish the acts of rape[, statutory sex offense, or crime against nature].' " *State v. Harris,* 140 N.C.App. 208, 213, 535 S.E.2d 614, 618 (2000) (quoting *State v. Mebane,* 106 N.C.App. 516, 532, 418 S.E.2d 245, 255 (1992)) (brackets omitted). Further, "[t]he test ... does not look at the restraint necessary to commit an offense, rather the restraint that is inherent in the actual commission of the offense." *State v. Williams,* 308 N.C. 339, 347, 302 S.E.2d 441, 447 (1983).

In *State v. Harris,* we held that there was restraint independent of the underlying felony where the defendant fraudulently coerced the victim into remaining with him in a car so that he could drive her to a secluded place and sexually assault her. 140 N.C.App. at 213, 535 S.E.2d at 618;*see also State v. McKenzie,* 122 N.C.App. 37, 46, 468 S.E.2d 817, 824–25 (1996) (separate and independent restraint found where defendant grabbed victim in front hallway, took victim to bedroom, bound her hands, covered her head with a pillowcase, shut blinds, and rummaged through apartment prior to rape). However, here, the evidence tended to show that defendant restrained Mary solely for the purpose of committing sexual assaults and strangulation. The evidence did not indicate that defendant's restraint of Mary extended beyond the restraint necessary to commit the sexual assaults and the strangulation. Therefore, the restraint operated as an inherent part of the sexual offenses and the assault by strangulation and cannot satisfy the element within the kidnapping statute. *See Ripley,* 360 N.C. at 337, 626 S.E.2d at 292. Accordingly, we must vacate the judgment convicting defendant of first-degree kidnapping.

III

Next, defendant contends the trial court erred in denying his request for an instruction on assault on a female as a lesser included offense. We disagree.

First, we note that during the charge conference, defendant requested an instruction on assault on a female as a lesser included offense of first-degree

rape. Defendant's request was denied and the trial court noted defendant's objection for the record. Later, the trial court instructed the jury, as follows: "[D]efendant has been charged with first degree rape. Under the law and evidence in this case it's
724 your duty to return one *724 of the following verdicts: Number 1, guilty of first degree rape; Number 2, guilty of second degree rape; or Number 3, not guilty." On this charge, the jury returned a verdict of not guilty. As defendant was found not guilty, defendant cannot establish prejudice as a result of the trial court's failure to instruct the jury on the charge of assault on a female as a lesser included offense of first-degree rape.

On appeal to this Court, defendant contends that an instruction on assault on a female should have been given as a lesser included offense in the charge of the two counts of first-degree sexual offense, though defendant acknowledges that our Supreme Court has previously held that assault on a female is not a lesser included offense of first-degree sexual offense. *See State v. Bagley,* 321 N.C. 201, 210, 362 S.E.2d 244, 249 (1987) ("In order for a defendant to be convicted of assault on a female, the evidence must establish, *inter alia,* that the victim is a female, that the defendant is a male, and that he is at least eighteen years of age. N.C.G.S. § 14–33(b)(2) (1986) [currently codified under § 14–33(c)(2) (2011)]. To convict for first-degree sexual offense, however, it need not be shown that the victim is a female, that the defendant is a male, or that the defendant is at least eighteen years of age. N.C.G.S. § 14–27.4 (1986) [(currently codified under § 14–27.4(a))]. Therefore, the crime of assault on a female has at least three elements not included in the crime of first-degree sexual offense and cannot be a lesser included offense of first-degree sexual offense." (citing *State v. Weaver,* 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982))), cited in *State v. Brunson,* 187 N.C.App. 472, 653 S.E.2d 552 (2007). Accordingly, defendant's argument is overruled.

IV

Lastly, defendant argues that the trial court erred by instructing the jury that it could find defendant guilty of first-degree kidnapping if it determined, *inter alia,* that the victim was not released in a safe place, because this element was not included in the indictment nor was there evidence in the record to support it. As we hold *supra* that defendant's conviction for first-degree kidnapping must be vacated, we need not reach this argument.

No error in part; vacated in part.

Judges CALABRIA and STROUD concur.

No. COA10-885
North Carolina Court of Appeals

State v. Martinez

711 S.E.2d 787
Decided Jun 1, 2011

No. COA10-885

Filed 21 June 2011

Appeal by Defendant from Judgments entered 21 January 2010 by Judge Orlando F. Hudson, Jr., in Granville County Superior Court. Heard in the Court of Appeals 12 January 2011.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State. Russell J. Hollers III for Defendant-appellant.

Granville County No. 08 CRS 52997-53000.

ROBERT C. HUNTER, Judge.

Luis Berber Martinez ("Defendant") appeals from Judgments imposing an active sentence after a jury found him guilty of three counts of indecent liberties with a child and one count of statutory rape. Defendant argues, *inter alia*, the trial court erred in admitting the testimony of a social worker that an allegation of sexual abuse made against Defendant had been substantiated by the Department of Social Services. Defendant argues this testimony was admitted in error, was
2 prejudicial, *2 and he seeks a new trial. For the reasons stated below, we agree and grant Defendant a new trial.

I. Factual Procedural Background

The State's evidence tended to establish the following. In 2008, Nadia[1] and her sister Sara were living with their legal guardian and aunt Sharon Martinez ("Mrs. Martinez") and Defendant. Nadia testified that on 27 June 2008, when Nadia was 13 years old, she had some friends sleeping over from the night before. That morning, Mrs. Martinez woke Nadia to look after Mrs. Martinez's infant daughter while Mrs. Martinez ran an errand. Nadia testified that she was sitting in the living room watching the infant and the television when Defendant came into the room and sat beside her on the sofa. Defendant then allegedly sexually molested Nadia before being interrupted by one of Nadia's friends walking into the room. Nadia testified that Defendant grabbed his clothes and ran out of the room. Nadia's friend encouraged Nadia to tell someone what had happened; the friend, however, did not testify.

1 Pseudonyms are used to protect the identity of juveniles.

Nadia called a family friend who called the police. A social worker from the Granville County Department of Social Services ("DSS") took Nadia to the hospital where she was examined and hospital staff collected physical evidence using a
3 *3 rape kit. When Nadia was released from the hospital, DSS placed her and her sister in a foster home.

On 1 December 20 08, a Granville County Grand Jury indicted Defendant with three counts of taking indecent liberties with a minor and one count of statutory rape. In June 2009, Judge Henry W. Hight, Jr., reviewed, *in camera*, confidential records pertaining to Nadia's allegations. In an Order entered 2 July 2009, Judge Hight concluded

the confidential records did not contain material exculpatory evidence and need not be disclosed to Defendant.

In January 2010, Defendant filed motions *in limine* seeking: to exclude evidence from a then-pending DSS investigation into whether Defendant neglected one or more of his children; and to exclude testimony by the State's expert witness as to the expert's opinion of whether Nadia and Sara were sexually abused children in the absence of physical evidence of abuse. Both Motions were denied.

Defendant's case came on for trial before Judge Orlando F. Hudson in the 19 January 2010 Criminal Session of Granville County Superior Court. At trial, Nadia testified to two other incidents of alleged sexual abuse by Defendant, and stated that such abuse "happened continuously." In one incident, Nadia and Defendant were cleaning his car in the garage when Defendant came up behind her, rubbed her
4 buttocks, breasts, and vaginal *4 area before attempting to unbutton her pants. Nadia told Defendant to stop and opened the garage door. Defendant allegedly told Nadia not to tell anyone, as she would not like the consequences. Nadia told Mrs. Martinez, who ignored her allegations.

Nadia also admitted, however, that she accused Defendant of raping her in 2006, but the accusation was false. Nadia testified that she recanted the 2006 allegation after DSS began to investigate because Mrs. Martinez and Defendant told her to do so.

The State called as a witness Cassandra Putney ("Putney"), the social worker assigned by DSS to investigate Nadia's allegations of abuse. Putney testified to her credentials, including her position with DSS, her work experience, and her educational background. In response to the State's question as to how Putney became familiar with Nadia and her sister, Putney stated, "The first time I met them was in 2006. A case and investigation was done and *substantiated* for — — ." (Emphasis added.) Defendant's counsel objected to any "substantiation" testimony. The trial court overruled the objection and Putney continued: "Our agency *substantiated* a case of sex abuse in regards to [Nadia]. And that was in 2006." (Emphasis added.) Defendant's counsel objected again and moved to strike the testimony. When
5 Defendant's counsel cited case law for the *5 proposition that substantiation testimony was not permitted, the trial judge stated he did not believe that was correct and overruled the objection. On cross-examination, Putney admitted that after Nadia confessed that her 2006 allegation was not true, DSS closed that investigation.

The State called as a witness Scott Snider ("Snider"), the Clinical Coordinator at the Duke Child Abuse and Neglect Medical Evaluation Clinic. Snider testified that he interviewed Nadia in July 2008 and that Nadia confirmed she recanted her prior allegations of sexual abuse by Defendant, because Defendant and Mrs. Martinez told her to "say that nothing happened."

The State also called Dr. Karen St. Claire to testify as to her physical examination of Nadia's genitals on 14 July 2008. Dr. St. Claire, qualified by the trial court as an expert witness on child sex abuse, concluded that Nadia's genitals looked "very typical" for an adolescent, and such non-specific findings could be consistent with repeated penile-vaginal penetration.

The jury found Defendant guilty on all charges. The trial court entered consecutive judgments imposing 399 to 491 months imprisonment. The trial court further found Defendant had been classified as a sexually violent predator and ordered Defendant, upon his release from prison,
6 to register as a sex offender and *6 be subject to satellite based monitoring for the remainder of his life. Defendant gave notice of appeal in open court.

II. Jurisdiction Standard of Review

As Defendant entered a plea of not guilty and appeals from the final judgment of a superior court, an appeal lies of right with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). When the admissibility of evidence by the trial court is preserved for review by an objection, we review the trial court's decision *de novo*. *See State v. Capers*, N.C. App., 704 S.E.2d 39, 45 (2010), *appeal dismissed, disc. review denied*, N.C., 707 S.E.2d 236 (2011) ("[W]e review a trial court's ruling on the relevance of evidence *de novo* . . . .") .

III. Analysis A. Voucher of Victim's Credibility

Defendant first argues the trial court erred in admitting DSS social worker Putney's testimony that she "substantiated" Nadia's 2006 claim of sexual abuse by Defendant. Defendant contends the admission of this testimony was an error of law as it unfairly bolstered the victim's credibility. We agree.

In *State v. Giddens* this Court concluded similar testimony to be an impermissible expression of opinion as to the credibility of the accuser. 199 N.C. App. 115, 123, 681 S.E.2d 504, 509 (2009), *aff'd*, 363 N.C. 826, 689 S.E.2d 858 (2010) (per curium). At issue in *Giddens* was the testimony by
7 a DSS *7 investigator that he "substantiated" the victim's sexual abuse allegation after an investigation into the claim. *Id.* Because the investigator's testimony was based, in part, on the DSS investigation and not "solely on the children's accounts of what happened," the Court rejected the State's argument that the testimony was a prior consistent statement and merely corroborated the victims' testimony. *Id.* at 120-21, 681 S.E.2d at 507-08. Rather, the testimony amounted to an impermissible voucher of the victims' credibility. *Id.* at 121, 681 S.E.2d at 508 ("Our case law has long held that a witness may not vouch for the credibility of a victim." (citing *State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986) and *State v. Teeter*, 85 N.C. App. 624, 355 S.E.2d 804, *appeal dismissed, cert. denied*, 320 N.C. 175, 358 S.E.2d 67 (1987))) .

The *Giddens* Court concluded the investigator's testimony, that DSS "substantiated" the allegations of sexual abuse, essentially told the jury that DSS determined the defendant was guilty of sexually abusing the victims and the trial court erred in admitting the testimony. *Id.* at 121-22, 681 S.E.2d at 508 (stating the testimony "amounted to a statement that a State agency had concluded Defendant was guilty").

The State argues the present case is distinguishable. In *Giddens*, the State's witness testified to the "thorough" nature of the investigation that led DSS to conclude the victims'
8 *8 allegation was substantiated. *Id.* at 121, 681 S.E.2d at 508. Here, Putney did not testify to the thoroughness of the DSS investigation, but merely stated that DSS "substantiated" the claim after conducting an investigation. On this basis, the State contends it would be disingenuous to equate the present case with the facts of *Giddens*. We cannot agree.

In *Giddens*, the DSS investigator testified that her investigation included a "global assessment," in which she inquired about more than the child's specific allegations, but also inquired as to the child's mental needs and supervision. *Giddens*, 199 N.C. App. at 121, 681 S.E.2d at 508. Based on this information, the DSS investigator stated she had no information to substantiate that the child's *other caregivers* were abusive or neglectful. *Id.* We cannot conclude the testimony in the present case, that DSS substantiated Nadia's sexual abuse allegations, is any less prejudicial than the testimony in *Giddens*. As we explained in *Giddens*, although the social worker was not qualified as an expert witness, the jury likely gave the witness' opinion more weight than the opinion of a lay person. *Id.* The trial court erred in admitting Putney's substantiation testimony.

We also note the striking similarity of the evidence in *Giddens* and the present case. Here, as in *Giddens*, there was no physical evidence of sexual
9 abuse. *See id.* at 119-20, *9 681 S.E.2d at 507 (noting physical exams of the children were normal and revealed no injures). The State's expert medical witness, Dr. St. Claire, testified to Nadia's non-specific genital exam results — — she "looked like a very typical adolescent." Thus, the State's case rested solely on Nadia's testimony and additional corroborative testimony. In effect, the essential issue for the jury to consider was Nadia's credibility. *See id.* at 119-20, 681 S.E.2d at 507 (noting that without the improper testimony by the DSS investigator, the jury was left with the children's testimony and other corroborating testimony, leaving the credibility of the victims as the central issue for the jury to resolve).

Accordingly, we conclude there is a reasonable possibility that had Putney's testimony not been admitted, the jury would have reached a different verdict. N.C. Gen. Stat. § 15A-1443(a) (2009) ("A defendant is prejudiced by errors . . . when 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.").

Furthermore, the *Giddens* defendant failed to object to the substantiation testimony at trial and, yet, the Court found it to be sufficiently prejudicial to rise to the level of plain error. *See Giddens*, 199 N.C. App. at 123-24, 681 S.E.2d at 509 (ordering a new trial after concluding that
10 while the victims' *10 testimony and corroborating testimony is strong evidence, it is not sufficient to survive a plain error review of the impermissible testimony of a witness vouching for the credibility of the victim). Unlike the defendant in *Giddens*, here, Defendant preserved the issue for review by objecting to Putney's testimony. Given the lower threshold required for finding prejudicial error when the issue is preserved for review by objection, we conclude Putney's testimony was sufficiently prejudicial to warrant a new trial.

B. Confidential Evidence

Defendant also argues the trial court erred in failing to disclose material exculpatory information contained in privileged documents reviewed *in camera.* After a review of this evidence, we agree.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963).

The record does not reveal what, if any, of this confidential material was made available Defendant. Our review of the material, however, leads us to conclude there is sufficient exculpatory
11 material to impeach the State's *11 witnesses. On remand for a new trial, we direct the trial judge to review the material *de novo* to determine, in his or her discretion, what material should be made available to Defendant.

IV. Conclusion

In summary, we conclude the trial court erred by permitting the DSS investigator to testify that she had substantiated the allegation of sexual abuse against Defendant. We also conclude the trial court erred in failing to disclose material exculpatory evidence to Defendant. Defendant is entitled to a new trial. Consequently, we do not reach Defendant's additional arguments regarding the trial court's refusal to instruct on attempted rape, sentencing Defendant as a level III sex offender, and ordering Defendant be subject to satellite-based monitoring for the remainder of his life.

New trial.

Judges CALABRIA and STROUD concur.

1 *1

No. 122A92
Supreme Court of North Carolina

State v. Skipper

337 N.C. 1 (N.C. 1994) · 446 S.E.2d 252
Decided Jul 1, 1994

No. 122A92

Filed 29 July 1994

1. Jury §§ 226, 227 (NCI4th) — capital case — death penalty views — equivocal answers — excusal for cause — rehabilitation not allowed

2

While a juror's answers on voir dire in a capital case were not entirely unequivocal and her views on whether she could consider the death penalty as required by law were not unmistakably clear, the trial court did not err by excusing the juror for cause where her responses revealed that her thoughts and views on the death penalty would substantially impair her ability to follow the instructions of the court as they related to her duty as a juror. Furthermore, the trial court did not err by refusing to permit defendant to attempt to rehabilitate the juror where the prosecution explained in detail the procedure that must be followed in determining a sentence of death; after this explanation, the juror affirmatively responded three times that she would be substantially impaired in following the law because of her beliefs; and there was no indication that further questioning of the juror would have done anything but make the situation more confusing.

Am Jur 2d, Jury §§ 289, 290.

Comment Note. — Beliefs regarding capital punishment as disqualifying juror in capital case — post-Witherspoon cases. 39 ALR3d 550.

*2

2. Jury § 123 (NCI4th) — capital case — voir dire questions — consideration of age, mental impairment, etc. — attempt to stake out jurors

The trial court did not err by refusing to permit defendant to ask prospective jurors in a capital case whether they could "consider" age, mental impairment or retardation, and other specific mitigating circumstances in reaching a decision, since the questions were an impermissible attempt to stake out the jurors. Defendant was given an adequate opportunity to discover any bias on the part of a juror where he was permitted to inquire generally into jurors' feelings about mental illness and retardation and other mitigating circumstances, to ask jurors if they would automatically vote for the death penalty in a first-degree murder case, and to ask jurors if they would consider mitigating circumstances when determining defendant's sentence.

Am Jur 2d, Jury § 197.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.

3. Jury § 123 (NCI4th) — capital case — jury voir dire — previous criminal record — automatic vote for death penalty — question properly excluded

Defendant's question to a prospective juror as to whether she felt "that a person should always be given the death penalty if he has a previous criminal record and has been convicted of first-degree murder" was an attempt to determine what kind of verdict the juror would render under certain circumstances not yet in evidence, and the trial court did not abuse its discretion in sustaining the State's objection to this question as phrased where the juror had already stated that she could consider mitigating circumstances in deciding whether to vote for life imprisonment or the death penalty and that she would not automatically vote for the death penalty for someone convicted of first-degree murder.

Am Jur 2d, Jury § 197.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.

3 *3

Propriety, on voir dire in criminal case, of inquiries as to juror's possible prejudice if informed of defendant's prior convictions. 43 ALR3d 1081.

4. Jury § 141 (NCI4th) — capital case — jury voir dire — meaning of life imprisonment — possibility of parole — questions properly excluded

Am Jur 2d, Jury § 197.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.

5. Criminal Law § 395 (NCI4th); Jury § 194 (NCI4th) — capital punishment views — questions by trial judge — no impartiality in favor of State

Am Jur 2d, Jury §§ 265 et seq.; Trial § 117.

Comment Note. — Beliefs regarding capital punishment as disqualifying juror in capital case — post-Witherspoon cases. 39 ALR3d 550.

6. Homicide § 552 (NCI4th) — first-degree murder — premeditation and deliberation — brain disorder — intoxication — lack of bad relationship — instruction on second-degree murder not required

4 *4

Am Jur 2d, Homicide §§ 525 et seq.

7. Criminal Law § 429 (NCI4th) — capital case — jury argument — defendant's failure to testify — error cured by courts's actions

5 *5 **Am Jur 2d, Trial §§ 237-243**

Violation of federal constitutional rule (Griffin v. California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error. 24 ALR3d 1093.

8. Evidence and Witnesses § 3015 (NCI4th) — cross-examination — prior conviction — date of crime — question properly excluded

8C-1

Am Jur 2d, Witnesses §§ 581 et seq.

Comment Note. — Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution. 20 ALR2d 1421.

9. Criminal Law § 414 (NCI4th) — defendant's introduction of evidence — loss of right to open and close arguments — no coercion by trial court

6 *6

Am Jur 2d, Trial § 213.

10. Homicide § 489 (NCI4th) — premeditation and deliberation — instructions — lack of provocation

Am Jur 2d, Homicide § 501.

11. Homicide § 489 (NCI4th) — premeditation and deliberation — instructions — inference from threats — no plain error

Am Jur 2d, Homicide § 501.

12. Evidence and Witnesses § 1694 (NCI4th) — autopsy photographs — relevancy to show premeditation and deliberation

7 *7 **Am Jur 2d, Homicide §§ 417 et seq**

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

13. Homicide § 659 (NCI4th) — instruction on voluntary intoxication — defendant's burden of production — no due process violation

Am Jur 2d, Homicide § 517.

14. Homicide § 669 (NCI4th) — voluntary intoxication instruction — insufficient evidence

Am Jur 2d, Homicide § 517.

15. Evidence and Witnesses § 2791 (NCI4th) — question about telling truth — properly excluded

8 *8

Am Jur 2d, Witnesses §§ 426 et seq.

16. Evidence and Witnesses § 2906 (NCI4th) — redirect examination — exceeding scope of cross-examination — objection sustained — answer not stricken — harmless error

Am Jur 2d, Witnesses § 425.

17. Criminal Law § 1068 (NCI4th) — capital sentencing proceeding — exclusion of testimony — no due process violation

Am Jur 2d, Criminal Law § 598.

18. Criminal Law § 680 (NCI4th) — mitigating circumstances — peremptory instructions — necessity for request

9 *9

Am Jur 2d, Criminal Law § 628.

19. Criminal Law §§ 860, 1322 (NCI4th) — capital sentencing proceeding — refusal to instruct on parole eligibility and concurrent sentences — jury question during deliberations — proper instruction

15A-2002

Am Jur 2d, Trial §§ 100, 890.

Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed. 35 ALR2d 769.

Prejudicial effect of statement or instruction of court as to possibility of parole or pardon. 12 ALR3d 832.

Jury's discussion of parole law as ground for reversal or new trial. 21 ALR4th 420.

20. Criminal Law § 1322 (NCI4th) — capital sentencing proceeding — parole eligibility not mitigating — instruction not required

10 *10

Am Jur 2d, Trial §§ 888 et seq.

21. Criminal Law § 1355 (NCI4th) — capital sentencing — mitigating circumstance — no significant criminal history — instruction not required

Am Jur 2d, Criminal Law §§ 598, 599.

22. Criminal Law §§ 1323, 1362 (NCI4th) — statutory mitigating circumstances — instructions — determination of mitigating effect

455 U.S. 104

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§
11 **888 et seq**. *11

23. Criminal Law § 1323 (NCI4th) — nonstatutory mitigating circumstances — instructions — determination of mitigating value

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

24. Criminal Law § 1323 (NCI4th) — mitigating circumstances — consideration of circumstances found by other jurors — instruction not constitutionally required

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

25. Criminal Law § 1323 (NCI4th) — consideration of mitigating circumstances — instructions — use of "may"

494 U.S. 433

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

26. Criminal Law § 1348 (NCI4th) — capital sentencing — instructions defining mitigating circumstance — jury not improperly restricted

12 *12

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

27. Criminal Law § 1347 (NCI4th) — capital sentencing — course of conduct aggravating circumstance — sufficiency of evidence

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

28. Criminal Law § 1363 (NCI4th) — capital sentencing — requested nonstatutory mitigating circumstances — combining of circumstances

13 *13

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

29. Constitutional Law § 370 (NCI4th) — mentally retarded defendant — death penalty not

unconstitutional

Am Jur 2d, Criminal Law § 628.

Propriety of imposing capital punishment on mentally retarded individuals. 20 ALR5th 177.

30. Jury § 261 (NCI4th) — peremptory challenges — death penalty views — constitutionality

Am Jur 2d, Jury §§ 233 et seq.

31. Criminal Law § 1327 (NCI4th) — capital sentencing — instruction on duty to recommend death penalty

Am Jur 2d, Trial §§ 888 et seq.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L.Ed.2d 1001.

14 *14

32. Jury § 103 (NCI4th) — capital trial — denial of individual voir dire and sequestration

Am Jur 2d, Jury § 197.

33. Criminal Law § 1318 (NCI4th) — capital trial — preliminary instructions

Am Jur 2d, Trial §§ 888 et seq.

34. Criminal Law § 1298 (NCI4th) — constitutionality of death penalty statute

Am Jur 2d, Criminal Law § 628.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L.Ed.2d 1001.

35. Criminal Law § 1326 (NCI4th) — mitigating circumstances — burden of proof

Am Jur 2d, Trial §§ 888 et seq.

36. Criminal Law § 1373 (NCI4th) — first-degree murders — death sentences not disproportionate

15 *15

Am Jur 2d, Criminal Law § 628.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by Britt, J., at the 4 February 1991 Special Criminal Session of Superior Court, Bladen County. Heard in the Supreme Court 1 February 1994.

Michael F. Easley, Attorney General, by Valerie B. Spalding, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellant.

Chief Justice EXUM concurring in the result.

MEYER, Justice.

On 25 August 1990, Ailene Pittman and her grandson Nelson Fipps, Jr., were shot and killed while standing in Ms. Pittman's front yard. The evidence showed that on 25 August 1990, defendant, Sherman Skipper, and Mark Smith drove to Ms. Pittman's home. They both had been drinking. Defendant had been dating Ms. Pittman and wanted to talk to her. Mr. Smith was driving defendant's truck. Defendant and Ms. Pittman talked for fifteen to twenty minutes, standing by the front door to Ms. Pittman's home. Defendant then went back to the truck, got in, and told Mr. Smith to drive away. Ms. Pittman approached the
16 truck and told Mr. Smith not to bring *16 defendant back to her home. When Mr. Smith

began backing the truck out of the driveway, defendant reached under the seat of the truck and pulled out a semiautomatic rifle containing fragmentation bullets. He then proceeded to shoot Ms. Pittman, stopped shooting, said "you too," and then shot Nelson Fipps, who was standing in the driveway. The two men then drove away from the home and spent a week on the run. Mr. Smith finally turned himself in to the police and told them where defendant could be found.

Defendant was found guilty of first-degree murder of both Ms. Pittman and Mr. Fipps and was sentenced to death for each murder. The jury found that defendant had previously been convicted of three assaults with a deadly weapon inflicting serious injury and that he had murdered each of his current victims during a course of conduct involving violence to the other. They also found that he was mentally and emotionally disturbed when the murders were committed and that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

Defendant sets forth thirty-one assignments of error in a 244-page brief. Additional facts will be addressed as necessary for the disposition of these issues.

JURY SELECTION ISSUES

[1] Defendant begins by arguing that the trial court committed reversible error in excusing Juror Shirley Clark for cause, based on that juror's feelings about the death penalty. Defendant argues that the trial court erred by not allowing defendant to question the juror. He also argues that the trial court failed to adequately question the juror before determining that the juror should be excused for cause. Defendant argues that, because of this, he was denied his rights to a fair and impartial jury, due process of law, and freedom from cruel and unusual punishment.

The standard for determining whether a prospective juror may be properly excused for cause for his views on capital punishment is whether those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Syriani*, 333 N.C. 350, 369, 428 S.E.2d 118, 128, *cert. denied*, ___ U.S. ___, 126 L.Ed.2d 341 (1993), *reh'g denied*, ___ U.S. ___, 126 L.Ed.2d 707 (1994); *accord State v. Davis*, 325 N.C. 607, 621-22, 386 S.E.2d 418, 425 (1989), *cert. denied*, 496 U.S. 905, 110 L.Ed.2d 268 (1990). *17

Defendant argues that it did not clearly appear that juror Clark was biased and that some of the juror's answers were equivocal; thus, the prosecutor's challenge for cause should have been denied. This Court has noted that a prospective juror's bias may not always be "'provable with unmistakable clarity [and,] [i]n such cases, reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially.'" *Syriani*, 333 N.C. at 370, 428 S.E.2d at 128 (quoting *State v. Davis*, 325 N.C. at 624, 386 S.E.2d at 426) (alteration in original).

The United States Supreme Court has also noted that it is sometimes difficult to establish total bias against the death penalty with "unmistakable clarity."

> [M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where a trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Wainwright v. Witt, 469 U.S. 412, 425-26, 83 L.Ed.2d 841, 852 (1985) (footnote omitted).

The transcript reveals that juror Clark stated that while she thought the death penalty may be necessary in today's society, she had personal convictions and scruples against the death penalty because she was a Christian. The prosecutor asked Ms. Clark many questions, trying to determine if the juror could impose the death penalty in some situations. The prosecutor explained in great detail the procedure that must be followed before a jury could impose the death penalty. After hearing how the law worked in regard to finding aggravating and mitigating circumstances and balancing the circumstances, the juror still stated that she was not sure whether she could impose the death penalty. The juror stated that she would try her best to be fair, but she also told the prosecutor two times that her scruples and Christian beliefs would substantially impair her ability to consider the death penalty. The prosecutor then challenged this juror for cause.

Before dismissing the juror for cause, the trial judge questioned her extensively. Juror Clark
18 stated that she could impose the death *18 penalty under some circumstances but then said that her scruples were such that she would be prevented or substantially impaired in the performance of her duty as a juror in accordance with her oath and the instruction of the Court. Here, as in *Syriani*, the juror seemed to give conflicting answers; nevertheless, her responses revealed that her thoughts and views on the death penalty would substantially impair her ability to follow the instructions of the court as they related to her duty as a juror. While the juror's view on whether she could consider the death penalty as required by the law was not "unmistakably clear," the juror's responses to the questions were such that the trial judge could determine that the challenge for cause should be permitted. The juror could not affirmatively state that she could follow the instructions given by the court and do her duty as a juror. The trial court did not err in excusing juror Clark for cause.

Defendant also argues that he should have been given the chance to rehabilitate this juror under *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993). In *Brogden*, this Court held that when a judge denies a defendant the opportunity to rehabilitate under the mistaken impression that defendant is not permitted to rehabilitate a juror, then the decision of the trial court is reviewable and is not considered under an abuse of discretion standard. *Id*. at 46, 430 S.E.2d at 909. In *Brogden*, we held that further questioning should have been allowed because the juror may have answered the crucial question about whether his views would substantially prevent or impair his duties as a juror differently if rehabilitation had been allowed. In *Brogden*, unlike here, the juror never affirmatively stated that his feelings would substantially impair his ability to do his duty and follow instructions. In this case, the prosecution explained in detail the procedure that must be followed in determining a sentence of death. After this explanation, the juror affirmatively responded three times that she would be substantially impaired in following the law because of her beliefs.

We have noted that while defendants can be given the opportunity to rehabilitate a juror, this is not an entitlement; judges are not required to allow a defendant to attempt to rehabilitate jurors challenged for cause. A trial court in its sound discretion may refuse a defendant's request to attempt to rehabilitate certain jurors challenged for cause by the State. *See Brogden*, 334 N.C. at 44, 430 S.E.2d at 908; *State v. Taylor*, 332 N.C. 372, 391, 420 S.E.2d 414, 425 (1992).

We conclude that while juror Clark's answers were not entirely unequivocal, they were sufficiently
19 equivocal to justify her being *19 excused for cause in the discretion of the trial judge, who heard the questions asked of, and the answers given by, the juror. In addition, we do not believe

that defendant was incorrectly denied his right to rehabilitate. The sentencing process had been fully explained to the juror and she had responded in answer to the prosecutor's question that, based on her beliefs, she would be impaired in following this procedure. The judge did not deny the right to rehabilitate based on a misunderstanding that no such right exists, and there was no indication that the questioning of the juror would have done anything but make the situation more confusing.

[2] In defendant's second and fourth assignments of error, he argues that his right to a fair and impartial jury was violated because the trial court sustained the prosecutor's objections to certain questions. In his second assignment of error, defendant argues that he should have been allowed to ask questions regarding how jurors would be affected by evidence of mental impairment, age, and other mitigating circumstances. In his fourth assignment of error, defendant argues that it was error not to allow him to ask two jurors who sat on the jury if they would always sentence a person to death if he had a criminal record and had just been found guilty of first-degree murder.

Defendant argues that under *Morgan v. Illinois*, ___ U.S. ___, 119 L.Ed.2d 492 (1992), a defendant must be able to specifically inquire of each prospective juror whether that individual juror would be predisposed not to consider relevant mitigating evidence in determining the appropriate sentence.

The State argues that defendant's questions were a blatant attempt to stake out jurors. The State also notes that when defendant asked the jurors questions about certain characteristics without questioning them as to what kind of verdict they would render in a situation involving those certain characteristics, the questions were allowed and defendant was able to elicit the desired information.

First, we note that defendant was permitted to ask jurors if they could, in general, consider mitigating circumstances in deciding whether to vote for life imprisonment or the death penalty. Defendant was also allowed to ask jurors if they would automatically sentence a person to death and not consider life imprisonment as an option in every case where a person has been convicted of first-degree murder. It is these two particular propositions that are addressed in *Morgan v. Illinois*. *20

20

A review of the *voir dire* illustrates that the judge sustained the prosecutor's objection to defendant's asking if a juror would "consider" age, mental impairment, mental retardation, and family and employment background in reaching a decision. However, the record also reveals that defendant was allowed to ask, "If the Court instructs you that you should consider whether or not a person is suffering from a mental or emotional disturbance in deciding whether or not to give someone the death penalty, do you feel like you could follow that instruction?" Additionally, defendant was permitted to inquire generally into a juror's feeling about such issues as mental illness.

On numerous occasions, the court indicated that it would allow the question defendant was trying to ask if it was "rephrased" or if an "appropriate predicate" was set. On one occasion, the judge even told defendant, "[Y]ou may ask the juror if he will accept and follow the law as given to the jury by this Court as it relates to mitigating circumstances." It is clear that the judge would allow defendant to ask if a juror could follow the law but would not allow defendant to ask a hypothetical question regarding if a juror would consider a circumstance, not known to exist at that time, in reaching a decision.

A defendant should not be able

> to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. . . . [S]uch questions tend to "stake out" the juror and cause him to pledge himself to a future course of action. This the law neither contemplates nor permits. The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts.

State v. Vinson, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *sentence vacated*, 428 U.S. 902, 49 L.Ed.2d 1206 (1976). In *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, ___ U.S. ___, 122 L.Ed.2d 684, *reh'g denied*, ___ U.S. ___, 123 L.Ed.2d 503 (1993), we noted that we would not allow questions that were intended to "stake out" jurors. Id. at 404, 417 S.E.2d at 772 (quoting *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980)).

In *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418, we held that the question, "Would the fact that the defendant had no significant history of any criminal record, would that be something that you would consider important in determining whether
21 or not to impose the *21 death penalty?" was impermissible. *Id*. at 621, 386 S.E.2d at 425. We noted that "[n]o evidence of defendant's criminal history had been introduced" during *voir dire;* thus, the question was "hypothetical and the trial court properly could view it as an impermissible attempt to indoctrinate a prospective juror regarding the existence of a mitigating circumstance." *Id*. In *State v. Yelverton*, 334 N.C. 532, 434 S.E.2d 183 (1993), the Court held that it was not error to refuse to allow defendant to ask jurors if they would find it impossible to vote for life imprisonment if torture or rape had also taken place during the murder. *Id*. at 541, 434 S.E.2d at 188. The Court noted that defendant was allowed to ask if jurors would automatically vote for death. The Court held that "'[j]urors should not be asked what kind of verdict they would render under certain named circumstances.'" *Id*. at 542, 434 S.E.2d at 188 (quoting *State v. Phillips*, 300 N.C. at 682, 268 S.E.2d at 455).

We recognize that the Supreme Court has held that some specific areas of bias may be explored in depth. In *Ham v. South Carolina*, 409 U.S. 524, 35 L.Ed.2d 46 (1973), the Court held that a defendant must be able to inquire as to any racial bias a juror may have. However, the Court noted in *Ham* that not all factors for prejudice should be granted such absolute constitutional protection. The question of racial bias was necessary because it derived from a protection inherent in long-standing case law and the Fourteenth Amendment. However, it was not an abuse of the trial court's discretion to refuse to allow inquiry into other areas of bias, such as bias against people with beards. The Court noted its "inability to constitutionally distinguish possible prejudice against beards from a host of other similar prejudices." *Id*. at 528, 35 L.Ed.2d at 51. In *Mu'Min v. Virginia*, 500 U.S. 415, 114 L.Ed.2d 493 (1991), the Court again noted that a trial court has significant discretion in allowing inquiry into areas that might tend to show juror bias. *Id*. at 427, 114 L.Ed.2d at 507. In *Mu'Min*, the Court noted that in order for a question to be constitutionally compelled, the inability to ask the question must render the defendant's trial fundamentally unfair. *Id*. at 425-26, 114 L.Ed.2d at 506.

We conclude that, in permitting defendant to inquire generally into jurors' feelings about mental illness and retardation and other mitigating circumstances, he was given an adequate opportunity to discover any bias on the part of the juror. The only restriction enforced by the court was whether a juror could "consider" a specific mitigating circumstance in reaching a decision.
22 This restriction *22 was neither fundamentally unfair nor an abuse of the trial court's discretion. In addition, defendant was allowed to ask jurors if they would automatically vote for the death penalty in a first-degree murder case and if they could consider mitigating circumstances when

determining defendant's sentence. We believe this satisfies the constitutional requirements of *Morgan* and does not violate the concerns set forth in *Ham*.

We conclude that there was no error in sustaining the prosecutor's objections to the questions at issue, as the manner in which they were phrased was erroneous and attempted to stake out jurors.

[3] Defendant also argues that the trial court erred when it refused to allow defendant to ask two jurors if they would always sentence a person to death if he has a previous criminal record and has been convicted of first-degree murder. We note first that defendant was prohibited from asking this question of only one juror who sat on the case. While, initially, an objection to the question was sustained in regard to juror Munroe, defendant rephrased the question after laying a foundation, and the question was permitted.

During the questioning of juror Howell, the following colloquy took place:

> MR. GRADY [Defense Counsel]: Do you feel like everyone who has a previous criminal record and who's been convicted of first-degree murder should automatically be put to death?
>
> MR. HICKS [Prosecuting Attorney]: Objection.

COURT: Sustained.

Rephrase, please.

> MR. GRADY: Do you feel that a person should always be given the death penalty if he has a previous criminal record and has been convicted of first-degree murder?

MR. HICKS: Objection.

COURT: Sustained.

Rephrase.

> MR. GRADY: Do you feel like a person — Do you feel like you would convict a person — Strike that question.
>
> Do you feel like you would convict a person solely because of their past lifestyle?

23 JUROR: No. *23

Defendant now argues that the trial court committed reversible error and abused its discretion by preventing him from asking the specific question concerning a defendant with a prior criminal record. Defendant again begins his argument by stating that this is error under *Morgan v. Illinois*, ___ U.S. ___, 119 L.Ed.2d 492. Defendant argues that the question needed to be asked in order to determine if the juror would automatically vote for the death penalty and if she would consider mitigating evidence. This particular juror had already stated that she could consider mitigating circumstances in deciding whether to vote for life imprisonment or the death penalty and had also stated in response to a question that she did not feel that "in every case where somebody's been convicted of first-degree murder, that [she] would automatically sentence that person to death and not consider life imprisonment as an option." This is the extent of what is required by *Morgan*. Thus, the trial court did not err in sustaining the State's objection to the question as phrased.

Defendant also argues that the trial court's decision to sustain the objection to this question was arbitrary and an abuse of discretion. We conclude that the question as phrased was not proper; thus, it was not an abuse of discretion to sustain the objection to the question. As noted above, defendant was not barred from asking the question in any form, but instead was asked to "rephrase" the question, indicating that if properly put, it would be permissible. This was further illustrated by the *voir dire* of juror Munroe, who was questioned immediately after juror Howell. An objection to the same question, posed to juror

Munroe, was sustained, and defendant was asked to rephrase the question. Defendant then asked the juror if he would consider mitigating circumstances in reaching his decision. The juror said "yes," and defendant next asked, "So even if a person's been convicted of first-degree murder and has a past criminal record, you could still consider mitigating circumstances in deciding whether to vote for life imprisonment or the death penalty; is that correct?" There was no objection, and juror Munroe answered the question.

It seems clear that had defendant proceeded in this manner with juror Howell, he would have been allowed to ask the particular question at issue. However, the manner in which the question was asked here: "Do you feel that a person should always be given the death penalty if he has a previous criminal record and has been convicted of first-degree murder?" was nothing more than an attempt to determine what kind of verdict a juror would render under certain named circumstances not yet in evidence. *See State v. Yelverton*, 334 N.C. 532, *24 542, 434 S.E.2d 183, 188; *State v. Hill*, 331 N.C. 387, 404, 417 S.E.2d 765, 772. We conclude that there was no reversible error or abuse of discretion in not allowing defendant to ask juror Howell this one particular question in the manner attempted by defendant.

[4] In his third assignment of error, defendant argues that the trial judge should have allowed him to question jurors about their views on the meaning of life imprisonment and the possibility of parole. Defendant notes that he made a motion to be allowed to question jurors concerning parole eligibility.

Defendant concedes that the issue concerning questions and instructions on parole eligibility and the meaning of life imprisonment has repeatedly been decided against him by this Court. *See State v. Green*, 336 N.C. 142, 157, 443 S.E.2d 14, 23 (1994); *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 558 (1994); *State v. Syriani*, 333 N.C. 350, 399, 428 S.E.2d 118, 145; *State v. Robbins*, 319 N.C. 465, 521, 356 S.E.2d 279, 312, *cert. denied*, 484 U.S. 918, 98 L.Ed.2d 226 (1987). Defendant has failed to assert any convincing reason why this Court should depart from its prior decisions on the issue concerning the questioning of, or informing jurors about, the possible parole eligibility of defendant.

[5] Defendant next argues that the trial court led jurors who were opposed to the death penalty to say that they would be impaired in the performance of their duty and not be able to follow the law so that they could be challenged for cause, and persuaded jurors who favored the death penalty to say that they would not be impaired in the performance of their duties and could follow the law so that these jurors could not be challenged for cause. Defendant argues that this disparate treatment violated his right to an impartial and fair jury and was an abuse of discretion.

Defendant stresses once again that juror Clark should not have been excused for cause because her answers were equivocal as to whether she could impose the death penalty. Defendant argues that the trial judge questioned juror Clark in a way that elicited answers that would allow her to be challenged for cause. Defendant argues that the trial judge used leading questions that suggested a desired answer and tainted the reliability of this and other jurors' responses. Defendant also argues that the trial judge acted unfairly when he intervened during defendant's questioning of jurors who were strongly in favor of the death penalty. Defendant specifically complains of three occasions where the trial court in effect asked jurors being *25 questioned by the defendant if they could follow the law as given to them. [1] Defendant argues that the trial court's intervention in defendant's questioning defeated his ability to challenge these jurors for cause and thus represented an unevenhanded treatment of defendant.

1 One juror was asked if he could "accept and follow the law as given to you by the Court in this case" and if he was saying "that you would not consider life imprisonment under those circumstances, regardless of the instructions of the Court." Another juror was asked, "if the Court instructs you that you're to consider all of the evidence, would you follow those instructions?"

In *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991), the defendant argued that the trial court acted unfairly during jury selection by allowing the State's challenges for cause without further questioning, while denying defendant's challenges for cause on two occasions after inquiring whether the juror could follow the law as he was instructed. This Court, after determining that the trial court was merely clarifying and explaining the law to confused jurors and noting that the trial court allowed the defendant to continue questioning the juror after the court had intervened, held that such conduct on the trial judge's part was not error. *Id*. at 15, 405 S.E.2d at 188.

In the case at bar, the trial judge intervened on two occasions after the jurors indicated some confusion in understanding the question posed by defense counsel. On the third occasion brought into question by defendant, the trial court did not intervene during defendant's questioning but, after the juror had been challenged by the defendant for cause, asked him if he "would not consider life imprisonment under those circumstances, regardless of the instructions of the Court." The trial court was simply determining if the juror should be stricken for cause. His question to this juror was just as appropriate as those he asked of the jurors who were challenged for cause by the prosecutor. We conclude that in determining challenges for cause, the trial judge treated the prosecution and defense in the same manner and evidenced no partiality for one side or the other.

Our review of the record shows no "gross imbalance in the trial court's responses to defendant's inquiries." *State v. Artis*, 325 N.C. 278, 296, 384 S.E.2d 470, 480 (1989), *sentence vacated*, 494 U.S. 1023, 108 L.Ed.2d 604 (1990), on remand, 329 N.C. 679, 406 S.E.2d 827 (1991). The trial court treated jurors challenged by the State and the defense in the same manner, asking the jurors questions to determine if they would in fact be substantially impaired by their views for or against the death penalty and if they could follow
26 the law. The trial *26 court also intervened on occasion to clarify and explain the law when jurors were confused. We have carefully reviewed the entire record of jury selection for evidence of bias or unfair treatment and hold that there was none and that there was no abuse of discretion on the part of the trial court.

GUILT-INNOCENCE PHASE ISSUES

[6] Next, defendant argues that the trial court erred in not giving an instruction on second-degree murder because the evidence of premeditation and deliberation was equivocal. He argues that *Beck v. Alabama*, 447 U.S. 625, 65 L.Ed.2d 392 (1980), and *Schad v. Arizona*, ___ U.S. ___, 115 L.Ed.2d 555 (1991), stand for the proposition that a lesser included instruction was required in this case.

Defendant argues that evidence of intoxication, lack of evidence of a bad relationship between the parties, and the fact that he was mildly retarded and had an organic brain disorder establish the necessary elements to support a finding of second-degree murder. We disagree.

> The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

State v. Leroux, 326 N.C. 368, 378, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871, 112 L.Ed.2d 155 (1990). A trial court may not "premise a second-degree murder instruction on the possibility that the jury will accept some of the State's evidence while rejecting other portions of the State's case." *Id*. at 379, 390 S.E.2d at 322. Neither *Beck v. Alabama* nor *Schad v. Arizona* stands for the proposition that the lesser included offense should be more freely given in capital cases. In fact, they support the proposition that the lesser instruction should not be given indiscriminately. *See State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983) (language of United States Supreme Court in *Beck* supports the position that lesser offense instructions should not be given indiscriminately or automatically, but only when warranted by the evidence), *modified on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

First-degree murder is "the unlawful killing of a human being with malice and with premeditation
27 and deliberation." *State v. Bonney*, *27 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id*. at 635, 440 S.E.2d at 836.

A careful review of the transcript shows that each and every element of first-degree murder is supported by the evidence and that the evidence would not support a finding of second-degree murder. The evidence showed that defendant and the victim Pittman did not get along. There was evidence that defendant had recently struck Pittman and that she told Mark Smith never to bring defendant back to her house. This indicates that defendant and Pittman were not on friendly terms and had not just had a normal, peaceful conversation at Pittman's home prior to the shooting. In addition, neither victim did anything to legally provoke defendant, yet defendant pulled a semiautomatic weapon from under the seat and killed the victims with fragmentation bullets known for their destructive power. Defendant shot one victim, paused momentarily, stated "you too," and shot the second victim. Both victims were wounded multiple times. Pittman's body had thirty-four wounds, and Fipps' body had two. As defendant and Mark Smith left the crime scene, defendant asked Smith, "did I get them" both. Defendant proceeded to dispose of the evidence of the crime (the gun and ammunition) and then left town. Thus, there was sufficient evidence to show premeditation and deliberation.

Additionally, the evidence would not support an instruction for second-degree murder. First, we note that the evidence that defendant was mildly retarded and suffered from organic brain disorder was not presented to the jury until the sentencing phase, so it was not a factor that could support a second-degree murder instruction. In addition, the evidence did not indicate a lack of a bad relationship between Pittman and defendant. The evidence showed that Pittman and defendant may have had an earlier argument and that Pittman did not want defendant to come to her home again. Finally, the evidence that the defendant was so intoxicated that he could not premeditate or

deliberate was based solely on the fact that defendant chose not to drive a vehicle and had had something to drink that day. There was no evidence as to how much he had had to drink that
28 day, nor over what *28 period of time. The evidence did establish that defendant was not visibly intoxicated. This evidence would not support an instruction for second-degree murder.

We conclude that the trial court did not err by not instructing the jury on the lesser included offense of second-degree murder.

[7] Defendant next argues that the trial court erred in denying defendant's request for a mistrial after the prosecutor made a grossly improper argument referring to defendant's failure to testify.

During the prosecutor's closing argument to the jury, he stated:

> You [the jury] have to decide if you believe [Mark Smith]. He turned himself in. Did Sherman Skipper [defendant] turn himself in? He talked about how he was there. Did Sherman Skipper do that? He talked about the way Ailene Pittman slumped down —

Defendant immediately objected to this argument, and the statement was withdrawn and stricken. Defendant then asked for a mistrial. The trial court denied this request. The trial court then reiterated that defendant's objection was sustained and instructed the jury to "disregard the last argument" of the prosecutor.

Defendant now argues that the trial court erred because, when the court sustained defendant's objection, it did not specifically instruct the jury that defendant has a right not to testify and that defendant's failure to testify cannot be held against him in any way. It is well established that a prosecutor may not refer to defendant's failure to testify because this "'violates an accused's constitutional right to remain silent.'" *State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1991) (quoting *State v. Randolph*, 312 N.C. 198, 205-06, 321 S.E.2d 864, 869 (1984)).

When the State comments on a defendant's failure to testify, the improper comment is "cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness." *State v. McCall*, 286 N.C. 472, 487, 212 S.E.2d 132, 141 (1975). In *McCall*, the Court noted that an instruction to the jury before it began deliberating — that defendants had no burden and were not required to produce evidence, testimony, or witnesses — was insufficiently curative because it was an incomplete statement of the pertinent rule of law in that it neglected to advise the jury that a defendant's failure to testify created no
29 presumption against him. *Id*. *29

In *State v. Williams*, 305 N.C. 656, 675, 292 S.E.2d 243, 255, *cert. denied*, 459 U.S. 1056, 74 L.Ed.2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed.2d 1031 (1983), this Court concluded that a court's instructions cured any error in a prosecutor's comments about a defendant's failure to testify. In *Williams*, the court immediately sustained the defendant's objection to the prosecutor's comment and instructed the jury not to consider any reference to this proposition. "The court later instructed the jury that defendant's decision not to testify created no presumption against him and was not to influence [its] decision in any way." *Id*.

In the case at bar, the trial court sustained defendant's objection, and the comments were both withdrawn and stricken from the record. The trial court then instructed the jury to "disregard the last argument" of the prosecutor. In addition, unlike *McCall*, during jury instructions, the trial court here also charged that "the defendant in this case has not testified. The law of North Carolina gives him this privilege. This same law also

assures him that his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in any way."

We conclude that the prosecutor's withdrawal and striking of his statement and the trial court's further instruction cured any possible error created by the prosecutor's statement. *See State v. Williams*, 305 N.C. at 675, 292 S.E.2d at 255; *see also State v. Monk*, 286 N.C. 509, 516, 212 S.E.2d 125, 131 (1975) (improper comment on defendant's failure to testify may be cured by an instruction from the court that the argument is improper, "followed by prompt and explicit instructions to the jury to disregard it"); *State v. Lindsay*, 278 N.C. 293, 295, 179 S.E.2d 364, 365 (1971) (any error caused by prosecutor's remarks regarding defendant's failure to testify was removed by the trial court's "prompt and explicit instructions to the jury to disregard the reference").

Assuming *arguendo*, however, that the trial judge's instructions immediately after he sustained the objection and during the jury instruction were insufficient to cure the error, we conclude that the evidence of guilt in this case was so overwhelming that the error was harmless beyond a reasonable doubt. Defendant attempts to argue that such an error may never be harmless beyond a reasonable doubt. In *State v. Barber*, 317 N.C. 502, 511, 346 S.E.2d 441, 447 (1986), we concluded that even if arguments by a prosecutor regarding a defendant's failure to testify were improper, the trial court's
30 decision to overrule *30 the objection was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt. We conclude that the uncontradicted evidence that defendant shot the two victims, disposed of the evidence, and then fled from the state makes the statement of the prosecutor harmless beyond a reasonable doubt.

[8] Defendant next argues that the trial judge erred when he sustained the prosecutor's objections to defendant's cross-examination of a witness regarding the date of the witness' prior criminal conviction, punishment received for the conviction, and whether he had violated the terms of his probationary sentence. A review of the record indicates that the only question defendant asked for which he did not receive an answer at some time in the cross-examination was the date the actual common law forgery occurred.

Rule of Evidence 609(a) allows a party to attack the credibility of a witness with "evidence that he has been convicted of a crime punishable by more than 60 days confinement." N.C.G.S. § 8C-1, Rule 609(a) (1992). However, "[t]he permissible scope of inquiry into prior convictions for impeachment purposes is restricted . . . to the name of the crime, the time and place of the conviction, and the punishment imposed." *State v. Lynch*, 334 N.C. 402, 409, 432 S.E.2d 349, 352 (1993). Defendant here attempted to ask on what date the crime occurred.

> Strong policy reasons support the principle that ordinarily one may not go into the details of the crime by which the witness is being impeached. Such details unduly distract the jury from the issues properly before it, harass the witness and inject confusion into the trial of the case.

State v. Finch, 293 N.C. 132, 141, 235 S.E.2d 819, 824 (1977) (determined to apply to post-Rules cases in *State v. Garner*, 330 N.C. 273, 288-89, 410 S.E.2d 861, 870 (1991)).

A close review of the record indicates that the witness told defense counsel, without objection, that he had been convicted of violating probation and common law forgery. The witness also told defense counsel that he had received five years' probation for the common law forgery crime, which involved four counts of common law forgery. Defendant argues that he sought to elicit the nature of the witness' prior criminal offenses, the dates they were committed, the punishment he received for them, and the witness' compliance with the terms of his probation. However, the

31 record indicates that *31 the only question defendant asked that the witness never gave an answer to was whether he had committed one particular act of common law forgery on a particular date. Defendant did not ask any specific questions about the nature of the witness' prior criminal offenses, beyond the name of the crimes. Nor did defendant ask the punishment that the witness had received for his probation violation. Also, defendant never asked the terms of the witness' probation.

We conclude that the trial court did not err in sustaining the prosecutor's objection to the question of when a particular act for which the witness was later convicted was committed.

Assuming *arguendo*, however, that defendant should have been allowed to ask the witness the date on which he committed a specific crime, we conclude that the error was harmless beyond a reasonable doubt. The jury knew when the witness was tried for his crime, the date he was convicted, and the name of the crime that he had been convicted of; the jury also knew that the witness had received five years' probation for this crime. We fail to see how the actual date on which one count of the crime occurred could add any impeachment value to the information about the prior conviction. Thus, we conclude that the failure to allow this question was harmless beyond a reasonable doubt.

[9] Defendant next argues that the court erred by coercing him into introducing a piece of evidence, the result of which was that he lost his right to open and close the final argument. We conclude that this argument is without merit.

Rule 10 of the General Rules of Practice for the Superior and District Courts states that "if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." In *State v. Hall*, 57 N.C. App. 561, 291 S.E.2d 812 (1982), Judge (now Justice) Webb noted:

> [W]e believe the proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of the witness.

Id. at 564, 291 S.E.2d at 814.

Defendant attempted to offer a photograph of the crime scene into evidence to help "illustrate" the witness' testimony during cross-examination. The prosecutor objected to the use of this photograph 32 *32 before the jury unless introduced into evidence. The court sustained the objection, and defendant immediately asked to introduce the photograph into evidence. The trial court asked defendant if he understood that he was now offering evidence. Defendant responded that he understood, and only then did the court allow the photograph to be received into evidence. A review of the transcript reveals that the trial court in no way coerced defendant to introduce the photograph.

Additionally, it is clear that the photograph was actually introduced into evidence. As noted above, defendant offered the photograph into evidence because the witness said it would help him illustrate his testimony. The photograph was then shown to the jury while the witness answered questions posed by defendant. In addition, defendant used the photograph to impeach the witness. We conclude that the photograph was actually offered into evidence; thus, defendant lost his right to open and close jury argument. *See State v. Reeb*, 331 N.C. 159, 180, 415 S.E.2d 362, 374 (1992); *State v. Hinson*, 310 N.C. 245, 257, 311 S.E.2d 256, 264, *cert. denied*, 469 U.S. 839, 83 L.Ed.2d 78 (1984); *State v. Knight*, 261 N.C. 17, 30, 134 S.E.2d 101, 109 (1964).

Finally, we note that even if the photograph had not been introduced into evidence, defendant would still have lost his right to open and close

jury argument because he introduced three other pieces of evidence during the trial: two depositions and a diagram of the crime scene.

We conclude that defendant's assignment of error is totally without merit.

[10] In defendant's next assignment of error, he argues that the trial court erred in instructing the jury that it could infer premeditation and deliberation from circumstances such as "lack of provocation of the victim." Defendant argues that this instruction misled the jury because it did not explain the difference between legal and ordinary provocation, it constituted an impermissible expression of judicial opinion on the evidence, and it tended to impermissibly shift the burden of proof to defendant on an element of an offense. We note that defendant did not object to the instruction at trial; thus, this issue will be analyzed under a "plain error analysis." *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). *33

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In *State v. Handy*, 331 N.C. 515, 527, 419 S.E.2d 545, 551 (1992), this Court addressed the same issues presented by the defendant here. In *Handy*, we concluded that defendant's assignment of error was without merit; we reach the same conclusion in this case.

First, we note that the trial court in this case properly instructed the jury that the State had the burden of proving beyond a reasonable doubt each and every element of first-degree murder, including the elements of premeditation and deliberation. The trial court never instructed that premeditation should be presumed and never expressed any opinion as to whether the State had proven lack of provocation. *See State v. Fowler*, 285 N.C. 90, 96, 203 S.E.2d 803, 807 (statement that jury may consider evidence of the absence of provocation in determining whether there was premeditation and deliberation does not amount to a judicial expression of opinion that there was no evidence of provocation), *sentence vacated*, 428 U.S. 904, 49 L.Ed.2d 1212 (1976).

In this case, the trial court instructed the jury with regard to premeditation pursuant to the Pattern Jury Instructions, stating:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the lack of provocation by the victim; the conduct of the defendant before, during, and after the killing; threats and declarations of the defendant; the brutal or vicious circumstances of the killing; and the manner in which or the means by which the killing is done.

In addition, the trial court instructed the jury that defendant did not act with deliberation if his intent to kill was formed "under the influence of some suddenly aroused violent passion."

We conclude that the instructions set forth by the trial court correctly placed the burden of proving premeditation and deliberation on the State. We also conclude that the instruction, that lack of provocation can be considered, could not have confused the jury. The jury could not have been confused about the difference between "adequate" or "legal" provocation and ordinary provocation because defendant was charged only with first-degree murder. No instruction was given as to second-degree murder or voluntary manslaughter; thus, specific definitions for provocation were not before the jury. Contrary to defendant's assertions, the jury could not have mistakenly concluded that defendant acted with premeditation and *34 deliberation simply because the evidence showed that defendant did not act in a heat of passion following adequate or legal provocation. The jury was specifically instructed that it could not find defendant guilty of premeditated and deliberated murder if he formed his intent to kill under the influence of some suddenly aroused violent passion. *See State v. Reid*, 335 N.C. 647, 669, 440 S.E.2d 776, 788 (1994); *State v. Handy*, 331 N.C. at 527, 419 S.E.2d at 551.

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[11] Defendant also argues under this assignment of error that the premeditation and deliberation instruction should not have included the statement that "threats" of the defendant may be inferred to indicate premeditation and deliberation, as there was no evidence that defendant ever threatened the victims. We note again that this issue will be analyzed under plain error analysis because no objection was made to the instruction at trial. Thus, "defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different verdict." *State v. Thomas*, 332 N.C. 544, 563, 423 S.E.2d 75, 86 (1992).

In *State v. Lampkins*, 283 N.C. 520, 196 S.E.2d 697 (1973), this Court determined that "[a] trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence." *Id.* at 523, 196 S.E.2d at 699. We note that while the evidence here may not have supported the instruction regarding consideration of "threats" of defendant, this was one word in the middle of eleven pages of detailed jury instructions. The evidence here supported a finding of premeditation and deliberation based on the fact that defendant asked Smith to take him to the victims' home, talked to one of the victims, then got in his truck, pulled a semiautomatic rifle loaded with fragmentation bullets from under the seat, killed one victim, stated "you too," and killed the second victim. He then asked Smith, "did I get them," and proceeded to get rid of the evidence.

Defendant has not demonstrated that, absent the word "threats" in the instruction, the jury probably would have reached a different verdict. We hold that defendant has not met his burden under the plain error rule. *See State v. Faison*, 330 N.C. 347, 363, 411 S.E.2d 143, 152 (1991).

In conclusion, we hold that the inclusion of the phrase "lack of provocation" in the instruction on premeditation and deliberation did not confuse the jury, reflect an opinion of the trial court, or impermissibly shift the burden of proof to defendant. Additionally, we *35 conclude that if it was error to instruct the jury that "threats" of the defendant may be considered an inference of premeditation and deliberation, it was not plain error.

[12] Defendant next argues that the trial court erred in admitting seven autopsy photographs into evidence over defendant's objection. Defendant argues that the photographs had no probative value as the fact that the victims were killed by multiple gunshots wounds from a semiautomatic rifle and that defendant was involved in the shooting was not controverted. In the alternative, defendant argues that any probative value of the photos is outweighed by the prejudicial effect. We conclude that neither of these arguments is valid.

"Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). Generally, photographs taken during an autopsy are admissible. *State v. Barnes*, 333 N.C. 666, 678, 430 S.E.2d 223, 230, *cert. denied*, ___ U.S. ___, 126 L.Ed.2d 336 (1993). In a first-degree murder case, autopsy photographs are relevant even when such factors as the identity of the victim or the cause of death are not disputed. *See State v. Kyle*, 333 N.C. 687, 701, 430 S.E.2d 412, 420 (1993); *State v. Barnes*, 333 N.C. at 678, 430 S.E.2d at 229; *State v. Bearthes*, 329 N.C. 149, 161, 405 S.E.2d 170, 177 (1991).

"A plea of not guilty places at issue all of the facts alleged in the indictment." *State v. Wall*, 304 N.C. 609, 621, 286 S.E.2d 68, 75 (1982). In this case, the State was attempting to prove first-degree murder by premeditation and deliberation. "Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence." *State v.*

Gladden, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 870, 93 L.Ed.2d 166 (1986). The nature and number of the wounds and evidence that the murders were done in a brutal manner are circumstances from which premeditation and deliberation can be inferred. *Id.* at 431, 340 S.E.2d at 693.

The State introduced into evidence seven autopsy photographs showing different areas of the bodies where the victims had been struck by bullets. Two of the photographs showed wounds suffered by Ailene Pittman, and five of the photographs showed the wounds of Nelson Fipps. The State introduced the photographs during the testimony of the pathologist who performed the autopsy, to
36 help illustrate *36 his testimony. Upon being admitted, the photographs were in fact used to illustrate and describe the numerous wounds and to show the tracks of the wounds. We conclude that the photographs were relevant and had substantial probative value.

Concluding that the photographs were relevant and probative, we turn to defendant's second argument, that the prejudicial effect of the photographs outweighed the probative value.

> Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each . . . lies within the discretion of the trial court. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

State v. Hennis, 323 N.C. at 285, 372 S.E.2d at 527 (citation omitted).

We have reviewed the photographs and conclude that they were relevant, probative, and not excessive, that they helped to illustrate the pathologist's testimony, and that they could contribute evidence for finding premeditation and deliberation. We conclude that there was no abuse of discretion in the trial court's admitting these photographs. This assignment of error is without merit.

Defendant next argues that the trial court should have instructed the jury regarding voluntary intoxication. Defendant argues that this instruction should be given because there was evidence that defendant had consumed alcohol on the day of the murders.

It is "well established that an instruction on voluntary intoxication is not required in every case in which a defendant claims that he killed a person after consuming intoxicating beverages or controlled substances." *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992). This Court has repeatedly held that in order to be entitled to an instruction on voluntary intoxication, the defendant must produce evidence that would support a conclusion by a judge that defendant was so intoxicated that he could not form a deliberated and premeditated intent to kill. *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988); *see also State v. Shoemaker*, 334 N.C. 252, 272, 432 S.E.2d 314, 324 (1993); *State v. Vaughn*, 324 N.C. 301, 308, 377 S.E.2d 738, 741 (1989). "The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a
37 deliberate *37 and premeditated purpose to kill." *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978) (citations omitted); *see also State v. McQueen*, 324 N.C. 118, 141, 377 S.E.2d 38, 51 (1989); *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987). Evidence of mere intoxication is not enough to justify the instruction. *State v. Mash*, 323 N.C. at 346, 372 S.E.2d at 536.

[13] Defendant argues that requiring him to meet this burden violates his due process rights because it keeps the jury from considering some evidence that may affect its determination of defendant's

ability to premeditate and deliberate. Defendant's argument is without merit. While defendant must satisfy a high burden in order to be given the benefit of the defense of voluntary intoxication, the jurors are not restricted from considering the evidence of intoxication in determining if the State satisfied them beyond a reasonable doubt as to all elements of first-degree murder, including premeditation and deliberation and intent to kill.

Defendant cites *Martin v. Ohio*, 480 U.S. 228, 94 L.Ed.2d 267 (1987), to support his argument. However, we conclude that Martin actually supports the conclusion that there is no due process violation present here. In *Martin*, the Court considered whether it was error to require a defendant to prove self-defense by a preponderance of the evidence. The Court held that it was not error but noted that

> [i]t would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, i.e., that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such instruction would relieve the State of its burden and plainly run afoul of Winship's mandate.

Martin v. Ohio, 480 U.S. at 233-34, 94 L.Ed.2d at 274 (citing *In re Winship*, 397 U.S. 358, 364, 25 L.Ed.2d 368, 375 (1970)).

In the case at hand, the jury was not instructed that evidence of intoxication could not be considered in determining whether there was reasonable doubt about the State's case. The jury was not told that the intoxication evidence must be set aside for all purposes unless the defendant satisfied the burden of production necessary to instruct on voluntary intoxication. We conclude that the State's burden in proving first-degree murder beyond a reasonable doubt is in no way reduced by the burden of production defendant must 38 satisfy in *38 order to receive a voluntary intoxication instruction. Thus, there is no due process violation.

[14] As an alternative argument, defendant states that the evidence here justified an instruction on voluntary intoxication as the evidence unquestionably showed that defendant's capacity to think and plan was impaired due to voluntary intoxication. In determining if the instruction should have been given, we review the evidence in the light most favorable to defendant. *State v. Vaughn*, 324 N.C. at 309, 377 S.E.2d at 742. The evidence in this case shows that defendant had been drinking for some time during the day of the murder and that he did not want to drive because he had been drinking. That is the extent of the evidence of intoxication presented in the guilt-innocence phase. [2] There was no evidence that defendant looked drunk or that he was having difficulty speaking or walking. See *id*. (evidence that defendant was intoxicated and had trouble walking, but no evidence that he behaved inappropriately or that his statements were irrational or incoherent or that he was unaware of what was going on around him; evidence insufficient to require instruction on voluntary intoxication). There was also no evidence in this case as to how much defendant had actually drunk.

> [2] In his argument to the Court, defendant states that evidence of defendant's long history of alcohol abuse and his unsuccessful institutionalized treatment for addiction support an instruction on voluntary intoxication. However, a close review of the transcript shows that this evidence was not presented to the jury until the sentencing phase, so it cannot be considered here.

We conclude that the evidence in this case was not sufficient to require an instruction on voluntary intoxication. *See State v. Baldwin*, 330 N.C. 446,

463, 412 S.E.2d 31, 41 (1992) (evidence that defendant drank five or six beers and consumed marijuana not sufficient to require instruction).

Determining that the standard of production required of defendant before allowing an instruction on voluntary intoxication does not violate due process and determining that the facts of this case did not require an instruction on voluntary intoxication, we conclude that defendant's assignment of error is without merit.

SENTENCING PHASE ISSUES

Defendant argues that the trial court erred when it sustained the prosecutor's objection to two of defendant's questions during the redirect examination of defendant's brother, Kenneth
39 Skipper. *39 Kenneth Skipper had been shot in the back by the defendant at an earlier date. Evidence of this assault had been introduced by the State earlier in the sentencing proceeding. Kenneth Skipper testified for defendant that he felt at fault for the shooting because he had attacked his brother and that he had forgiven defendant for shooting him. On cross-examination, the prosecutor asked Kenneth Skipper if he had contacted another witness, defendant's ex-wife (who had also been attacked by defendant) and told her to testify that it was her fault that defendant attacked her. Kenneth Skipper denied making this statement to defendant's ex-wife, and no evidence was ever presented that such a statement was in fact made. On redirect examination, defendant attempted to ask the witness (1) if he was telling the truth, and (2) for what church he was a minister.

[15] Defendant argues that he should have been allowed to ask these questions to bolster the witness' credibility, which had been undermined by the State's questions. Defendant argues that by precluding him from asking these questions, the trial court prevented him from offering competent evidence that would have bolstered the mitigating effect of the witness' other testimony. We conclude that defendant's argument is without merit.

The trial correctly sustained the prosecutor's objection to the question, "Are you telling this jury the truth?" because the credibility of a witness is for a jury to decide, *State v. Ford*, 323 N.C. 466, 469, 373 S.E.2d 420, 421 (1988). Thus, whether this witness, who was affirmed to tell the truth, was actually telling the truth was something the jury was to decide, not the witness.

[16] In regard to the second question concerning the witness being a minister to a particular church, we note that redirect examination is limited to information elicited in cross-examination. Questions asked on redirect should not go beyond matters discussed during cross-examination. *See State v. Felton*, 330 N.C. 619, 633, 412 S.E.2d 344, 353 (1992); *State v. Jolly*, 332 N.C. 351, 366, 420 S.E.2d 661, 670 (1992). In this case, the second question at issue went far beyond the scope of cross-examination, which made no mention whatsoever of the witness' profession. Thus, the trial court correctly sustained the prosecutor's objection.

In any case, there was no error with regard to the second question because the witness actually answered the defendant's question despite the prosecutor's objection and the trial court's sustaining of the objection. The prosecutor did not
40 move to strike the answer, and *40 the trial court did not admonish the jury to disregard the answer. "Thus, defendant effectively received the benefit of the evidence sought . . ., and he has no . . . cause for complaint on appeal." *State v. Pinch*, 306 N.C. 1, 14, 292 S.E.2d 203, 216, *cert. denied*, 459 U.S. 1056, 74 L.Ed.2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed.2d 1031 (1983), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994).

[17] Defendant also argues that even if these questions were impermissible under traditional evidentiary standards, they should have been permitted under the relaxed evidentiary standard of the penalty phase of a capital proceeding in

order to avoid any violation of defendant's due process rights. We conclude that there is no due process concern here as there was in *State v. Barts*, 321 N.C. 170, 362 S.E.2d 235 (1987), *Green v. Georgia*, 442 U.S. 95, 60 L.Ed.2d 738 (1979), and *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed.2d 297 (1973). In those cases, the evidence at issue was written and oral hearsay statements that did not fit under traditional hearsay exceptions but which contained some evidence indicating they were credible statements. More importantly for due process consideration, the evidence at issue in these cases all directly reflected on defendant's guilt or involvement in the crime for which he had been convicted. *See Barts*, 321 N.C. at 179, 362 S.E.2d at 240 (confession of other person that he actually killed the person defendant was convicted of killing was at issue); *Green*, 442 U.S. at 96, 60 L.Ed.2d at 740 (statement of witness that he was told that another person shot and killed the victim after telling defendant to run an errand was at issue); *Chambers*, 410 U.S. at 289, 35 L.Ed.2d at 305 (evidence at issue was that someone else had made a sworn written confession to crime and told three people he had committed crime for which defendant was convicted). The evidence that defendant addresses in this assignment of error is not of the same degree of importance as the evidence the defendants attempted to present in *Barts, Green, and Chambers*. We conclude that defendant's due process rights were not violated when the trial court sustained the prosecutor's objections to the particular questions at issue.

Finally, even if the trial court erred by sustaining the objection to these two questions, the error was harmless beyond a reasonable doubt. On redirect, defendant was allowed to elicit the fact that the witness was a minister. The witness had already affirmed that he would tell the truth; thus, the
41 question, "Are you telling this jury the *41 truth?" was redundant. We also conclude that determining the name of the church that the witness worked for does not bolster the witness' credibility. Thus, any error made by the trial court was harmless beyond a reasonable doubt.

[18] Defendant next argues that the trial court erred when it did not give peremptory instructions on all the mitigating circumstances for which the factual predicate was uncontradicted. Defendant notes that he made a written request that peremptory jury instructions be given as to each mitigating circumstance he submitted to the court. Defendant argues that he should have received peremptory instructions as to all uncontroverted mitigating circumstances, both statutory and nonstatutory.

While we agree that a defendant is entitled to peremptory instructions for uncontradicted mitigating circumstances, whether statutory or nonstatutory, we conclude that defendant requested that peremptory instructions be given only for the mitigating circumstances dealing with mental and emotional impairment and defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the law. As defendant did not request that peremptory instructions be given for any other circumstances, the trial court did not err in not giving such instructions. *See State v. Green*, 336 N.C. 142, 174, 443 S.E.2d 14, 33; *State v. Gay*, 334 N.C. 467, 493, 434 S.E.2d 840, 854 (1993). The trial judge should not "be required to determine on his own which mitigating circumstance is deserving of a peremptory instruction in defendant's favor. In order to be entitled to such an instruction defendant must timely request it." *State v. Johnson*, 298 N.C. 47, 77, 257 S.E.2d 597, 618-19 (1979).

As noted above, defendant made a general request that peremptory instructions be given as to each mitigating circumstance. However, when the trial court questioned him as to the meaning of this request, defendant responded:

> We are requesting peremptory instructions, especially as to those mitigating factors, the two statutory . . . mitigating factors dealing with mental and emotional impairment and also dealing with the defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to law.

There was then a discussion about the evidence for and against these particular circumstances. At the
42 conclusion of this discussion, the *42 following colloquy occurred between defense counsel and the trial court:

> COURT: Let me ask you this. Do I understand you correctly that you're asking for a peremptory instruction on the first two mitigating circumstances?

[DEFENSE COUNSEL]: Yes, sir.

> COURT: You are not asking for a peremptory instruction on the remainder?
>
> [DEFENSE COUNSEL]: No, sir. We recognize we're probably not entitled to it on the other.
>
> COURT: All right. So you're only asking for peremptory instructions on the first two?

[DEFENSE COUNSEL]: Yes, sir.

Defendant did not ask that peremptory instructions be given as to the last statutory mitigating circumstance, regarding defendant's age, nor did he ask that peremptory instructions be given for any of the nonstatutory circumstances. Now, however, defendant argues that peremptory instructions should have been given as to the third statutory mitigating circumstance and for at least eight of the thirteen nonstatutory mitigating circumstances.

We conclude that defendant did not request that peremptory instructions be given for any circumstances except the circumstances that defendant was under the influence of a mental or emotional impairment when he committed the murder and that defendant was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. We will not require the trial judge "to determine on his own which mitigating circumstance is deserving of a peremptory instruction in defendant's favor." *Johnson*, 298 N.C. at 77, 257 S.E.2d at 618-19. Therefore, we hold that the trial judge did not err when he gave peremptory instructions pursuant only to defendant's specific request.

[19] Defendant next argues that the trial court erred by not instructing the jury that defendant would not be eligible for parole for twenty years if given a life sentence and that defendant could serve two life sentences consecutively, and thus not be eligible for parole for forty years. Defendant notes that he made a written request during the charge conference that such an
43 instruction be given during the *43 jury instructions. Defendant also argues that such an instruction definitely should have been given when the jury sent a note to the judge asking how long defendant would serve before he would be eligible for parole if given life and whether he would serve two life sentences concurrently.

To begin, the trial court correctly denied defendant's request to include in the jury charge the instruction that life means that defendant may be eligible for parole in twenty years and that the court has the discretion to determine that defendant's sentences be served consecutively. This Court has held that a jury may be instructed about the question of parole and meaning of life imprisonment, if such question arises during jury deliberation. *State v. Robinson*, 336 N.C. 78, 123, 443 S.E.2d 306, 329 (1994). However, we have not held that a jury should be instructed upon these issues absent such an inquiry. Such an instruction to the jury "would unnecessarily

present the issue of parole to the jury, absent any indication that the jury was considering that possibility." *Id*. at 124, 443 S.E.2d at 329.

In this case, the jury sent out a question asking about parole eligibility and concurrent sentences. The trial court specifically instructed the jury pursuant to *State v. Conner*, 241 N.C. 468, 85 S.E.2d 584 (1955), and *State v. Robbins*, 319 N.C. 465, 518, 356 S.E.2d 279, 310, telling the jury that eligibility for parole is not a proper matter for the jury and that in considering life imprisonment, "you should determine the question as though life imprisonment means exactly what the statute says: imprisonment for life in the state's prison." The trial court also correctly instructed that concurrence of sentences is not a proper matter for the jury to consider.

We conclude that defendant has failed to assert a convincing basis for this Court to abandon its prior decisions stating that instructions about parole eligibility should not be given. *See State v. Green*, 336 N.C. at 157, 443 S.E.2d at 23. It is true that the General Assembly has recently amended N.C.G.S. § 15A-2002 to require the trial court to instruct the jury during a capital sentencing proceeding concerning the parole eligibility of a defendant sentenced to life. N.C.G.S. § 15A-2002 (Act of 23 March 1994, ch. 21, sec. 5, 1994 N.C. Extra Sess. Serv. 71). This statute is to become effective 1 October 1994. Act of 26 March 1994, ch. 24, sec. 14(b), 1994 N.C. Extra Sess. Serv. 106. However, the General Assembly has decided that the legislation is to be applied prospectively; thus, it does not apply in this case. *See* N.C.G.S. § 15A-2002 official commentary. *44

We are aware of the recent United States Supreme Court decision in *Simmons v. South Carolina*, ___ U.S. ___, ___ L.Ed.2d ___, 1994 WL 263483 (1994), which held that it was error to refuse to give a proposed jury instruction that under state law, defendant was ineligible for parole. We do not consider that case apposite because defendant in this case, if given a life sentence, would eventually have been eligible for parole under North Carolina law. *See* N.C.G.S. § 15A-1371(a1) (1988).

[20] Defendant also argues that in light of the prosecutor's argument stressing defendant's potential for future dangerousness, the instruction on parole eligibility was especially necessary as mitigating evidence. We note that "parole eligibility is not mitigating since it does not reflect on 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *State v. Green*, 336 N.C. at 158, 443 S.E.2d at 23 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 4, 90 L.Ed.2d 1, 6 (1986)).

We conclude that defendant's assignment of error is without merit.

[21] Defendant next argues that the trial court erred in not submitting the mitigating circumstance that defendant had no significant history of prior criminal activity. Defendant requested on three occasions that the instruction not be given. The State presented evidence that defendant had been convicted of assault with a deadly weapon inflicting serious bodily injury in 1978, 1982, and 1984.

A "trial court is required to determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988). The trial court has no discretion as to whether to submit statutory mitigating circumstances when evidence is presented in a capital case which may support a statutory circumstance. *State v. Lloyd*, 321 N.C. 301, 311, 364 S.E.2d 316, 323, *sentence vacated on other grounds*, 488 U.S. 807, 102 L.Ed.2d 18, *on remand*, 323 N.C. 622, 374 S.E.2d 277 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L.Ed.2d 601 (1990), *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991). However, the trial court is not required to instruct on a mitigating circumstance unless substantial

evidence supports the circumstance. *State v. Laws*, 325 N.C. 81, 110, 381 S.E.2d 609, 626 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L.Ed.2d 603 (1990), *on remand*, 328
45 N.C. 550, 402 S.E.2d 573, *cert.* *45 *denied*, 502 U.S. 876, 116 L.Ed.2d 174, *reh'g denied*, 502 U.S. 1001, 116 L.Ed.2d 648 (1991).

We conclude that defendant's record of three violent felonies, similar in nature to the crime for which he was being sentenced, in the twelve years preceding this particular crime illustrated that defendant did have a significant record. We note that "it is not merely the number of prior criminal activities, but the nature and age of such acts that the trial court considers in determining whether by such evidence a rational juror could conclude that this mitigating circumstance exists." *State v. Artis*,
46 325 N.C. 278, 314, 384 S.E.2d 490, 470.

In many cases, we have held that the trial court did not err in failing to submit this circumstance ex mero motu. *See State v. Jones*, 336 N.C. 229, 247, 443 S.E.2d 48, 56-57 (1994) (defendant used illegal drugs, broke into a convenience store six or seven times, and broke into a pawn shop and stole guns); *State v. Robinson*, 336 N.C. 78, 119, 443 S.E.2d 306, 326 (defendant used and dealt drugs, had pled guilty to a robbery, carried a pistol, and used another man's driver's license as identification); *State v. Stokes*, 308 N.C. 634, 653-54, 304 S.E.2d 184, 196 (1983) (defendant engaged in five incidents of theft and possessed, used, and sold marijuana).

"We do not find it necessary to engage in any further comparison between this case and those cases in which we have determined the propriety of the submission or refusal to submit the circumstance at issue." *State v. Robinson*, 336 N.C. at 119, 443 S.E.2d at 326. We hold that based on the evidence of defendant's continuous involvement in violent criminal activities, similar to that for which he was sentenced in this case, no rational juror could have found that defendant had "no significant history of prior criminal activity." The jury in fact specifically found, as an *aggravating* circumstance, that defendant had been previously convicted of a felony involving the use or threat of violence to a person. We fail to see how a rational juror could have then found that this criminal history was also a mitigating circumstance. The trial court did not err in failing to submit this circumstance for the jury's consideration.

[22] Next, defendant argues that the trial court erred when giving its instructions regarding the statutory mitigating circumstance of age. The trial court instructed the jury:

> (3) Consider whether the age of the defendant at the time of this murder is a mitigating factor.
>
> *46
>
> The mitigating effect of the age of the defendant is for you to determine from all the evidence and circumstances which you find from the evidence.
>
> If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreman write, "Yes," in the space provided after this mitigating circumstance on the issues and recommendation form.
>
> If none of you finds this circumstance to exist, you would so indicate by having your foreman write, "No," in that space.

These instructions are pursuant to the North Carolina Pattern Jury Instructions. N.C.P.I. — Crim. 150.10 (1993). Defendant, however, argues that these instructions allowed the jury to give the statutory mitigating circumstance no weight in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 71 L.Ed.2d 1 (1982). Defendant bases his argument on the language that "the mitigating

effect of the age of the defendant is for you to determine." We conclude that defendant's argument is without merit.

We begin by noting that in regard to statutory mitigating circumstances, jurors are instructed that if they find a statutory mitigating circumstance to exist, then they must consider the circumstance in their balancing of aggravators and mitigators. However, jurors are instructed to indicate a finding of a particular circumstance only if the preponderance of the evidence persuades a juror that the circumstance exists. *See State v. Kirkley*, 308 N.C. 196, 224, 302 S.E.2d 144, 160 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988); N.C.P.I. Crim — 150.10. Additionally, the actual weight that a juror chooses to give to such a circumstance is up to the particular juror. *State v. Craig*, 308 N.C. 446, 460, 302 S.E.2d 740, 749, *cert. denied*, 464 U.S. 908, 78 L.Ed.2d 247 (1983). The only requirement is that the jury may not "refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. at 114, 71 L.Ed.2d at 11. The jurors "may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Id*. at 114-15, 71 L.Ed.2d at 11.

We conclude that, in this case, the language "mitigating effect" did not allow the jury to "refuse to consider, *as a matter of law,"* the evidence about age as a mitigating circumstance. The instruction clearly states that age should be considered. However, the weight to *47 be given such circumstance is for the jury to decide based on its consideration of all the facts and circumstances found from the evidence.

Defendant argues that it is clear that the jury interpreted this instruction to mean that it could have "refuse[d] to consider" this circumstance because the evidence in support of the circumstance was so strong, yet the jury did not find that the circumstance existed. We conclude that this analysis is erroneous.

Defendant's chronological age was forty-eight. Chronological age standing alone is usually not determinative of the existence of this circumstance. *State v. Hill*, 331 N.C. 387, 414, 417 S.E.2d 765, 778 (chronological age of fifty-four standing alone does not entitle defendant to have this (age) mitigating circumstance submitted). In this case, evidence was presented that defendant had a mental age of a six-year-old. However, there was also evidence that defendant had been married, ran his own business, and supported himself and his children. We conclude that based on these facts, the jury was not required to find that this circumstance existed. *See State v. Turner*, 330 N.C. 249, 268, 410 S.E.2d 847, 858 (1991) (jury not required to accept circumstance where defendant was twenty-two years old; evidence of very bad childhood affecting his development; and evidence that defendant married, maintained employment, and had a prior criminal history indicating maturity). We also note that defendant acknowledged that the evidence as to this circumstance was controverted. Defendant's counsel told the trial court that he did not believe a peremptory instruction would be appropriate for this circumstance.

Holding that the instruction given to the jury was correct and that the evidence was contradictory as to this mitigating circumstance, we conclude that defendant's assignment of error is without merit.

[23] Next, defendant argues that the trial court erred when instructing as to nonstatutory mitigating circumstances because its instructions let the jury decide if the nonstatutory circumstance had mitigating value. Defendant argues that the nonstatutory mitigating circumstances that he presented to the jury had inherent mitigating value, as evidenced by the fact that the trial court decided to submit them in the first place. Thus, defendant argues that the jury has to consider the

circumstances under *Eddings v. Oklahoma*, 455 U.S. 104, 71 L.Ed.2d 1, and *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed.2d 973 (1978).

48 The trial court instructed the jury that *48

> [i]f one or more of you finds by a preponderance of the evidence that this [nonstatutory] circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write, "Yes," in the space provided.

This Court has repeatedly determined that nonstatutory mitigating circumstances do not necessarily have mitigating value. *See State v. Green*, 336 N.C. 142, 173, 443 S.E.2d 14, 32; *State v. Robinson*, 336 N.C. 78, 117, 443 S.E.2d 306, 325; *State v. Gay*, 334 N.C. 467, 492, 434 S.E.2d 840, 854; *State v. Fullwood*, 323 N.C. 371, 397, 373 S.E.2d 518, 533 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L.Ed.2d 602 (1990), *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991). In *State v. Fullwood*, the Court held that it is "for the jury to determine whether submitted nonstatutory mitigating circumstances have mitigating value." 323 N.C. at
49 396, 373 S.E.2d at 533. "[B]efore the jury 'finds' a nonstatutory mitigating circumstance, it must make two preliminary determinations: (1) that the evidence supports the existence of the circumstance and (2) that the circumstance has mitigating value." *State v. Huff*, 325 N.C. 1, 59, 381 S.E.2d 635, 669 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L.Ed.2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991). This proposition has recently been reiterated in *State v. Green*, 336 N.C. at 173, 443 S.E.2d at 32 (jurors may reject nonstatutory mitigating circumstances if they do not deem them to have mitigating value).

In addition:

> The language of the instructions clearly permits and instructs the jury to consider any evidence of the nonstatutory mitigating circumstances, as required by *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed.2d 973, and *Eddings v. Oklahoma*, 455 U.S. 104, 71 L.Ed.2d 1 (1982). As this Court noted in State v. Fullwood, however, "neither Lockett nor Eddings requires that the sentencer must determine that the submitted mitigating circumstance has mitigating value." *Fullwood*, 323 N.C. at 396, 373 S.E.2d at 533.

State v. Robinson, 336 N.C. at 117, 443 S.E.2d at 325. As recently noted by the United States Supreme Court,

> *"Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all."

*49

Johnson v. Texas, ___ U.S. ___, ___, 125 L.Ed.2d 290, 302 (1993) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 456, 108 L.Ed.2d 369, 389 (1990) (Kennedy, J., concurring in judgment)). The instruction at issue here allows the jury to consider all the evidence in mitigation, and it allows the jury to consider whether nonstatutory mitigating circumstances in fact have mitigating value. The instruction does not allow the jury to ignore the evidence.

We find no reason to alter our previous decisions and conclude that the trial court did not err in its instructions on nonstatutory mitigating circumstances in this case.

[24] Next, defendant argues that the trial court's instructions to the jury were erroneous because they did not allow all the jurors to consider any

issue of mitigation when weighing the aggravators and mitigators in determining the death sentence. Defendant argues that such instructions violate *McKoy v. North Carolina*, 494 U.S. 433, 108 L.Ed.2d 369.

The trial court instructed the jury:

> If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances.
>
> When deciding this issue, each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in Issue Two.

. . . .

> Issue Four is, Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?
>
> In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by one or more of you. When making this comparison, each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence.

Defendant argues that these instructions were erroneous because they precluded those jurors
50 who had not earlier found a mitigating *50 circumstance to exist from considering that mitigating circumstance, even if it was found by another juror, when determining defendant's sentence. Defendant seems to believe that the jury should be instructed that once one juror finds a mitigating circumstance to exist and have value, all twelve jurors must consider that circumstance when reaching their decision, even if a juror did not believe that the mitigating circumstance existed.

We conclude that defendant's desired instruction is inconsistent with the procedure dictated by the North Carolina capital sentencing scheme and is not what was required or contemplated by the United States Supreme Court in *McKoy v. North Carolina*, 494 U.S. 433, 108 L.Ed.2d 369, or *Mills v. Maryland*, 486 U.S. 367, 100 L.Ed.2d 384 (1988), upon which *McKoy* relied. "Were we to adopt this reading of McKoy and its progenitors, we would create an anomalous situation where jurors are required to consider mitigating circumstances which are only found to exist by a single holdout juror." *State v. Lee*, 335 N.C. 244, 287, 439 S.E.2d 547, 570.

The purpose of *Mills* and *McKoy* was to allow individualized determination of mitigating circumstances.

> *Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death. This requirement means that, in North Carolina's system, each juror must be allowed to consider all mitigating evidence . . . .

McKoy v. North Carolina, 494 U.S. at 442-43, 108 L.Ed.2d at 381. Justice Blackmun noted in *McKoy* that

> it is understood that different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie their verdict.

Id. at 449, 108 L.Ed.2d at 384-85 (Blackmun, J., concurring) (footnotes omitted). *McKoy* does not invalidate "a jury instruction that does not require unanimity with respect to mitigating circumstances but requires a juror to consider a mitigating circumstance only if he or she is convinced of its existence by a preponderance of the evidence." *Id*. at 444, 108 L.Ed.2d at 382 (White, J., concurring).

We conclude that there is no constitutional requirement that a juror must consider a mitigating
51 circumstance found by another juror *51 to exist. What is constitutionally required is that jurors be individually given the opportunity to consider and give weight to whatever mitigating evidence they deem to be valid. The instructions given by the trial court in this case gave each juror this individualized opportunity. Thus, the instructions of the trial court are valid. Defendant's assignment of error is without merit.

[25] In a related issue, defendant argues that the trial court erred by instructing the jury that each juror "may" consider mitigating circumstances that juror found to exist when weighing the aggravating and mitigating circumstances. Specifically, the trial judge instructed the jury:

> If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances.
>
> When deciding this issue, each juror *may* consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in Issue Two.
>
> . . . .
>
> In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by one or more of you. When making this comparison, each juror *may* consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence.

(Emphasis added); *see* N.C.P.I. — Crim. 150.10.

Defendant contends that this instruction violated the Eighth and Fourteenth Amendments to the United States Constitution and principles set forth in *Eddings v. Oklahoma*, 455 U.S. 104, 71 L.Ed.2d 11. Defendant argues that the use of the word "may" allowed some jurors to disregard relevant mitigating evidence they had earlier found to exist.

We have recently addressed this issue, reviewing the exact instruction challenged here and finding it to be without error. *State v. Lee*, 335 N.C. at 286-87, 439 S.E.2d at 569. Specifically, we held in *Lee* that "[f]ar from precluding a juror's consideration of mitigating circumstances he or she may have found, the instant instruction expressly instructs that the evidence in mitigation *must* be weighed against the evidence in aggravation." *Id*. at 287,
52 439 S.E.2d at 570. We *52 continue to believe that the Pattern Jury Instructions as given here are correct. *See State v. Green*, 336 N.C. at 175, 443 S.E.2d at 33-34; *State v. Robinson*, 336 N.C. at 121, 443 S.E.2d at 327. Thus, this assignment of error is without merit and is overruled.

[26] Next, defendant argues that the trial court erred in its instruction on mitigating circumstances because the instruction was too narrow and created an unacceptable risk that the jury failed to consider relevant mitigating information.

The trial court instructed the jury:

> Members of the jury, a mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first-degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first-degree murders.

This Court has approved this definition in numerous cases. *See State v. Hill*, 331 N.C. 387, 420, 417 S.E.2d 765, 782; *State v. Boyd*, 311 N.C. 408, 421, 319 S.E.2d 189, 198 (1984), *cert. denied*, 471 U.S. 1030, 85 L.Ed.2d 324 (1985); *State v. Moose*, 310 N.C. 482, 499, 313 S.E.2d 507, 518 (1984); *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 446-47 (1981); *see also* N.C.P.I. — Crim. 150.10.

In addition, the trial court instructed the jury that

> in considering Issue Two it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death and any other circumstances arising from the evidence which you deem to have mitigating value.

This instruction is consistent with language from *Eddings v. Oklahoma*, 455 U.S. 104, 110, 71 L.Ed.2d 1, 8, and *Lockett v. Ohio*, 438 U.S. 586, 605, 57 L.Ed.2d 973, 990, discussing what evidence a sentencer must be able to consider when determining a sentence of life versus death. *See State v. Irwin*, 304 N.C. at 104, 282 S.E.2d at 447; *see also* N.C.P.I. — Crim. 150.10.

Reviewing the instructions given to the jury in their entirety, we conclude that the jury was not restricted from considering any evidence that may have lessened defendant's sentence, whether it be
53 *53 evidence that was directly based on defendant's character or evidence that related to the actual murders. The trial court gave a valid instruction consistent with our case law, the North Carolina Pattern Jury Instructions, and United States Supreme Court case law. We conclude that defendant's assignment of error is without merit.

[27] Next, defendant argues that the trial court erred in submitting the aggravating circumstance that the murders were part of a course of conduct in which defendant engaged and which course of conduct included the commission by the defendant of crimes of violence against another person or persons. N.C.G.S. § 15A-2000(e)(11) (1988).

Defendant acknowledges that the trial court instructed the jurors consistent with the Pattern Jury Instructions:

> A murder is part of such a course of conduct if it and the other crimes of violence are part of a pattern of the same or similar acts which establish that there existed in the mind of the defendant a plan, scheme, system, or design involving both the murder and those other crimes of violence.

Defendant argues that this circumstance should not have been submitted because it was not supported beyond a reasonable doubt by the evidence. We note:

> In determining the sufficiency of the evidence to *submit* an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, with the State entitled to every reasonable inference to be drawn therefrom, and discrepancies and contradictions resolved in favor of the State.

State v. Syriani, 333 N.C. 350, 392, 428 S.E.2d 118, 140 (emphasis added). "'If there is substantial evidence of each element of the [aggravating] issue under consideration, the issue must be submitted to the jury for its determination.'" *State*

v. Moose, 310 N.C. at 494, 313 S.E.2d at 516 (quoting *State v. Stanley*, 310 N.C. 332, 347, 312 S.E.2d 393, 401 (1984) (Martin, J., dissenting)).

When determining if there is evidence to prove the existence of the course of conduct circumstance, the sufficiency of the evidence "depends upon a number of factors, among them the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons." *State v. Price*, 326 N.C. 56, 81, 388 S.E.2d 84, 98, *sentence vacated on other grounds*,
54 498 U.S. 802, *54 112 L.Ed.2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated on other grounds*, ___ U.S. ___, 122 L.Ed.2d 113, *on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993), *sentence vacated on other grounds*, ___ U.S. ___, ___ L.Ed.2d ___, 1994 WL 287581 (1994). "[T]he closer the incidents of violence are connected in time, the more likely that the acts are part of a plan, scheme, system, design or course of action." *State v. Cummings*, 332 N.C. 487, 510, 422 S.E.2d 692, 705 (1992). "[I]n order to find course of conduct, a court must consider the circumstances surrounding the acts of violence and discern some connection, common scheme, or some pattern or psychological thread that ties them together." *Id*.

In this case, there was substantial evidence to support the submission of this circumstance. As noted previously, the evidence established that defendant pulled a semiautomatic rifle from under the seat of his truck and fired multiple shots at Ailene Pittman, inflicting thirty-four wounds. He then said "you too" and shot Nelson Fipps. As the truck pulled away from the scene of the crime, defendant asked the driver, "did I get them" both. There was no evidence that the victims had provoked defendant.

Determining that the crimes occurred within moments of each other at the same location and that the same *modus operandi* was used in each killing, we hold that the facts clearly establish that the two crimes were committed as a part of a course of conduct in which defendant engaged and which included the commission by defendant of a crime of violence against another person. We conclude that the trial court did not err when it submitted this circumstance to the jury. Defendant's assignment of error is without merit.

[28] Next, defendant argues that the trial court erred when it refused to independently submit specific nonstatutory mitigating circumstances requested by defendant in writing. Defendant argues that the instructions given by the trial court kept the jury from considering relevant mitigating evidence and diluted and diminished the written instructions that were given in place of the requested instructions.

All the circumstances requested by defendant were put on the written recommendation form; however, some of the written instructions were combined. The instruction that defendant cannot read and the instruction that defendant cannot write were combined to read that defendant was functionally illiterate and cannot read or write. The instruction that defendant pled guilty to criminal charges in 1984, the instruction that defendant pled guilty to criminal charges in 1981,
55 *55 and the instruction that defendant pled guilty to criminal charges in 1977 were combined to read that the defendant pled guilty to criminal charges in 1984, 1981, and 1977. The instruction that defendant was under the influence of alcohol at the time of the offense was changed to read that defendant had consumed alcohol at the time of the offense. Finally, the instruction that defendant loves and respects his mother and the instruction that defendant loves and respects his father were combined to read that defendant loves and respects his parents.

In *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990), this Court held that

> where a defendant makes a timely *written* request for a listing *in writing* on the form of possible nonstatutory mitigating circumstances that are supported by the evidence and which the jury could reasonably deem to have mitigating value, the trial court must put such circumstances in writing on the form.

Id. at 324, 389 S.E.2d at 80. We concluded that such a practice was necessary because "common sense teaches us that jurors, as well as all people, are apt to treat written documents more seriously than items verbally related to them. [If] . . . the circumstances [were] written on the form, the trial judge and the jury would . . . [be] required to directly address each of them." *Id*. at 325, 389 S.E.2d at 81.

We conclude that in this case the instructions requested by defendant were given to the jury in written form. While the language was not exactly that requested by defendant, the jury was required to directly address every point brought forward by defendant in his written request. For example, the jury was instructed to consider whether defendant loves and respects his parents. In addressing this issue, the jury must consider both whether defendant loves and respects his mother and whether defendant loves and respects his father. In essence, the requested instructions were subsumed into the given instruction. *See State v. Benson*, 323 N.C. 318, 327, 372 S.E.2d 517, 522 (1988) (no error when trial court fails to submit a mitigating circumstance that was subsumed into another mitigating circumstance).

The refusal of a trial judge to submit proposed circumstances separately and independently is not error. *State v. Greene*, 324 N.C. 1, 21, 376 S.E.2d 430, 443 (1989) (court may incorporate requested circumstances within given instructions and the catchall circumstance), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L.Ed.2d 603 *56 (1990), *on remand*, 329 N.C. 771, 408 S.E.2d 185 (1991); *State v. Fullwood*, 323 N.C. 371, 393, 373 S.E.2d 518, 531 (court did not err in refusing to submit nonstatutory mitigating circumstance that had been incorporated into statutory mitigating circumstance that was submitted to jury); *State v. Lloyd*, 321 N.C. 301, 313-14, 364 S.E.2d 316, 324-25 (court did not err in refusing to submit two nonstatutory mitigating circumstances regarding defendant's criminal record where a submitted statutory mitigating circumstance allowed jury to consider defendant's criminal record as a whole).

56

Assuming *arguendo* that the trial court erred by not giving the exact instructions requested by defendant, we conclude that such error was harmless beyond a reasonable doubt. A trial court's error in failing to submit a nonstatutory mitigating circumstance is harmless "where it is clear that the jury was not prevented from considering any potential mitigating evidence." *State v. Green*, 336 N.C. 142, 183, 443 S.E.2d 14, 38; *see State v. Hill*, 331 N.C. 387, 417, 417 S.E.2d 765, 780.

We conclude that the trial court correctly brought to the jury's attention all of defendant's requested instructions that were supported by the evidence. Assuming *arguendo*, however, that the trial court did err, such error was harmless beyond a reasonable doubt.

[29] Next, defendant argues that imposition of the death penalty here is unconstitutional because defendant has suffered lifelong organic brain damage and is mentally retarded. To begin, we note that defendant did not object to the imposition of the death penalty on these grounds at trial. Nor did defendant make this an assignment of error in the record. Accordingly, the issue is deemed waived by defendant. *State v. Upchurch*, 332 N.C. 439, 456, 421 S.E.2d 577, 587 (1992). Nevertheless, we have considered defendant's argument.

We first note that the United States Supreme Court has held that the Eighth Amendment does not categorically prohibit the infliction of the death penalty on a person who is mentally retarded.

Penry v. Lynaugh, 492 U.S. 302, 340, 106 L.Ed.2d 256, 292 (1989). In addition, this Court has affirmed the death penalty in cases where defendants' IQ test scores were similar to or lower than this defendant's IQ test score of 69. *State v. McCollum*, 334 N.C. 208, 248, 433 S.E.2d 144, 166 (1993) (Exum, C.J., concurring in part and dissenting in part) (IQ tests scores of 61 and 69), *cert. denied*, ___ U.S. ___, ___ L.Ed.2d ___, 1994 WL 287580 (1994); *State v. Artis*, 325 N.C. 278, 311, 384 S.E.2d 470, 489 (IQ test score of 67);
57 *State v. Hunt*, 323 N.C. 407, 435, *57 373 S.E.2d 400, 418 (1988) (codefendant Barnes' IQ test score of 68), *sentence vacated on other grounds sub nom. Barnes v. North Carolina*, 499 U.S. 1022, 108 L.Ed.2d 602, *on remand*, 330 N.C. 104, 408 S.E.2d 843 (1991); *State v. Pinch*, 306 N.C. 1, 57, 292 S.E.2d 203, 240 (1982) (Exum, J., dissenting) (IQ test score of 66).

The imposition of the death penalty on this defendant is not unconstitutional, and defendant's assignment of error has no merit.

PRESERVATION ISSUES

[30] Defendant brings forward six issues for preservation purposes. First, defendant contends that it is unconstitutional to permit the prosecutor to peremptorily challenge jurors who express any reservation about the death penalty. We have previously decided this issue against defendant. *State v. Allen*, 323 N.C. 208, 222, 372 S.E.2d 855, 863 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L.Ed.2d 601 (1990), *on remand*, 331 N.C. 746, 417 S.E.2d 227 (1992), *cert. denied*, ___ U.S. ___, 122 L.Ed.2d 775, *reh'g denied*, ___ U.S. ___, 123 L.Ed.2d 503 (1993).

[31] Second, defendant contends that the Pattern Jury Instruction imposing a duty upon the jury to return death if the mitigating circumstances are insufficient to outweigh the aggravating circumstances is unconstitutional. This Court has previously decided this issue adversely to defendant. *State v. McDougall*, 308 N.C. 1, 26, 301 S.E.2d 308, 324, *cert. denied*, 464 U.S. 865, 78 L.Ed.2d 173 (1983); *State v. Pinch*, 306 N.C. 1, 33-34, 292 S.E.2d 203, 227.

[32] Third, defendant contends that the trial court erred in denying his request for individual voir dire and sequestration of prospective jurors. This Court has consistently denied other defendants relief on this basis. *State v. Reese*, 319 N.C. 110, 119, 353 S.E.2d 352, 357 (1987); *State v. Wilson*, 313 N.C. 516, 524, 330 S.E.2d 450, 457 (1985); *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979). "The decision whether to grant sequestration and individual *voir dire* of prospective jurors rests in the sound discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion." *State v. Wilson*, 313 N.C. at 524, 330 S.E.2d at 457. A review of the transcript and record shows no such abuse of discretion in this case.

[33] Fourth, defendant contends that the trial court erred by denying defendant's request that the trial court give specific instructions, written by defendant, about the procedures involved in a capital punishment proceeding prior to the
58 beginning of jury selection. The trial *58 court did give preliminary jury instructions pursuant to the Pattern Jury Instructions. This Court has previously considered such a contention and decided it adversely to defendant. *State v. Artis*, 325 N.C. 278, 294-96, 384 S.E.2d 470, 478-79.

[34] Fifth, defendant argues that the North Carolina death penalty statute is unconstitutional. This Court has repeatedly held that the North Carolina death penalty statute is not unconstitutional. *State v. Roper*, 328 N.C. 337, 370, 402 S.E.2d 600, 619, *cert. denied*, 502 U.S. 902, 116 L.Ed.2d 232 (1991); *State v. McLaughlin*, 323 N.C. 68, 102, 372 S.E.2d 49, 71 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L.Ed.2d 601 (1990), *on remand*, 330 N.C. 66, 408 S.E.2d 732 (1991); *State v. Barfield*, 298 N.C. 306, 353-54, 259 S.E.2d 510,

544 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed.2d 1137, *reh'g denied*, 448 U.S. 918, 65 L.Ed.2d 1181 (1980).

[35] Sixth, defendant argues that the trial court erred by instructing the jury that defendant had the burden of proving the mitigating circumstances by a preponderance of the evidence. We have previously considered this contention and have decided it adversely to defendant. *State v. Roper*, 328 N.C. at 368, 402 S.E.2d at 618; *State v. Barfield*, 298 N.C. at 353, 259 S.E.2d at 543; *State v. Johnson*, 298 N.C. 47, 75-76, 257 S.E.2d 597, 617-18.

In summary, all of defendant's contentions as to the preservation issues have been decided contrary to defendant in the past. Upon our review of the issues, we find no reason to alter our previous decisions and determine that all of these assignments of error are without merit.

PROPORTIONALITY REVIEW

[36] Finding no error in either the guilt-innocence phase or the capital sentencing proceeding, it is now the duty of this Court to review the record and determine (1) whether the record supports the jury's finding of the aggravating circumstances upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1988).

The following aggravating circumstances were
59 submitted to the jury: *59

> (1) Had the defendant been previously convicted of a felony involving the use of violence to the person? [N.C.G.S. § 15A-2000(e)(3) (1988).]
>
> . . . .
>
> (2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against other persons? [N.C.G.S. § 15A-2000(e)(11).]

The jury responded "yes" to each of these inquiries, thus finding these aggravating circumstances to exist.

As noted earlier, we have already concluded that the aggravating circumstance that the murder was part of a course of conduct that included other crimes of violence was supported by the evidence. We also conclude that the jury's finding of the other aggravating circumstance was clearly supported by the evidence. During the sentencing phase, the State presented evidence that defendant had pled guilty on three separate occasions to assault with a deadly weapon inflicting serious injury.

After conducting a thorough review of the transcript, record on appeal, and briefs and oral arguments of counsel, we further conclude that the jury did not sentence defendant to death while under the influence of passion, prejudice, or any other arbitrary factor.

Our final duty is to determine whether the punishment of death in this case is excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

As this Court has frequently noted, the purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L.Ed.2d 935 (1988). Proportionality review is necessary to serve "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979). In conducting proportionality review, we

"determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 70, 337 S.E.2d 808, 829 (1985), *cert. denied*, 476
60 U.S. 1165, 90 L.Ed.2d 733 (1986), *60 *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

We begin our analysis by comparing the instant case with those seven cases in which this Court has determined that the sentence of death was disproportionate: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

In *State v. Benson*, the defendant was convicted of first-degree murder based solely upon the theory of felony murder; the victim died of a cardiac arrest after being robbed and shot in the legs by the defendant. The only aggravating circumstance found by the jury was that the crime was committed for pecuniary gain. This Court determined that the death sentence was disproportionate based in part on the fact that it appeared defendant was simply attempting to rob the victim, 323 N.C. at 329, 372 S.E.2d at 523, and defendant "pleaded guilty during the trial and acknowledged his wrongdoing before the jury." *Id.* at 328, 372 S.E.2d at 523.

In *State v. Stokes*, the defendant was one of four individuals who was involved in the beating death of a robbery victim. Defendant was found guilty of first-degree murder under the theory of felony murder, and only one aggravating circumstance was found, that the crime was especially heinous, atrocious, or cruel. This Court, in finding that the death sentence was disproportionate, noted that none of the defendant's accomplices were sentenced to death, although they "committed the same crime in the same manner." 319 N.C. at 27, 352 S.E.2d at 667.

In *State v. Rogers*, the defendant was convicted of first-degree murder based on a shooting of the victim in a parking lot during an argument. Only one aggravating circumstance was found, that " [t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." 316 N.C. at 234, 341 S.E.2d at 731.

In *State v. Young*, the defendant stabbed and robbed a man. The Court noted that in armed robbery cases where death is imposed, the jury has found the aggravating circumstance that the
61 defendant was *61 engaged in a course of conduct that included the commission of violence against another person and/or that the crime was especially heinous, atrocious, or cruel. 312 N.C. at 691, 325 S.E.2d at 194. Neither of these circumstances was found by the jury in *Young*.

In *State v. Hill*, the defendant shot a police officer while engaged in a struggle near defendant's automobile. This Court found the death sentence disproportionate:

> Given the somewhat speculative nature of the evidence surrounding the murder here, the apparent lack of motive, the apparent absence of any simultaneous offenses, and the incredibly short amount of time involved, together with the jury's finding of three mitigating circumstances tending to show defendant's lack of past criminal activity and his being gainfully employed, and the unqualified cooperation of defendant during the investigation . . . .

311 N.C. at 479, 319 S.E.2d at 172.

In *State v. Bondurant*, the defendant shot his victim after defendant had spent the night drinking; there was no motive for the killing, and immediately after the victim was shot, defendant made sure the victim was taken to the hospital. 309 N.C. at 694, 309 S.E.2d at 182-83.

In *State v. Jackson*, the victim had been shot twice in the head. The defendant had earlier flagged down the victim's car, telling his companions that he intended to rob the victim. This Court found the death sentence disproportionate because there was "no evidence of what occurred after defendant left with McAulay [the victim]." 309 N.C. at 46, 305 S.E.2d at 717.

We conclude that this case is not similar to any of the above cases, where death was found to be a disproportionate sentence. Most notably, in all of the cases where the death sentence has been determined to be disproportionate, only one person has been murdered by the defendant. In this case, two people were murdered by defendant, in front of an eyewitness who could relate exactly what happened. Defendant here, without provocation, shot Ailene Pittman and Nelson Fipps numerous times with a semiautomatic rifle containing fragmentation bullets. He left his two victims dying on the front lawn and never attempted to get them any help. Defendant had already been convicted on three other occasions of inflicting serious injury with a deadly weapon, on
62 three different victims. *62

In reviewing the proportionality of a sentence, it is also appropriate for us to compare the case before us to other cases in the pool used for proportionality review. *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed.2d 267 (1985). However, we "will not undertake to discuss or cite all of those cases" we have reviewed. *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164. In examining the pool, we review cases with similar facts and with similar aggravators and mitigators.

Here, defendant was convicted of two first-degree murders on the theory of premeditation and deliberation. In addition, the jury found the existence of the two aggravating circumstances submitted in this case: defendant had previously been convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3); and the murders were part of a course of conduct that included crimes of violence to others, N.C.G.S. § 15A-2000(e)(11). The jury also found five of the sixteen submitted mitigating circumstances to exist. [3] The mitigating circumstances found were: the murder was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1988); the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6) (1988); at the time of the offense defendant had consumed alcohol; defendant was an alcohol abuser; and any other circumstance or circumstances arising from the evidence which one or more of the jurors deems to have mitigating value, N.C.G.S. § 15A-2000(f)(9) (1988). The following circumstances were submitted to the jury but not found: the age of defendant at the time of the murder, N.C.G.S. § 15A-2000(f)(7) (1988); defendant was a hard worker and had a good employment record; defendant's IQ is in the mental retardation range; defendant pled guilty to the earlier criminal charges with which he was charged, occurring on 31 May 1984, 15 December 1981, and 6 December 1977; defendant suffered the death of two children during the last five years within a six-week period of each other; defendant loves and respects his parents; defendant provided love, financial assistance, and care for his children; defendant only completed the eighth grade in school; defendant was cooperative with law enforcement at the time of his arrest;
63 defendant is functionally illiterate and *63 cannot read or write; defendant was a kind, friendly, and compassionate person who developed strong emotional ties to his close friends.

3 Two issues and recommendation sheets were given to the jury, one for Ailene Pittman and one for Nelson Fipps. The sheets contained the same aggravators and mitigators, and the jury found the same aggravators and mitigators to exist in both cases.

Defendant argues that the prime reasons that his sentence is disproportionate are his low IQ and the fact that the jury found him to be mentally or emotionally disturbed when the crime was committed, and that defendant's capacity to appreciate the criminality of his conduct was impaired. This Court has affirmed death sentences even when the jury has found the two noted statutory mitigators. *See State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308; *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed.2d 155 (1982). As noted earlier in this decision, this Court has also affirmed the death sentences in cases where defendants have made similar scores on IQ tests.

We have reviewed cases involving the two statutory aggravators found in this case and have noted that in many of these cases, the defendant received death. *See State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250, *cert. denied*, 471 U.S. 1094, 85 L.Ed.2d 526 (1985); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308. We have also reviewed cases where there have been other crimes of violence committed during a premeditated and deliberated murder. We have noted that while many of these defendants received life sentences, most of these cases involved only a single killing. *But see State v. Austin*, 320 N.C. 276, 357 S.E.2d 641 (three victims), *cert. denied*, 484 U.S. 916, 98 L.Ed.2d 224 (1987).

Defendant argues that the fact that this case involved a multiple killing does not automatically make it proportionate and sets forth cases where defendants have received life sentences for multiple murders. We note that "our responsibility in proportionality review is to evaluate each case independently, considering 'the individual defendant and the nature of the crime or crimes which he has committed.'" *State v. Quesinberry*, 325 N.C. 125, 145, 381 S.E.2d 681, 693 (1989) (quoting *State v. Pinch*, 306 N.C. 1, 36, 292 S.E.2d 203, 229), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L.Ed.2d 603 (1990), *on remand*, 328 N.C. 288, 401 S.E.2d 632 (1991). "Early in the process of developing our methods for proportionality review, we indicated that similarity of cases, no matter how many factors are compared . . . [is not] '. . . the last word on the subject of proportionality'" but merely serves as an initial point of inquiry. *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 46-47 (quoting *State v.*
64 *Williams*, *64 308 N.C. 47, 80-81, 301 S.E.2d 335, 356). The issue of whether the death penalty is proportionate in a particular case must rest in part on the experienced judgment of the members of this Court, not simply on a mere numerical comparison of aggravators, mitigators, and other circumstances. *Id*. In addition, "the decision of the jury [is given] great deference in determining whether a death sentence is disproportionate." *State v. Quesinberry*, 325 N.C. at 145, 381 S.E.2d at 694.

This case involves a man who had previously assaulted and seriously injured three other people, by shooting one in the back, severing the hand of another with a knife, and shooting another in the chest. He had pled guilty and been convicted of all three of these previous assaults. However, defendant continued to inflict injuries on other people, ultimately killing two people in a single incident with a semiautomatic rifle. Therefore, based upon our review of the cases in the pool and the experienced judgment of members of this Court, we hold that the sentence of death in this case is not disproportionate and decline to set aside the death penalty imposed.

In summary, we have carefully reviewed the transcript of the trial and sentencing proceeding as well as the record and briefs and oral arguments of counsel. We have addressed all of defendant's assignments of error and conclude that defendant

received a fair trial and a fair sentencing proceeding free of prejudicial error before an impartial judge and jury. The conviction and the aggravating circumstances are fully supported by the evidence. The sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor and is not disproportionate.

NO ERROR.

No. 233A93
Supreme Court of North Carolina

State v. Solomon

340 N.C. 212 (N.C. 1995) · 456 S.E.2d 778
Decided May 1, 1995

No. 233A93

Filed 5 May 1995

1. Evidence and Witnesses §§ 601, 693 (NCI4th) — reading letters to jury — absence of authentication, offer of proof The trial court did not err by refusing to permit defendant to have a State's witness read into evidence the contents of three letters written on his behalf to defendant where there was no proper identification or authentication of the letters, and defendant made no offer of proof or other attempt to show the court what he was trying to do with regard to the contents of the letters.

Am Jur 2d, Trial §§ 436 et seq.

2. Criminal Law § 445 (NCI4th) — argument that defendant lied in testimony — no impropriety The prosecutor did not improperly inject his own beliefs, personal opinions or knowledge by his jury argument that defendant lied during his testimony. Rather, the prosecutor's remarks were consistent with the facts in evidence from the defendant himself and reasonable inferences drawn therefrom. Assuming that the prosecutor's statements were improper, the impropriety was not so gross or excessive as to require the trial court to intervene *ex mero motu* since the prosecutor in effect argued that the jury
213 *213 should reject defendant's testimony because his credibility, having been impeached, made his version of the events unbelievable.

Am Jur 2d, Trial §§ 692 et seq.

3. Evidence and Witnesses § 2791 (NCI4th) — knowledge of oath — truthful testimony — questions excluded — no error The trial court did not err by refusing to permit defense counsel to ask a defense witness whether she knew she was under oath where, notwithstanding the rule that credibility is for the jury, the witness was ultimately allowed to testify that she told the truth. Nor did the trial court err by refusing to allow defense counsel to ask defendant whether he had accurately pointed out to the prosecutor all of the places in his pretrial statements that were untrue since the effect of the question was to ask defendant whether the remainder of his testimony was truthful, and the question of whether a witness told the truth was for the jury to decide.

Am Jur 2d, Witnesses §§ 743 et seq.

4. Homicide § 255 (NCI4th) — first-degree murder — shooting victim numerous times — second-degree instruction not required — argument insufficient to show incapacity to deliberate The evidence in a first-degree murder prosecution did not require the trial court to instruct the jury on the lesser offense of second-degree murder where defendant's evidence tended to show that another person shot and killed the victim, and the State's evidence tended to show that defendant and the victim argued because the victim had cheated defendant in a drug deal, defendant shot the victim in the groin, and as the victim attempted to run away, defendant ran after him and shot him several more times at close range. Evidence that defendant and the victim argued, without more, is insufficient to show that

defendant's anger was strong enough to disturb his ability to reason and that he was thus incapable of deliberating his actions.

Am Jur 2d, Homicide §§ 482 et seq.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Michael, J., at the 30 November 1992 Criminal Session of
214 Superior *214 Court, Halifax County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 13 February 1995.

Michael F. Easley, Attorney General, by Mary Jill Ledford, *Assistant Attorney General, for the State*.

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor, *Assistant Appellate Defender, for defendant-appellant*.

LAKE, Justice.

The defendant was indicted on 1 June 1992 for the first-degree murder of Jessie Smith. The defendant was tried noncapitally, and the jury found defendant guilty of first-degree murder on the theory of premeditation and deliberation. By judgment and commitment dated 3 December 1992, Judge Michael sentenced the defendant to a term of life imprisonment.

At trial, the State presented evidence tending to show that Jessie Smith bled to death on 9 April 1992 as a result of multiple shotgun wounds to the arms, chest, abdomen and legs. Dr. Louis Levy, Medical Examiner for Nash and Edgecombe Counties, performed an autopsy on the victim. Dr. Levy's examination revealed that the victim's left lung and the main artery coming out of the heart were totally destroyed. The victim also suffered soft tissue and bone injuries. Dr. Levy discovered the presence of birdshot, buckshot, and plastic and fiber wadding material from shotgun shells inside the victim's body.

The State's evidence established that Delvin and Terence Dickens were with the defendant when the victim was shot. In November 1992, in lieu of facing murder charges, the Dickens brothers pled guilty to being accessories after the fact to murder and agreed to testify truthfully against the defendant.

Delvin Dickens testified that on the evening of 9 April 1992, he and his brother, Terence Dickens, drove to Scotland Neck, North Carolina, to pick up Delvin's girlfriend. On the way, Delvin and Terence stopped in Enfield, North Carolina, to pick up the defendant. At some point after the defendant was picked up, the victim, Jessie Smith (also known as "Booger"), came to the car, talked to the defendant and then got in the car. After driving away, the defendant and the victim began to argue. The car stopped and Delvin asked them to get out of the car. At that time, Delvin noticed that the defendant had a pistol grip shotgun between his legs. Terence asked the defendant what was going on, and the defendant replied,
215 "This *215 guy [Smith] stuck me up for twenty dollars worth of stuff." Delvin believed that the defendant was referring to "crack" cocaine.

According to Delvin, as the victim left the car, the defendant began shooting. The first shot hit the victim in his groin area. The victim tried to run or hop away, but the defendant ran after him and shot the victim again. The victim continued to run until the defendant shot him a third time, at which point the victim screamed, "I'm a dead man. I'm dead." The defendant again approached the victim and shot him a fourth time. Smith fell to one knee. As Smith stood up, the defendant shot him a fifth time. Smith fell and did not move again.

Terence Dickens, the brother of Delvin Dickens, similarly testified that on the evening of 9 April 1992, he received a telephone call from the defendant. The defendant asked Terence to drive him downtown to meet someone. When Terence and Delvin arrived at the defendant's residence, the defendant was carrying a green jacket. Terence

testified that he noticed a gun in the coat. When asked why he had the gun, the defendant stated that he needed to go downtown to give the gun to someone named "Booger."

Terence and the defendant found "Booger," and "Booger" got into the car. Terence drove out toward the country, and at some point, the defendant told Terence where to stop the car. According to Terence, he and Delvin got out of the car and made the defendant and the victim get out of the car. Terence testified that Delvin asked the defendant "what was going on," and the defendant replied that Jessie Smith "had stuck him up for twenty dollars worth of drugs." The defendant then began shooting "Booger." The victim attempted to run away, but the defendant ran after him while continuing to shoot. Defendant shot the victim numerous times at "point-blank range."

The defendant then got back into the car and told the Dickens brothers to take him home. Upon arrival at the defendant's home, the defendant told the Dickens brothers "not to tell anyone about this."

I.

[1] In his first assignment of error, the defendant contends that the trial court erred by sustaining the State's objections to defense counsel's repeated efforts to cross-examine Delvin Dickens about letters written to the defendant on Dickens' behalf.

On direct examination, Delvin Dickens testified that at his request, other inmates wrote three
216 letters to the defendant urging him *216 to admit to killing the victim in order to clear Dickens' own name. On cross-examination, Dickens testified that other inmates wrote the letters on his behalf, that he read the letters, and that he intended for the letters to be sent to the defendant. Without further questioning, defense counsel then asked Dickens to read the three letters in an attempt to introduce their contents into evidence. The State's objections to each attempt to read the letters into evidence were sustained.

The defendant argues that contrary to Delvin Dickens' testimony, the letters do not contain any statements urging the defendant to admit to shooting the victim. Instead, the letters clearly state that Dickens told the police he did not know who killed the victim; that Delvin, Terence and the defendant should refuse to testify against one another; and that they all faced severe punishment unless they cooperated to deceive the police. The defendant contends that the trial court erred by not allowing him to cross-examine Dickens about the letters. The defendant asserts the following five arguments in support of his position that he should have been allowed to read into evidence the contents of the letters: (1) the letters contained prior inconsistent statements; (2) the letters were admissible for purposes of impeachment as a specific instance of prior bad conduct; (3) the State opened the door to the testimony; (4) the letters demonstrated bias; and (5) the letters were admissible generally under N.C.G.S. § 8C-1, Rule 611(b).

The defendant correctly argues that he was entitled to cross-examine Delvin Dickens about the letters. However, it is clear that the defendant was not seeking to cross-examine Dickens about the letters, but rather, was seeking to have Dickens read each letter into evidence. Further, defendant failed to lay a proper foundation prior to asking Dickens to read the letters. There was no point of reference made to any specific statement in any of the three letters so that the witness could either admit or deny such statement. In fact, there was no foundation or question asked by defendant to establish that the three letters (defendant's Exhibits 1, 2 and 3) were the same letters referred to by the witness on direct examination. The witness was merely asked to "read the letter."

The record reflects that the following testimony was elicited after defense counsel handed the witness the letter marked defendant's Exhibit No. 3:

> Q. All right. Was this letter written while you were held in Halifax Jail?

217 *217

A. Repeat the question, please.

Q. Was that letter written while you were in the Halifax Jail?

A. Yes, sir.

Q. Do you know about when it was written?

A. No. I really don't.

> Q. It was written with your consent and at your direction. Is that right? But you didn't write it?

A. No. I didn't write it.

Q. Who is that addressed to up at the top?

A. Kelvin Solomon.

> Q. All right. Read the letter that was written with your consent, with your name, with the intent to go to Kelvin Solomon, read what's marked Exhibit #3. [State's objection sustained.]

Without query or any argument to the court or exception taken or proffer, and without continuing to cross-examine as to the letter marked defendant's Exhibit No. 3, the defendant's counsel merely continued his cross-examination with respect to the other two letters. The questioning set out above is representative of, and virtually identical to, the language preceding the State's objections to the defendant's attempts to have the witness read the remaining two letters to the jury.

In essence, the defendant contends, in all of his arguments on this issue, that he was not allowed to cross-examine a key prosecution witness, regarding statements the witness made on direct examination about some letters written on his behalf, simply because he was not allowed to read into evidence the entire contents of what we can only presume are the same letters. This is not the case, as the record reflects. Defendant was allowed to cross-examine the witness as to his testimony about "some letters," but he failed to extend this cross-examination sufficiently to allow the reading of the entire contents of these particular letters into evidence. A written statement is not admissible as evidence without proper identification or authentication. *State v. Artis*, 325 N.C. 278, 305, 384 S.E.2d 470, 485 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L.Ed.2d 604, *on remand*, 327 N.C.
218 470, 397 S.E.2d 223 (1990). *218

Additionally, as above noted, after the prosecutor's objections were sustained, the defendant made to the trial court no offer of proof or other attempt to show the court where he was going or what he was trying to do with regard to the contents of the letters. Absent such an offer of proof, coupled with the failure to lay a proper foundation for the introduction of the letters, there was no showing of relevance. Evidence not relevant is not admissible. N.C.G.S. § 8C-1, Rule 402 (1992). The trial court properly sustained each of the prosecutor's objections. We would note that for the same reasons as stated above, the letters were similarly not admissible through the defendant's own testimony. This assignment of error is overruled.

II.

[2] In his next assignment of error, the defendant contends that the trial court abused its discretion by failing to intervene *ex mero motu* to prevent closing argument by the prosecutor that the defendant lied during his testimony.

The prosecutor made the following arguments, to which defendant now takes exception:

> Not only is he a murderer, but he's bold as brass cause [sic] he can be taken in, be advised of his rights, come in here under oath and get right up on that witness stand and deny that he understood what his rights were one minute and then turn around and admit that he did the next, and then start *lying his head off* about what happened in April of 1992. And then want this jury to believe him. *To come up with a cock and bull story* in December of 1992 and expect you to brush away everything that's been said and every untruth he's ever told like you're suppose to say, we'll [sic] *let's give him best one out of four*.

. . . .

> . . . The thing about Kelvin Solomon is he has not dealt with the truth in so long that he's forgot what it is. And he wants you to forget what the truth is. He wants to boldly come in here *after giving what he says are three untruthful statements* and . . . pull the wool over your eyes.

(Emphasis added.)

Prosecutors are given wide latitude in the scope of their argument. *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144, *cert. denied*, ___ U.S. ___, 126 L.Ed.2d 341 (1993), *reh'g denied*, *219 ___ U.S. ___, 126 L.Ed.2d 707 (1994). "Even so, counsel may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence." *State v. Johnson*, 298 N.C. 355, 368, 259 S.E.2d 752, 761 (1979). Counsel may, however, argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom. *Syriani*, 333 N.C. at 398, 428 S.E.2d at 144.

It is well established that control of counsel's arguments is left largely to the discretion of the trial judge. *Johnson*, 298 N.C. at 368, 259 S.E.2d at 761. When no objection is made at trial, as here, the prosecutor's argument is subject to limited appellate review for gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. *State v. Pinch*, 306 N.C. 1, 17, 292 S.E.2d 203, 218, *cert. denied*, 459 U.S. 1056, 74 L.Ed.2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed.2d 1031 (1983), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994). In order to determine whether the prosecutor's remarks are grossly improper, the remarks must be viewed in context and in light of the overall factual circumstances to which they referred. *Id*. at 24, 292 S.E.2d at 221.

The evidence tends to show that after his arrest, the defendant made three statements to law enforcement officers. As the record reflects below, the defendant repeatedly stated, on cross-examination, that he had lied when giving these previous statements:

> Q. Mr. Solomon, once you were advised of your rights, you told Detective Tripp, and this was at 10:30 A.M. on the eleventh of April when you were picked up, you told Detective Tripp, "Terry, I don't know his last name, came and picked me up the other night." Isn't that what you told Detective Tripp?

A. Yes, but I lied too, on that statement.

. . . .

Q. You said in your statement you heard about five shots?

A. I lied on that.

. . . .

> Q. You said in your statement it was a white four-door car. Isn't that right?

220 A. No, sir. *220

Q. You didn't say that on your statement?

A. I lied if I did.

. . . .

> Q. And then the very next sentence after that and the last sentence on that statement is, "Then we went up 48 and that's when he shot the hell out of him."

A. I lied on this statement.

On numerous other occasions, the defendant did not specifically state that he lied, but instead, when asked if he was telling the truth, answered, "No, sir." The defendant also testified at one point that he did not understand his *Miranda* rights. Later, he changed his answers and admitted that he did indeed understand those rights. At yet another point in his testimony, the defendant denied knowing what the phrase "stuck me up" meant before admitting that the phrase referred to someone being cheated on a drug deal. Clearly, in light of the defendant's own testimony, the prosecutor did not inject his own beliefs, personal opinions or knowledge into his jury argument. Rather, the prosecutor's remarks were consistent with the facts in evidence from the defendant himself and the reasonable inferences drawn therefrom.

Assuming *arguendo* that the statements which the defendant now complains of were improper, the impropriety was not so gross or excessive that we would conclude the trial court abused its discretion by failing to intervene *ex mero motu*. When read in context, the prosecutor's argument was no more than an argument that the jury should reject the defendant's testimony in that the defendant's credibility, having been impeached, made his version of the events unbelievable. A prosecutor may properly argue to the jury that it should not believe a witness. *State v. McKenna*, 289 N.C. 668, 687, 224 S.E.2d 537, 550, *death sentence vacated*, 429 U.S. 912, 50 L.Ed.2d 278 (1976). This assignment of error is, accordingly, overruled.

III.

[3] In his third assignment of error, the defendant contends that the trial court erred by sustaining the State's objections to the defendant's efforts to ask two defense witnesses if they were telling the truth.

Defense counsel argues that the defendant and Cassandra Morrow were both vulnerable on cross-
221 examination: the defendant *221 because he had made prior inconsistent statements to the police, and Ms. Morrow because her status as the defendant's girlfriend and mother of his children might imply bias. To bolster each witness' credibility on redirect examination, defense counsel asked the defendant whether he had accurately pointed out to the prosecutor all the places in his prior statements that were untrue and asked Ms. Morrow whether she knew she was under oath. The State objected to each question. The defendant argues that the trial court erred when it sustained each objection. We disagree.

The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone. *State v. Ford*, 323 N.C. 466, 469, 373 S.E.2d 420, 421 (1988). Recently, this Court held that a trial court correctly sustained the prosecutor's objection to the question, "Are you telling this jury the truth?" *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, ___ U.S. ___, 130 L.Ed.2d 895 (1995). Notwithstanding this principle, Ms. Morrow was ultimately allowed to testify that she told the truth. We find no merit to the defendant's argument with respect to Ms. Morrow as she was permitted to testify to more than that which was previously excluded by the trial court. Defense counsel's question to the defendant was no more than a means to ask the witness whether the remainder of his testimony, which he did not point out as being untrue, was truthful. Thus, pursuant to our ruling in *Skipper*, the question of whether this witness, who was affirmed to tell the truth, did in fact tell

the truth in his testimony, was something for the jury to decide, not the witness. *Id*. This assignment of error is without merit.

IV.

[4] Defendant next contends that the trial court erred by denying his request to instruct the jury on second-degree murder as a lesser included offense of first-degree murder.

Murder in the first degree, the crime of which the defendant was convicted, is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 337 (1986). Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Brown*, 300 N.C. 731, 735, 268 S.E.2d 201, 204 (1980). A defendant is entitled to have a lesser included offense submitted to the jury only when there is evidence to support that lesser included offense. *Id*. at 735-36, 268 S.E.2d at 204. *222

Here, evidence of the lesser included offense of second-degree murder is totally lacking. The defendant's defense and his evidence, if believed, tended to show that Delvin Dickens shot and killed the victim and that the defendant had no role in the killing. The State's evidence on the other hand tended to show that Terence and Delvin Dickens, at the defendant's request, drove the defendant, who was armed with a sawed-off shotgun, to Enfield, North Carolina, to search for Jessie Smith, the victim. After finding Smith, the four men drove out toward the country. At some point, the defendant asked Terence Dickens to stop the car. The State's evidence further showed that the defendant and the victim were arguing because the victim had "stuck [the defendant] up," a term meaning he had cheated the defendant in a drug deal. The defendant then shot the victim in the groin. As the victim attempted to run away, the defendant ran after him and shot the victim several more times, all at close range. Neither the defendant's nor the State's view of the evidence tended to show a killing with malice but without premeditation and deliberation.

The defendant argues that the jury could have inferred that the defendant lacked the requisite element of "deliberation" based on evidence that the defendant and the victim were arguing prior to the shooting. Deliberation means that the defendant formed an intent to kill and carried out that intent in a cool state of blood, in furtherance of a fixed design for revenge or other unlawful purpose and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. *State v. Faust*, 254 N.C. 101, 106-07, 118 S.E.2d 769, 772, *cert. denied*, 368 U.S. 851, 7 L.Ed.2d 49 (1961). "The requirement of a `cool state of blood' does not require that the defendant be calm or tranquil." *Fisher*, 318 N.C. at 517, 350 S.E.2d at 337. The fact that the defendant was angry or emotional at the time of the killing will not negate the element of deliberation unless such anger or emotion was strong enough to disturb the defendant's ability to reason. *Id*. Thus, evidence that the defendant and the victim argued, without more, is insufficient to show that the defendant's anger was strong enough to disturb his ability to reason. Without evidence showing that the defendant was incapable of deliberating his actions, the evidence could not support the lesser included offense of second-degree murder. We therefore conclude that the trial court correctly denied the defendant's request to submit the offense of second-degree murder to the jury. In this assignment, we find no error. *223

For the foregoing reasons, we conclude that the defendant received a fair trial, free of prejudicial error.

NO ERROR.

No. COA08-961
North Carolina Court of Appeals

State v. Streater

197 N.C. App. 632 (N.C. Ct. App. 2009)
Decided Jul 1, 2009

No. COA08-961.

Filed 7 July 2009.

1. Sexual Offenses — expert testimony — sexual abuse by defendant — opinion or victim's credibility — plain error

A pediatrician's testimony in a prosecution for first-degree sexual offense that his findings were consistent with "the history that [he] received from [the victim]" of repeated anal penetration by defendant constituted an improper opinion on the victim's credibility and amounted to plain error where the pediatrician testified that there was no physical evidence of anal penetration; the victim's medical history as testified to by the pediatrician presented an unclear evidentiary foundation for the pediatrician's conclusion that defendant, rather than one of the other men the victim referred to as "dad," was the perpetrator of the sexual offense; and the victim's testimony was the only direct evidence implicating defendant as the perpetrator of the sexual offense.

2. Evidence — expert testimony — sexual abuse victim's physical condition consistent with history

The trial court did not err in a first-degree statutory rape case when it admitted an expert's testimony that the victim's physical condition was consistent with her history because: (1) the doctor was qualified as an expert in the field of pediatrics, the expert testified that the victim's history of repeated vaginal penetration was consistent with his findings made during his examination of the victim, and his testimony was not impermissible opinion testimony regarding the victim's credibility since the expert's previous testimony established the existence of physical evidence supporting a diagnosis of sexual intercourse; and (2) once the trial court accepted the doctor as an expert, controversy over his opinion goes to the weight of his testimony and not its admissibility.

3. Evidence — child abuse investigator — victim's interview atDSS

The trial court did not commit plain error in a first-degree sexual offense and first-degree rape case by allowing a child abuse investigator's testimony about the victim's
633 interview at DSS *633 because: (1) the investigator did not testify as an expert; (2) the investigator did not render an opinion that sexual abuse had occurred; and (3) the investigator merely explained her usual protocol in forensic interviews and stated she thought the first portion of the interview was sufficient to support the allegations contained in the protective services report.

4. Evidence — victim's testimony — truthfulness — swore to Jesus

Although the trial court erred in a first-degree sexual offense and first-degree rape case by admitting the victim's testimony that she told the truth and swore to Jesus regarding her previous testimony, it did not amount to plain error because it cannot be said that the victim's testimony tilted the scales and caused the jury to reach its verdict convicting defendant of first-degree rape in light of the remainder of the victim's testimony, the physical evidence of vaginal penetration presented by a doctor, and the victim's prior consistent statements made to a child sex abuse investigator.

5. Evidence — prior bad acts — incarceration — drug use — non-sexual physical assault of a victim

The trial court did not commit plain error in a first-degree sexual offense and first-degree rape case by admitting into evidence a witness's testimony concerning defendant's prior bad acts including incarceration, drug use, and non-sexual physical assault of a victim because: (1) although the trial court erred when it admitted a witness's testimony that defendant was previously incarcerated and used marijuana while living with the witness and the victim since this evidence came before defendant placed his credibility at issue by testifying, it cannot be said that absent the error the jury probably would have reached a different verdict in light of other similar evidence properly admitted at trial; and (2) the testimony concerning a "whooping" incident tended to show the victim began wetting the bed around the time of the alleged sexual abuse and was properly admitted to establish defendant's intent to conceal the alleged sexual abuse.

6. Constitutional Law — effective assistance of counsel — dismissal without prejudice to file motion for appropriate relief

Although defendant contends he received ineffective assistance of counsel in a first-
634 degree sexual offense and first-degree *634 rape case based on his counsel's failure to object at trial, this assignment of error is dismissed without prejudice to allow defendant to file a motion for appropriate relief with the trial court because the trial court is in a better position to determine whether counsel's performance was deficient and prejudiced defendant.

7. Sentencing — consolidated — remand for resentencing — new trial awarded on one of charges

A first-degree sexual offense and first-degree rape case was remanded for resentencing on defendant's first-degree rape conviction because: (1) the trial court consolidated defendant's convictions; and (2) defendant was awarded a new trial on the charge of first-degree sexual offense.

Appeal by defendant from judgment entered on 21 February 2008 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 28 January 2009.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State. Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Carnell Tyrone Streater ("defendant") appeals from judgment entered after a jury found him guilty of: (1) first-degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a) and (2) first-degree rape pursuant to N.C. Gen. Stat. § 14-27.2(a). We award defendant a new trial on his first-degree sexual offense charge, hold there to be no error in his first-degree rape conviction, and remand for resentencing on the first-degree rape conviction.

I. Background

Defendant was indicted for first-degree statutory sexual offense and first-degree statutory rape on 13 March 2006. The indictments alleged that "between the 1st day of October, 2004 and the 31st day of March, 2005" defendant engaged in a sex offense and vaginal inter-course with B.H.S. (hereinafter "B.H.S." or "the victim").

The State's evidence showed that B.H.S. was born on 7 October 2000. When B.H.S. was age four she
635 was living with her parents, *635 defendant and Rosanna Nicole Bacon ("Bacon"). At this time, defendant was unemployed and "watched" B.H.S. while Bacon worked at a dance club about five nights a week from approximately 5:30 p.m. to 4:00 a.m. She testified while Bacon was at work, defendant "would do things [she] didn't like," on her "bed." Defendant would put "[h]is private" inside of the victim's "[f]ront and back" privates, and doing these acts "hurt" her front and back parts. She testified that she would tell him to stop, but he did not. B.H.S. further testified that defendant told her he "would ground [her]" if she told anyone. B.H.S. did not tell Bacon about these events because she "felt scared to" tell. She testified the acts stopped around October of 2005, when Bacon "wanted [B.H.S.] to go stay with [B.H.S.'s] aunt and uncle so [Bacon] could get [her]self together

On cross-examination, B.H.S. testified she first told her aunt and uncle about these events. She further testified that the acts caused a "mess" on sheets which were changed by Bacon. At trial she testified that she called Bobby and Boyd, two friends of her mother who lived with them, "daddy" and would also call her uncle "daddy," but none of the other men she called "daddy" touched her, and that the person who touched her was defendant.

Bacon testified that she, B.H.S., and defendant lived together from "the time period around her fourth birthday" until March 2005 when defendant had a stroke. During the period of time in which the events B.H.S. complained of, and afterward, two other men, Boyd and Bobby, lived in the house with Bacon and B.H.S. Both Boyd and Bobby "watched" B.H.S. Bacon testified that during this period of time she used cocaine supplied by Bobby, and defendant used marijuana. She also testified during the period of time she lived with defendant, B.H.S. did not report to her that defendant touched her, and that she did not notice anything or suspect anything. Bacon testified that defendant had a stroke in March and lived in a hospital and nursing home. After leaving the nursing home, he returned to her home.

On 12 October 2005, Bacon signed an agreement relinquishing custody of B.H.S. to Bacon's brother George and his wife. Their agreement provided for return of the victim to Bacon conditioned upon her giving up cocaine and dancing.

The Alamance County Department of Social Services ("DSS") received a Protective Services Report regarding B.H.S. on 27 January 2006. The custodial aunt brought B.H.S. to DSS's interview
636 facility on *636 30 January 2006. At the interview, B.H.S. described defendant's actions to DSS's child abuse investigator Leslie Jones ("Jones"). B.H.S. drew anatomical pictures of herself and described defendant's genitals. Her pictures also showed urine and blood on the bed.

Lieutenant Weidner of the Thomasville Police Department testified that he conducted an investigation of B.H.S.'s report which included seizing a mattress from the residence of Bacon. After being tested by the SBI, there were no findings of bodily fluids present.

At DSS's request, Dr. Joseph Pringle, Jr. ("Dr. Pringle") examined B.H.S. on 3 February 2006. At trial Dr. Pringle was qualified without objection as an expert in the field of pediatrics. The prosecutor notified the court at the time of Dr. Pringle's testimony that Dr. Pringle was "obviously extremely busy" and was specially scheduled to testify at 2:00 p.m. on 20 February 2008. His direct examination with regard to the history given him by the victim is as follows:

637

> Q During the time period in which you spoke with [B.H.S.], do you recall any specific comments she made to you in reference to the allegations?
>
> A Yes. She was calm during the interview process and stated to me that her dad — and she did not name a name — but she called and said her dad and she used the word weeny for penis, stuck his weeny in both her front and back areas and on her bottom and it hurt. And at times there was some bleeding after the event occurred and she said it happened many times. She didn't give me a number of times. . . .
>
> * * * *
>
> Q Explain to the ladies and gentlemen what a physical examination or that part of the evaluation entails.
>
> A It is a physical examination in child sexual or physical abuse cases. We are looking for signs of trauma such as bruises, burns, scars and lacerations. In sexual abuse cases as alleged here, we are looking for signs of any changes in the anatomy of the genital area that might have been caused by trauma or signs of infection such as vaginal discharge or bleeding for an accute (sic) event.
>
> Q In your experience and in the literature that's published in this field, when you go in for these examinations, regardless of the history that you receive from the child making the allegations, do you expect to make findings, generally?

*637

> A Many times in sexual abuse cases there are no residual findings in the genital area that will say yes or no to this, that the abuse did or did not occur. It is not uncommon to have the abuse alleged and have a normal genital examination.

Q Is there any reason why you expect that other than the literal take says that, is there any particular experience you have in that area of the human body causes you to believe that?

A It could be the degree of trauma involved. If it was minor trauma, it wouldn't show anything. If the tissues are stretchy, they give or take. They may just
638 stretch and spring back to normal if there's no laceration or abruption or tearing of the tissues at all. There was no evidence of discharge here either so —

Q Thank you. I appreciate you answering that question. That's in general?

A In general.

Dr. Pringle explained the procedures he used to examine the victim and that he conducted a full examination of the victim's vaginal and anal openings. He testified the victim's "vaginal opening was abnormal in several ways[:]" (1) "it was slightly larger than . . . a child of her age[;]" (2) "there w[ere] deep notches at the upper part of the vaginal opening . . . at 10:00 o'clock and 2:00 o'clock[;]" and (3) "[t]here was also a small scar just inside the rim of the vaginal opening that looked like a healed laceration. . . ." Dr. Pringle stated this was a "significant finding." The examination of Dr. Pringle continued as follows:

Q Would you find that based on the history that we already covered, [the victim's] statements that the defendant did penetrate her with his penis on many occasions, would you find that that is consistent with a finding of two deep notches in the vaginal tissue?

A Yes, I would think so. The penetration split the opening at the margins of the vaginal opening and created the tears that resulted in these notches as they healed.

After explaining the formation of scar tissue, the examination continued as follows:

Q Again, based on the history that you received from [B.H.S.], repeated penile intercourse by the defendant, did you find that's consistent with that history?

A Yes, I believe so. It was not a normal finding.

*638

Q Taking that and moving to the next part of that examination, you also had a history from [B.H.S.], as you indicated in your testimony, of anal penetration by the defendant's penis; is that correct?

A That is correct.

Q After you finished your vaginal examination did you examine her anal area?

A Yes, I did.

* * * *

Q And in reviewing of the examination of [B.H.S.] at that time, did you make any significant findings there?

A No. I thought her anal opening looked normal in her size, shape and caliber. There was no hemorrhoids or fissures or splits in the anal wall. It looked normal.

Q Based on the history that you received from [B.H.S.], potentially repeated penetration of the defendant's penis into the anal area, would you find that inconsistent with your medical findings of no trauma or would you find that consistent with it?

> A I think it was consistent with the findings. She may not, despite having been anally penetrated, she may not have had any physical findings. In many cases it is common to have a normal exam even after an allegation of physical sexual abuse in that area.

Dr. Pringle indicated that there were no other allegations made by the victim other than those indicated. Defendant testified in his own defense and denied the charges. On 21 February 2008, a jury found defendant guilty of first-degree sexual offense and first-degree rape. The trial court determined defendant to be a prior record level III offender, consolidated the convictions, and sentenced him to a minimum of 269 and a maximum of 332 months' incarceration. Defendant appeals.

II. Issues

Defendant argues the trial court committed plain error when it admitted: (1) Dr. Pringle's expert testimony that "sexual abuse" had in fact occurred; (2) Dr. Pringle's expert testimony that defendant's repeated penetration of the victim with his penis
639 was consistent with *639 her history and bolstered the victim's credibility; (3) Dr. Pringle's expert testimony that the presence and absence of physical findings were both consistent with the victim's history; (4) Jones's testimony about the credibility and sufficiency of the victim's initial DSS interview; (5) the victim's testimony about the truthfulness of her testimony; and (6) evidence of defendant's prior bad acts. Defendant also argues he received ineffective assistance of counsel.

III. Standard of Review

Because defendant failed to object or move to strike this testimony, we must determine whether these evidentiary errors amounted to plain error.

When an issue is not preserved in a criminal case, we apply plain error review. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). We find plain error

> only in exceptional cases where, "after reviewing the entire record, it can be said the claimed error is a" ` *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.'" Thus, the appellate court must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error.

State v. Davis, 349 N.C. 1, 29, 506 S.E.2d 455, 470 (1998) (citations omitted), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). Accordingly, we must determine whether the jury would probably have reached a different verdict if this testimony had not been admitted. *See State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (explaining that "plain error" is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached"), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988); *State v. Hammett*, 361 N.C. 92, 637 S.E.2d 518 (2006).

IV. Dr. Pringle's Testimony

Defendant argues he is entitled to a new trial in the sex offense conviction because Dr. Pringle's expert opinion evidence that sexual abuse had in fact occurred was plain error. In addition, defendant argues that he is entitled to a new trial on both cases because Dr. Pringle's evidence that the victim's physical condition was consistent with her testimony that it was defendant who had repeatedly penetrated her with his penis and that
640 the presence and absence of physical *640 findings were both consistent with the victim's history. We agree with defendant with regard to the sexual abuse conviction but disagree with defendant with regard to the rape conviction.

Our consideration of these issues is governed by *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002); *Hammett*, 361 N.C. 92, 637 S.E.2d 518; *State v. Aguallo*, 322 N.C. 818, 370 S.E.2d 676 (1988); and *In re Butts*, 157 N.C. App. 609, 582 S.E.2d 279 (2003), *disc, review improvidently allowed, appeal dismissed*, 358 N.C. 370, 595 S.E.2d 146 (2004), and their progeny. We are also mindful that application of the evidentiary principles established by these cases are *sui generis* involving a fact intensive analysis of the testimony involved. There is a fine line between permissible and impermissible expert testimony and its effects on the jury's result.

We find plain error in the sex abuse conviction based upon our analysis of the following factors and their cumulative effects on the jury result in that specific conviction. These factors include (1) the presence of ordinary evidentiary error which, if an objection had been lodged, should have been sustained; (2) the ambiguous testimony of Dr. Pringle as to which of the two charges his testimony was directed toward with regard to the allegations of "sexual abuse"; (3) the victim's medical history as testified to by Dr. Pringle, presenting an unclear evidentiary foundation for the conclusion by Dr. Pringle that defendant, rather than one of the other men the victim called "Dad," was the perpetrator of the sexual abuse; (4) the likelihood that Dr. Pringle's opinion bolstered the victim's credibility with regard to the sexual abuse case and its probable impact on the jury; (5) the lack of a curing instruction with regard to the evidence which could be considered by the jury in the sexual abuse conviction; and (6) lack of any corroborative testimony or physical evidence, which was not derived from the child's testimony, that sexual abuse (as opposed to rape) had in fact occurred.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) holds:

> In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility.

See also, State v. Trent, 320 N.C. 610, 614-15, 359 S.E.2d 463, 465-66 (1987); *State v. Grover*, 142 641 N.C. App. 411, 543 S.E.2d 179, *aff'd per* *641 *curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith. *State v. Hall*, 330 N.C. 808, 818, 412 S.E.2d 883, 888 (1992); *Aguallo*, 322 N.C. at 822-23, 370 S.E.2d at 678; *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987).

N.C. Gen. Stat. § 8C-1, Rule 702 (2007), provides:

> **Testimony by experts.**
>
> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

The proper foundation is a predicate to the admission of expert opinion. In a sex abuse case, a physical examination and an interview with the victim can lay the proper foundation for expert testimony.

Prior to Dr. Pringle's testimony, testimony from the victim and Bacon showed that the victim referred to as many as four men by the name of "daddy." In his direct testimony, Dr. Pringle, in reporting history given by the victim, "dad," and "she did not give a name," was the perpetrator of both the vaginal and anal penetration.

Subsequently, Dr. Pringle testified "in general" that physical findings are not always present in sex abuse cases. This conclusion was proper testimony and provided the needed evidence for the State.

Nonetheless, the State examined Dr. Pringle with leading questions which did not have the predicate foundation. The questions assumed a fact not in evidence from Dr. Pringle's history — that the man the victim named as "dad" and defendant were the same person. The impact of this questioning could not be for the purpose of clarifying for the jury the fact that sexual abuse can occur in the absence of physical findings. Prior to that question being lodged, Dr. Pringle had testified that physical findings of abuse were not always present in sex abuse cases. The impact of this line of questions was not only to bolster the credibility of defendant but to resolve the issue for the jury that the victim had specifically identified defendant as the perpetrator during her case history, which was directly contrary to Dr. Pringle's earlier testimony. The leading questioning repeatedly made this connection
642 without proper foundation. *642

While Dr. Pringle could give such testimony with regard to vaginal rape, where he found "significant" findings of physical evidence to support the charge history, he cannot testify that it was defendant who repeatedly abused the victim where no such physical evidence exists. He could testify that the physical findings could be present even where there was repeated penetration, but it is the specific identification of defendant as perpetrator which crosses over the line into impermissible testimony

Here, following Dr. Pringle's testimony, the prosecutor questioned Dr. Pringle:

> Q Can you explain to the ladies and gentlemen when you have a history as described by [the victim] and you moved to examine the anus what would you be looking for as far as that part of the body is indicated?
>
> A We are looking for a natural laxity gaping anal opening caused by a breakdown of the anal sphincter muscle that would result in an anal laxity with a breakdown of the anal sphincter. We would look for fresh lacerations or tears if they were recently created.
>
> Q And in reviewing of [sic] the examination of [the victim] at that time, did you make any significant findings there?
>
> A No. I thought her anal opening looked normal in her [sic] size, shape and caliber. There [were] no hemorrhoids or fissures or splits in the anal wall. It looked normal.
>
> Q Based on the history that you received from [the victim], potentially repeated penetration of the defendant's penis into the anal area, would you find that inconsistent with your medical findings of no trauma or would you find that consistent with it?
>
> A I think it was consistent with the findings. She may not, despite having been anally penetrated, she may not have had any physical findings. In many cases it is common to have a normal exam even after an allegation of physical sexual abuse in that area.

Dr. Pringle testified that there was no physical evidence of anal penetration. The trial court therefore erred when it admitted Dr. Pringle's testimony that his findings were consistent with "the history that [he] received from [the victim]" of repeated anal penetration by defendant. "[S]uch testimony [was] an impermissible opinion regarding the victim's credibility." *Stancil*, 355
643 N.C. at 266-67, 559 S.E.2d at 788. *643

Here, the jury had only the testimony of the victim and testimony by investigators that the victim had repeated the same evidence to them at an earlier time. The victim's testimony was the only direct

evidence implicating defendant on the charge of first-degree sexual offense. Dr. Pringle's testimony amounted to an improper opinion on the victim's credibility, and it had a probable impact on the jury's result. *See State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 ("[B]ecause there was no physical evidence of abuse and the State's case was almost entirely dependent on J.M.'s credibility with the jury, the admission of Dr. Brown's statement was plain error."), *disc. review denied*, 356 N.C. 173, 567 S.E.2d 144 (2002); *State v. Couser*, 163 N.C. App. 727, 731, 594 S.E.2d 420, 423 (2004) ("We conclude that the impermissible expert medical opinion evidence had a probable impact on the jury's result because it amounted to an improper opinion on the victim's credibility, whose testimony was the only direct evidence implicating defendant."). Defendant is entitled to a new trial on the charge of first-degree sexual offense. In light of this holding, we review defendant's remaining assignments of error only as they relate to his first-degree rape conviction.

Defendant's remaining arguments with regard to Dr. Pringle's testimony are that the trial court erred when it admitted Dr. Pringle's testimony that the victim's physical condition was consistent with her history and found that this testimony was not helpful to the jury. We disagree.

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a). "[O]nce the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 461, 597 S.E.2d 674, 688 (2004) (citation omitted).

Here, Dr. Pringle was qualified as "an expert in the field of pediatrics." Dr. Pringle testified that the victim's history of repeated vaginal penetration was consistent with his findings made during his examination of the victim's vaginal opening. This testimony was not impermissible opinion
644 testimony regarding the victim's credibility *644 because Dr. Pringle's previous testimony established the existence of physical evidence supporting a diagnosis of sexual intercourse. *Stancil*, 355 N.C. at 266-67, 559 S.E.2d at 789. Once the trial court accepted Dr. Pringle as an expert, controversy over his opinion goes to the weight of his testimony, not its admissibility. *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688. The trial court did not err when it allowed Dr. Pringle to testify that his physical findings were consistent with the victim's history. These assignments of error are overruled.

V. Jones's Testimony

Defendant argues the trial court committed plain error when it allowed Jones's testimony about the victim's interview at DSS "because it was 1) opinion evidence a legal standard had been met, and 2) evidence on [the victim's] credibility." We disagree.

Jones testified that as a child abuse investigator she conducts forensic interviews of children to determine "whether the allegations [contained in the Protective Services Report] are true or false." After playing a portion of the videotaped interview of the victim for the jury, the following exchange occurred between the prosecutor and Jones:

> Q During this part of the video you and [the victim] are out of the room; is that correct?
>
> A Yes.
>
> Q Where did you go?

> A I walked up with [the victim] where there was another play area and walked back down the hall.
>
> Q Did you meet with anybody at that time?
>
> A I spoke with Detective Kelly.
>
> * * * *
>
> Q What was the topic of your discussion? Don't say what anybody else said, but what did you talk about?
>
> A Detective Kelly and I talked about was there any additional information or any other questions that need to be asked.
>
> Q Is that normal protocal [sic] that you take a break and ask if there's any other questions that anybody needs to ask?

645 *645

> A Right.
>
> * * * *
>
> Q What did you tell [Detective Kelly] about what was [sic] the answers of the child?
>
> A I felt from that interview there was enough.
>
> Q For the allegations?
>
> A For the allegations on the report.

Defendant correctly notes that in *State v. Parker*, our Supreme Court stated:

> *An expert* may not testify regarding whether a legal standard or conclusion has been met "at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness." Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable.

354 N.C. 268, 289, 553 S.E.2d 885, 900 (2001) (citations omitted) (emphasis added), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). *Parker* is not applicable here, however, because Jones did not testify as an expert. More importantly, Jones did not render an opinion that sexual abuse had occurred. Jones merely explained her usual protocol in forensic interviews and stated she thought the first portion of the interview was sufficient to support the allegations contained in the Protective Services Report. The trial court properly allowed Jones's testimony. This assignment of error is overruled.

VI. The Victim's Testimony

Defendant argues the trial court committed plain error when it admitted the victim's testimony "that she `told the truth' and `swore to Jesus[.]'" We disagree.

"The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784, *cert. denied*, 516 U.S. 996, 133 L. Ed. 2d 438 (1995). "Therefore . . . it is improper for . . . counsel to ask a witness (who has already sworn an oath to tell the truth) whether he has in fact spoken the truth during his testimony." *State v. Chapman*, 359 N.C. 328, 364, 611 S.E.2d

646 794, 821 (2005). *646

In *Chapman*, our Supreme Court stated:

> [T]he error cited by [the] defendant involve[d] the prosecutor's questions to the State's witness after that witness's credibility had been attacked. Moreover, [the] defendant did not object to the prosecutor's questions concerning [the witness's] truthfulness at trial; thus, [the] defendant must show plain error to prevail on appeal. As stated earlier, plain error is error "`so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" After thorough review of the record, we cannot say that [the witness's] responses probably altered the outcome of the trial.

359 N.C. at 364, 611 S.E.2d at 821 (citations omitted).

Here, the following exchange occurred between the prosecutor and the victim at the end of the victim's direct examination:

> Q Now, earlier when you came up to the witness stand and Judge Klass had you put your hand on the Bible and swear that you would tell the truth, do you understand what that meant?
>
> A Yes.
>
> Q When you put your hand on the Bible, who were you swearing you were going to tell the truth to?
>
> A Jesus.
>
> Q Have you told the truth to these folks here today?
>
> A Yes.

Like *Chapman*, the error cited by defendant involves the prosecutor's questions to the State's witness. Unlike *Chapman* however, the victim's credibility had not been attacked on cross-examination. The victim's ability to tell the truth was questioned only during *voir dire*. The trial court erred when it allowed the victim's testimony about the truthfulness of her previous testimony. *Id.*

In light of the remainder of the victim's testimony, the physical evidence of vaginal penetration presented by Dr. Pringle, and the victim's prior consistent statements made to Jones, we cannot say that the victim's testimony "`tilted the scales' and caused the jury to reach its verdict convicting . . . defendant" of first-degree rape. *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. Likewise, we cannot
647 say the victim's testimony *647 that she swore she was going to tell the truth to "Jesus" probably altered the jury's verdict on the charge of first-degree rape. *Id.* The admission of the victim's testimony did not constitute plain error. This assignment of error is overruled.

VII. Defendant's Prior Bad Acts

Defendant argues the trial court committed plain error when it "admitted . . . Bacon's `other crimes' character evidence about defendant's prior incarceration, drug use, and non-sexual physical assault of [the victim] into evidence. . . ." We disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

During the State's direct examination of Bacon, she disclosed the following facts: (1) defendant was previously incarcerated; (2) defendant used marijuana while he lived with Bacon and the victim; and (3) she walked in on defendant

"whooping" the victim with a belt and thought it might have been because the victim "us[ed] the bathroom on the bed or on herself or something."

After the State presented its case, defendant took the stand to testify on his own behalf. Defendant stated during his direct examination that he sold drugs to help out around the house, "got busted[,]" and was incarcerated first for "six to nine months" and then for "111 days." The following exchange occurred during the State's cross-examination of defendant:

> Q [Defendant], what have you been tried and convicted of in the last ten years that carries a jail sentence of 60 days or more?
>
> A Drugs.
>
> Q Possession with intent to sell and deliver marijuana October of `01?
>
> A Yeah.
>
> Q Anything else?
>
> A Crack.

648 *648

> Q Possession with intent to sell and deliver cocaine August of `04?
>
> A Yeah.
>
> Q Anything else?
>
> A Some more crack.
>
> Q Some more crack?
>
> A Yeah.
>
> Q Anything else?
>
> A No.
>
> Q Assault on a female maybe in May of 2002?
>
> A Yeah, yeah.
>
> Q Larceny in 2000?
>
> A Yeah.

The trial court erred when it admitted Bacon's testimony that defendant was previously incarcerated and used marijuana while living with Bacon and the victim. This evidence was admitted before defendant placed his credibility at issue by testifying. *See State v. Norkett*, 269 N.C. 679, 681, 153 S.E.2d 362, 363 (1967) ("[The][d]efendant testified, but did not otherwise put his character in issue. For purposes of impeachment, he was subject to cross-examination as to convictions for unrelated prior criminal offenses."). Nonetheless, in light of the other similar evidence properly admitted at trial, we are not "convinced that absent the error the jury probably would have reached a different verdict." *Walker*, 316 N.C. at 39, 340 S.E.2d at 83.

The trial court properly admitted Bacon's testimony regarding the "whooping" incident. The State's evidence tended to show that the victim began "wetting the bed" around the time of the alleged sexual abuse. Bacon's testimony about the "whooping" incident therefore tended to establish defendant's intent to conceal the alleged sexual abuse. The trial court properly admitted this testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b). This assignment of error is overruled.

VIII. Ineffective Assistance of Counsel

Defendant argues he received ineffective assistance of counsel and is entitled to a new trial.

649 *649

> A defendant's ineffective assistance of counsel claim may be brought on direct review "when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." If an ineffective assistance of counsel claim is prematurely brought, this Court may dismiss the claim without prejudice, allowing the defendant to reassert the claim during a subsequent motion for appropriate relief proceeding.

State v. Pulley, 180 N.C. App. 54, 69, 636 S.E.2d 231, 242 (2006) (citations omitted), *disc, review denied*, 361 N.C. 574, 651 S.E.2d 375 (2007). "Simply stated, the trial court is in a better position to determine whether a counsel's performance: (1) was deficient so as to deprive defendant of `"counsel" `guaranteed under the Sixth Amendment; and (2) prejudiced defendant's defense to such an extent that the trial was unfair and the result unreliable." *State v. Duncan*, 188 N.C. App. 508, 517, 656 S.E.2d 597, 603 (Hunter, J., dissenting), *disc, review improvidently allowed, reversed*, 362 N.C. 665, 669 S.E.2d 738 (2008) ("For the reasons stated in the dissenting opinion of the Court of Appeals, the decision of the Court of Appeals is reversed[.]").

Here, defendant's alleged errors relate to his counsel's failure to object at trial. Under *Pulley*, the proper action is to dismiss this assignment of error without prejudice, allowing defendant to file a motion for appropriate relief with the trial court. The trial court is in the best position to review defendant's counsel's performance.

IX. Resentencing

In *State v. Stonestreet*, our Supreme Court stated:

> Where two or more indictments or counts are consolidated for the purpose of judgment, and a single judgment is pronounced thereon, even though the plea of guilty or conviction on one is sufficient to support the judgment and the trial thereon is free from error, the award of a new trial on the other indictment(s) or count(s) requires that the cause be remanded for proper judgment on the valid count. 243 N.C. 28, 31, 89 S.E.2d 734, 737 (1955).

Here, the trial court consolidated defendant's convictions for first-degree sexual offense and first-degree rape. We have awarded defendant a new trial on the charge of first-degree sexual
650 offense *650 and found there to be no error in defendant's first-degree rape conviction. Based on our Supreme Court's holding in *Stonestreet*, this cause is remanded for resentencing on defendant's first-degree rape conviction.

X. Conclusion

For the foregoing reasons, we award defendant a new trial on the charge of first-degree sexual offense, hold there to be no error in his first-degree rape conviction, and remand for resentencing on the first-degree rape conviction.

No error in part; new trial in part; and remanded for resentencing.

Judges McGEE and JACKSON concur.

No. 484A19
SUPREME COURT OF NORTH CAROLINA

State v. Warden

376 N.C. 503 (N.C. 2020) · 852 S.E.2d 184
Decided Dec 18, 2020

No. 484A19

12-18-2020

STATE of North Carolina v. David William WARDEN II

Joshua H. Stein, Attorney General, by Margaret A. Force, Assistant Attorney General, for the State-appellant. Mark Montgomery, for defendant-appellee.

EARLS, Justice.

Joshua H. Stein, Attorney General, by Margaret A. Force, Assistant Attorney General, for the State-appellant.

Mark Montgomery, for defendant-appellee.

504 EARLS, Justice.*504 In this case, we consider whether the Court of Appeals correctly held that the trial court committed plain error when it admitted improper testimony by a Department of Social Services (DSS) Child Protective Services Investigator who, after explaining that DSS will "substantiate a case" if the agency "believe[s] allegations [of sexual abuse] to be true," testified that DSS had "substantiated sexual abuse naming [defendant] as the perpetrator." The Court of Appeals held that because the DSS investigator's testimony "improperly bolstered or vouched for the victim's credibility," and because "the credibility of the complainant was the central, if not the only, issue to be decided by the jury," the trial court committed plain error requiring a new trial. *State v. Warden* , 268 N.C.App. 646, 652, 836 S.E.2d 880, 885 (2019). Judge Young dissented. While agreeing with the majority that the DSS investigator's testimony was improper, Judge Young concluded that defendant had failed to prove that, absent the improper vouching testimony, the jury likely would have reached a different result. *Warden,* 836 S.E.2d at 885 (Young, J., dissenting).

We agree with the majority of the Court of Appeals and hold today that the trial court committed plain error by allowing the State to introduce the DSS investigator's inadmissible vouching testimony. Consistent with the precedent this Court established in *State v. Towe* , 366 N.C. 56, 732 S.E.2d 564 (2012), we hold that the trial court commits a fundamental error when it allows testimony which vouches for the complainant's credibility in a case where the verdict entirely depends upon the jurors' comparative assessment of the complainant's and the defendant's credibility. Accordingly, we affirm the decision of
505 the Court of Appeals.*505 Background

Defendant is the father of two children, Virginia[1] and her younger brother. Defendant separated from Virginia's mother in 2011. Around Father's Day in 2017, fifteen-year-old Virginia had a conversation with her paternal grandfather regarding their plans for the upcoming holiday. Virginia told her grandfather that she did not want to spend the holiday with defendant. Her grandfather became angry. In frustration, he shouted "It's not like he molested y'all or anything." Virginia became quiet, then told her
187 grandfather *187 she loved him, and hung up the phone. Later that day, Virginia told her mother

that, on one occasion when she was nine and two occasions when she was twelve, defendant sexually abused her. Virginia alleged that each assault followed a similar pattern. Defendant would summon Virginia to his bedroom, force Virginia to perform oral sex on him, and then pray for forgiveness after the assault was over. During each of the assaults, Virginia's younger brother was home but not present in the bedroom. Besides Virginia and defendant, there were no other direct witnesses to any of these incidents. Virginia testified that she did not report the assaults at the time they occurred because defendant "told me not to tell anybody" and she "was terrified of my dad."

[1] We refer to the juvenile by the pseudonym used at the Court of Appeals.

The day after she first disclosed the assaults to her mother, Virginia's mother took her to the Rockingham County Sheriff's Office to file a report. In a statement she provided on 14 June 2017, Virginia described the three incidents of sexual abuse. After an investigation, defendant was indicted on 13 October 2018 on the charges of sexual offense with a child by an adult, child abuse by a sexual act, and indecent liberties with a child.

At trial, the State called nine witnesses. In addition to Virginia, the jury heard testimony from a Detective and a Deputy Sheriff with the Rockingham County Sheriff's Office who were involved in investigating Virginia's report, Virginia's mother, Virginia's maternal grandmother, Virginia's paternal grandfather, the DSS Child Protective Services Investigator assigned to Virginia's case, and the director of a child advocacy non-profit who conducted a forensic interview of Virginia. The jury also heard testimony from Virginia's aunt, defendant's sister, who testified that when she was around the age at which Virginia was allegedly abused by defendant, defendant sexually assaulted her in a manner that shared many similarities with Virginia's account of *506 defendant's conduct. This testimony was admitted pursuant to N.C.G.S. § 8C–1, Rule 404(b) (2009). Defendant was the only witness to testify on his behalf. The jury found defendant guilty on all three charges. He was sentenced to consecutive sentences of 300 to 369 months for the sexual offense with a child by an adult, 29 to 44 months for the child abuse by a sexual act, and 19 to 32 months for the indecent liberties with a child.

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Standard of Review

Because defendant failed to object to the DSS investigator's testimony at trial, we review his challenge on appeal for plain error. *State v. Hammett* , 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006). "[T]o establish plain error defendant must show that a fundamental error occurred at his trial and that the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Towe* , 366 N.C. at 62, 732 S.E.2d at 568 (quoting *State v. Lawrence* , 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)). A fundamental error is one "that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Lawrence* , 365 N.C. at 518, 723 S.E.2d at 334 (cleaned up). In determining whether the admission of improper testimony had a probable impact on the jury's verdict, we "examine the entire record" of the trial proceedings. *State v. Odom* , 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983).

Analysis

There is no disputing, and the State concedes, that the trial court erred in allowing the DSS Child Protective Services Investigator's testimony that

> part of our role is to determine whether or not we believe allegations to be true or not true. If we believe those allegations to be true, we will substantiate a case. If we believe them to be not true or we don't have enough evidence to suggest that they are true, we would unsubstantiate a case.... We substantiated sexual abuse naming [defendant] as the perpetrator.

"In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil* , 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002) (per curiam). This rule permits the introduction of expert testimony
188 only when the testimony is "based on the *188 special expertise of the expert," who "because of
507 his [or her] expertise is in a better *507 position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson* , 295 N.C. 559, 568–69, 247 S.E.2d 905, 911 (1978) ; *see also State v. McGrady* , 368 N.C. 880, 889, 787 S.E.2d 1, 9 (2016). Thus, an expert witness's "definitive diagnosis of sexual abuse" is inadmissible unless it is based upon "supporting physical evidence of the abuse." *State v. Chandler* , 364 N.C. 313, 319, 697 S.E.2d 327, 331 (2010) ; *see also State v. Trent* , 320 N.C. 610, 614–15, 359 S.E.2d 463, 465–66 (1987). Because there was no physical evidence that Virginia was sexually abused, it was error to permit the DSS investigator to testify that sexual abuse had *in fact* occurred. In addition, it is typically improper for a party to "s[eek] to have the witnesses vouch for the veracity of another witness."[2] *State v. Robinson* , 355 N.C. 320, 334, 561 S.E.2d 245, 255 (2002) ; *see also State v. Gobal,* 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007), *aff'd* , 362 N.C. 342, 661 S.E.2d 732 (2008) ("[O]ur Supreme Court has determined that when one witness vouch[es] for the veracity of another witness, such testimony is an opinion which is not helpful to the jury's determination of a fact in issue and is therefore excluded." (alterations in original) (cleaned up)).

> [2] The ultimate analysis of the appropriateness of a witness's opinion testimony regarding the credibility of another witness differs depending on whether the witness is a lay or expert witness. *Compare* N.C.G.S. § 8C-1, Rule 701 (2019) (providing the rule that applies to lay witness testimony) *with* N.C.G.S. § 8C-1, Rule 702 (2019) (providing the rule that applies to expert witness testimony).

The only question for this Court to address is whether defendant has met his "burden of showing that [the] error rose to the level of plain error." *State v. Melvin* , 364 N.C. 589, 594, 707 S.E.2d 629, 633 (2010). Based on our precedents, we conclude that he has. In considering this question, the Court is bound by our prior cases. This Court considered the same legal question under similar factual circumstances in *Towe* . In that case, we held that the trial court committed plain error when it allowed the State to present inadmissible vouching testimony because, in the absence of physical evidence of abuse, the case "turned on the credibility of the victim, who provided the only direct evidence against defendant." 366 N.C. at 63, 732 S.E.2d at 568. The Court reached that conclusion notwithstanding the fact that the State had also presented evidence corroborating the complainant's testimony which supported the jury's conclusion that the defendant had committed the alleged criminal acts. *Id.*

The present case shares a core, determinative similarity with *Towe* . In both this case and in *Towe* , the "victim displayed no physical symptoms diagnostic of sexual abuse," *id.* at 62,
508 732 S.E.2d at 568, and the *508 jury's decision to find the complainant more credible than the defendant clearly formed the basis of its ultimate verdict, *id.* at 62–64, 732 S.E.2d at 568–69. As the prosecutor emphasized at trial in this case, a guilty

verdict necessarily followed from the jury's determination that Virginia was credible and defendant was not:

> What this case comes down to is whether or not you believe [Virginia]. If you believe [Virginia], there's no reasonable doubt. It really doesn't matter if you fully believe [Virginia's mother], or if you fully believe [the DSS investigator], or if you fully believe the Defendant's father. Those are extra. Those are corroborating evidence. What matters is if you believe [Virginia]. If you believe what she says, then it happened.... Tell her you believe her. Tell her not to be afraid. Tell her not to be ashamed. Tell her that this Defendant is guilty of exactly what he did to her.

By the prosecutor's logic, the converse was also true. If the jury determined that defendant was more credible than the complainant, then the jury would have been overwhelmingly likely to acquit. Thus, "the case against defendant revolved around the victim's credibility." *Towe* , 366 N.C. at 61, 732 S.E.2d at 567.

The State attempts to evade *Towe* by pointing to other evidence presented to the jury in this case which, it contends, independently provided a basis for the jury's decision to find defendant guilty. But
189 the State also *189 presented similar evidence in *Towe* , which did not detract from the Court's holding that the trial court committed plain error. To be sure, other evidence presented in this case served to corroborate the victim's testimony. However, there was no other direct evidence of the abuse.[3] In *Towe* , as in this case, the State presented testimony from close family members "describing the behavior of the victim" around the time of the alleged assaults. *Id.* at 63, 732 S.E.2d at 568. In *Towe* , as in this case, the State offered testimony from the victim's aunt, admitted under N.C.G.S. § 8C–1, Rule 404(b), "describing a similar sexual assault on her by defendant," *Id.* Therefore, under these circumstances, the impermissible vouching testimony "stilled any
509 doubts the jury might have had *509 about the victim's credibility or defendant's culpability, and thus had a probable impact on the jury's finding that defendant is guilty." *Id.* at 64, 732 S.E.2d at 569. By contrast, in cases such as *Hammett* where this Court has held that impermissible vouching testimony did not rise to the level of plain error, it was because the jury's verdict "did not rest solely on the victim's credibility." 361 N.C. at 99, 637 S.E.2d at 523. Instead, the State also presented evidence regarding the victim's physical symptoms of abuse, as well as the defendant's admission that he had previously engaged in conduct of a sexual nature with the victim. *Id.*

> 3 The dissent contends that even if there is no direct evidence of the assault, "the statement about 'substantiation' was likely superfluous." We do not agree that, in the absence of any direct evidence of an alleged assault, testimony from a professional investigator employed by a county social services agency to investigate allegations of child sexual abuse is "superfluous" to the jury's ultimate determination of the complainant's credibility and defendant's guilt.

Although there are some factual distinctions between this case and *Towe* , these factual distinctions do not alter our legal analysis. Our necessary review of the entire record convinces us that the State presented no evidence at trial supplying an alternative basis for the jury's conclusion that defendant was guilty besides the jury's determination that the complainant was more credible than defendant. Rather, the evidence the State presented at trial was primarily aimed at persuading the jury to find the complainant's allegations more credible than defendant's denials. For example, testimony from Virginia's maternal grandmother that her behavior changed around the time of the alleged abuse, and testimony from Virginia's paternal grandfather that "all [defendant has] done his whole life is lie and try to cheat people," provided jurors with evidence suggesting

that Virginia was telling the truth and defendant was lying, not evidence supporting an independent conclusion that the alleged sexual assaults did or did not occur. Similarly, while jurors were free to draw inferences from testimony alleging that defendant encouraged Virginia to shave her legs at a young age, this evidence concerned an incident that was not inherently sexual in nature, and the State did not otherwise thoroughly impeach defendant's denials that his conduct had any sexual aspect. *Cf. Hammett* , 361 N.C. at 99, 637 S.E.2d at 523. Again, this is evidence that might lead a jury to conclude that the complainant was more credible than defendant, not independent proof that the alleged assaults occurred. Similarly, Virginia's consistent testimony throughout trial and the forensic examiner's testimony that Virginia exhibited behaviors indicating past abuse may have given the jury reason to believe Virginia's allegations, but did not constitute evidence independent from the jury's assessment of the complainant's and defendant's credibility. *Id.* (holding that admission of impermissible vouching testimony was not plain error because "*in addition to* [the victim's] consistent statements and testimony that defendant had abused her sexually, the jury was able to consider properly admitted evidence that [the victim] exhibited physical signs of repeated sexual abuse") (emphasis added). Accordingly, we hold that the admission of *510 the DSS investigator's improper vouching testimony was, in the absence of "overwhelming evidence" directly proving defendant's guilt at trial, plain error. *Stancil* , 355 N.C. at 267, 559 S.E.2d at 789 (per curiam).

Nothing in this decision dispossesses the jury of its authority to find a defendant guilty of sexual abuse in the absence *190 of physical evidence, based entirely on the jurors' determination that a complainant is more credible than a defendant. Nor does our decision express any opinion about the probative value of the complainant's testimony in this case or in any case. Rather, our decision reflects, and helps preserve, the jury's fundamental "responsibility at trial" in our adversarial system to "find the ultimate facts beyond a reasonable doubt." *State v. White* , 300 N.C. 494, 503, 268 S.E.2d 481, 487 (1980) (quoting *Cty. Court of Ulster Cty., N.Y. v. Allen* , 442 U.S. 140, 156, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)). Of course, the State is entitled to submit to the jury any admissible evidence that it thinks will help convince jurors to believe a complainant and disbelieve a defendant. But concern for the fairness and integrity of criminal proceedings requires trial courts to exclude testimony which purports to answer an essential factual question properly reserved for the jury. When the trial court permits such testimony to be admitted, in a case where the jury's verdict is contingent upon its resolution of that essential factual question, then our precedents establish that the jury's verdict must be overturned.

Conclusion

Absent evidence supporting the jury's guilty verdict on a basis other than the jury's relative assessment of the complainant's and defendant's credibility, we do not believe that the outcome at trial would probably have been the same if the DSS investigator's inadmissible vouching testimony had been excluded. Accordingly, we hold that defendant has met his burden of showing that the trial court committed plain error. We affirm the decision of the Court of Appeals.

AFFIRMED.

Justice NEWBY dissenting.

When a defendant alleges on appeal that an error occurred at trial, but failed to properly object, that defendant must demonstrate that the outcome of the trial probably would have been different without the error. Holding that such prejudicial error occurred in this case, the majority seizes on one word uttered by one witness and decides that the State's entire case, which was supported by abundant evidence, is compromised. I respectfully dissent.*511 At trial, Virginia[1] testified at length

that defendant, her father, forced her to perform oral sex on him multiple times. She explained that after these assaults, defendant would go to another room to pray, apologize to God, and promise never to do it again. At the time, defendant instructed Virginia not to tell anyone about what happened. Law enforcement, Virginia's mother, and two grandparents testified at trial for the State as well. Virginia's maternal grandmother testified that Virginia's behavior significantly changed around the time of the first assault. Virginia's mother and paternal grandfather testified that even though Virginia did not get along with her step-mother, she often went to work with her instead of remaining at home alone with her father.

[1] A pseudonym is used to protect the juvenile's identity.

Defendant's sister testified that multiple times when she was between the ages of seven and twelve, defendant forced her to perform various sexual acts with him. After each assault, just like with Virginia, he would express remorse and pray to God asking for forgiveness. She testified that she kept this a secret until the age of fourteen because defendant told her she would get in trouble and be taken from her mother if she brought it up. The Department of Social Services investigator testified that during her interviews Virginia's paternal grandfather, maternal grandmother, and mother's fiancé all indicated that they believed Virginia. A jury convicted defendant of sexual offense with a child by an adult, child abuse by sexual act, and indecent liberties with a child.

The majority decides that all of this evidence is not strong enough to support the guilty verdicts. It discards the verdicts because the DSS investigator also said that DSS "substantiated" Virginia's
191 allegations.[2] *191 The majority cites *State v. Towe* , 366 N.C. 56, 732 S.E.2d 564 (2012) to frame the question around whether the case turns on the victim's credibility. To the majority, the vouching testimony by DSS probably impacted the trial outcome because, in its view, this case turns on Virginia's credibility. It therefore holds that without the testimony that DSS substantiated Virginia's claims, the jury likely would not have believed Virginia and would have believed defendant instead.

[2] All parties concede that this testimony was inappropriate. The question is whether it is probable that the admission of the testimony impacted the jury's finding that the defendant was guilty. *State v. Lawrence* , 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

The majority confuses evidence that is simply relevant with evidence that is essential to the outcome of the case. Of course, a witness stating that Virginia's claims were "substantiated" could enhance the credibility of her allegations. But that
512 does not mean her allegations *512 would be unbelievable if they lacked the support of that one particular statement. Indeed, that notion is quite far from the truth in this case, where the statement about "substantiation" was likely superfluous. In context, the jury would have understood that statement simply to mean that DSS pursued the allegations, which was already obvious considering that a DSS investigator testified against defendant. Moreover, the DSS investigator explained that substantiation is for social work purposes, not trial purposes. She noted that in some cases DSS will substantiate but the government will not prosecute, or vice versa. With these careful qualifications, and the substantial additional evidence of Virginia's credibility and defendant's guilt, the majority's position that the word "substantiate" would have likely changed the outcome of the trial is hard to believe.

In addition to the explanation the jury heard about the term "substantiate," the jury heard extensive testimony from several other witnesses corroborating Virginia's consistent story—testimony of Virginia's behavior change, testimony from an expert witness regarding delayed

disclosures, and testimony of defendant's demeanor during his denial of the events. Perhaps most significantly, the jury heard testimony from both Virginia and defendant's sister detailing defendant's similarly idiosyncratic behavior after each victim's sexual assaults. Defendant's modus operandi was well established.

Moreover, the majority misapplies our precedent from *Towe* . In *Towe* the challenged testimony came from an expert to whom multiple witnesses referred, likely leading the jury to place more value on that expert's testimony. 366 N.C. at 58, 732 S.E.2d at 565–66. But here no other witness emphasized the investigator's testimony, and the prosecution paid little attention to it during closing arguments. Further, unlike the victim in *Towe* , whose story was inconsistent, the victim in this case consistently recounted the traumatic events for the entire fifteen months from first disclosure until trial. Finally, unlike in *Towe* , where the defendant chose not to testify, here defendant did take the stand, allowing the jury to directly evaluate his credibility. The expert testimony in *Towe* that the victim was indeed sexually abused was pivotal to the prosecution because the State's evidence was weaker than here and the other witnesses relied on the contested expert testimony. In this case, the DSS investigator's testimony that Virginia's claims were "substantiated" was not nearly so critical. The rigorous plain error standard to which this Court has long adhered has not been met. The convictions should be upheld.

I respectfully dissent.

No. COA 19-244
COURT OF APPEALS OF NORTH CAROLINA

State v. Wohlers

847 S.E.2d 781 (N.C. Ct. App. 2020)
Decided Aug 4, 2020

No. COA 19-244

08-04-2020

STATE of North Carolina v. Jeremy John WOHLERS, Defendant.

Attorney General Joshua H. Stein, by Assistant Attorney General Deborah M. Greene, for the State. Sean P. Vitrano, for Defendant.

McGEE, Chief Judge.

Attorney General Joshua H. Stein, by Assistant Attorney General Deborah M. Greene, for the State.

Sean P. Vitrano, for Defendant.

McGEE, Chief Judge.

I. Factual and Procedural History

Defendant and A.W. were married in July 2008. As of August 2017, Defendant and A.W. were living together in Richlands, North Carolina, with their daughters L.W. (age 8), Jo.W. (age 5), and Ja.W. (age 4), as well as A.W.'s daughter from a previous partner, M.K. (age 10), with whom A.W. was pregnant when she and Defendant began dating.

On 13 February 2018, a grand jury indicted Defendant on two counts of indecent liberties with a child, two counts of felony child abuse by sexual act, and two counts of statutory sexual offense with a child by an adult. The bill of indictment in case number 17 CRS 55834 stated the charges with respect to L.W. The indictment in case number 17 CRS 55835 stated the charges with respect to M.K. The cases were tried in Superior Court, Onslow County, on 4 September 2018.

At trial, A.W. testified that, around the beginning of August 2017, Defendant told A.W. that her best friend had reported that L.W. had searched for and watched pornography on her Kindle tablet. She testified they discussed the need to monitor the girls' use of electronic devices more closely. A.W. testified that later that week, Defendant told her he had been having an affair with her best friend and that he was leaving A.W. to be with her.

A.W. spoke with all four of her children on 21 August 2017 to explain that watching
783 pornography was inappropriate. She testified *783 she asked L.W. where she learned to watch pornography and L.W. replied that "Daddy showed us how to watch it, and every time you go to work or you go to school, Daddy makes the older three girls watch it." A.W. said to the girls that "if this happened, then they needed to tell somebody they trust[.]" A.W. also told them to tell an adult if someone touches them. At that point, M.K. said, "Well, Daddy touched me." M.K. told A.W. that, after the last cheerleading competition they participated in, "Daddy gave [Ja.W.]. his phone and put her in another room, and that's when Daddy touched me." A.W. testified that there was a cheerleading competition in June 2017 in Greensboro, North Carolina, at which she had Jo.W. and L.W. in her car and Defendant had M.K. and Ja.W. in his car and, after staying the night and attending the cheerleading competition on the

second day, Defendant left several hours early with M.K. and Ja.W. to return to their home to care for their dog.

After M.K. told A.W. that Defendant had touched her, A.W. contacted the Onslow County Sheriff's Department and asked to have an officer come to their house so she could make a report. A deputy came to the house, along with Sue Barnett ("Ms. Barnett"), a social worker with Onslow County Department of Social Services. Denita Sims ("Ms. Sims"), another social worker investigating the case, testified that Ms. Barnett tried to interview the children outside of Defendant's presence, but they did not speak when spoken to and acted bashful and slightly annoyed by the questions. Ms. Sims testified that Defendant visited DSS the next day. According to Ms. Sims, Defendant indicated he had previously caught M.K. and L.W. looking at inappropriate pictures online and also that M.K. was a "problem child." Ms. Sims testified Defendant did not at that time deny any of the allegations that had been made.

Sara Ellis ("Ms. Ellis"), a forensic interviewer with the Child Advocacy Center of Onslow County, interviewed M.K. and L.W. at the Child Advocacy Center on 30 August 2017. Ms. Ellis testified that "[a] child forensic interview is a neutral, fact-finding conversation with a child" and she is "specially trained to have these conversations with children." In the interview with M.K., which was video-recorded and played at trial, M.K. said that Defendant had broken the no-touch rule more than once when they lived in both houses they had lived in in Richlands and their previous home in Jacksonville. In the interview, M.K. said during the most recent time after the cheerleading competition, Defendant broke the no-touch rule for "both" parts.

The State showed M.K. an anatomical diagram on which she had circled where Defendant had touched her. She identified the place Defendant touched her as the "private part" which she used to "[p]ee[.]" The prosecutor showed her another anatomical diagram of genitalia, including labels for the labia majora, labia minora, clitoris, urethra, vagina, and anus. She was then given a marker and asked to "color in" the area where Defendant touched her. The exhibit, which was published to the jury and included in the record on appeal, indicates she colored in the area of the vagina and the labia minora. M.K. testified Defendant touched her there with his hand more than one time.

Ms. Ellis testified she interviewed L.W. on 1 September 2017, and a video recording of the interview was also played at trial. In the interview, L.W. said she thought Defendant had touched M.K. once, but that M.K. had not told her he had. She said Defendant had not broken the no-touch rule with her.

Dr. Suzanne Stelmach ("Dr. Stelmach"), a volunteer physician at the Child Advocacy Center, conducted physical examinations of M.K. and L.W. after viewing the interviews with Ms. Ellis. She testified that, based on the alleged conduct being penetration by Defendant with his fingers, her "anticipated results of the exam would have been a normal exam[,]" because "[t]hey did not describe anything that would have resulted in any evidence of trauma." She testified the examinations of both girls were in fact normal. Dr. Stelmach also testified regarding female anatomy using a three-dimensional model. She testified the clitoris is located interior to the labia majora and that she would consider touching of the clitoris to
784 be penetration of the genital opening.*784 Keith Johnston ("Detective Johnston"), a detective with the Special Victims Unit of the Onslow County Sheriff's Office, interviewed Defendant on 13 September 2017 and a video of the recorded interview was played at trial. Defendant made a written statement that he touched L.W. "in privet [(sic)] area on out side area" at the house where he and the family used to live, when L.W. was 7. In the interview, he said L.W. was already in the bedroom using the computer when he came in and touched her on the outside near her clitoris. He

said she said "no or something" and he realized what he was doing was wrong and he stopped after touching her for less than a minute.

Defendant also made a written statement saying he "touch[ed] M.K. in privet [(sic)] area on out side area" at the current house, when M.K. was 9. In the interview, Defendant said he called her into his bedroom, asked M.K. to take off her pants and he touched her in her private area, at the top where her clitoris would be. He said he touched her there for a few minutes. He said M.K. turned her head and only at that point did he realize what he was doing was wrong and stopped. Defendant denied exposing himself to M.K. or having an erection.

At the close of the State's case, the trial court dismissed the statutory sexual offense charge arising from the conduct against L.W. for insufficient evidence. After hearing all the evidence, the jury found Defendant not guilty of the statutory sexual offense charge in 17 CRS 55835, regarding M.K., and returned guilty verdicts as to the remaining charges of indecent liberties with a child and felony child abuse by sexual act as to both L.W. and M.K.

The trial court imposed two consecutive sentences of 64 to 137 months each and ordered Defendant to undergo risk assessment for a satellite-based monitoring determination and, upon the completion of his term in prison, to register as a sex offender for 30 years. Defendant appeals.

II. Analysis

Defendant argues three issues on appeal: (1) the trial court plainly erred in instructing the jury regarding charges of felonious child abuse by sexual act; (2) the trial court plainly erred in "permitting [Ms. Ellis] to testify that M.K. had deliberately withheld information about sexual abuse during the interview and that she was a child whose disclosure was intended to stop the abuse"; and (3) that the trial court erred in calculating the maximum term of imprisonment during sentencing.

A. *Jury instruction for charges of felonious child abuse by sexual act*

Defendant first argues that the trial court plainly erred in instructing the jury regarding the charges of felonious child abuse by sexual act. Defendant did not object to the instruction at trial and, therefore, it is not preserved; however, Defendant asks this court to review the jury instruction for plain error. This Court reviews unpreserved claims of error in jury instructions for plain error. *State v. Lawrence* , 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). A party arguing plain error on appeal must show "a fundamental error occurred at trial." *Id.* (citation omitted). "To show that 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.* (citations omitted). "[B]ecause 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[.]' " *Id.* (internal citations omitted).

Defendant was charged with two counts of felonious child abuse by sexual act. N.C. Gen. Stat.§ 14-318.4(a2) provides that "[a]ny parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class D felony." N.C. Gen. Stat. § 14-318.4(a2) (2017). This statute under which Defendant was charged does not specifically define "sexual act"; however, the trial court gave a jury instruction based on North Carolina Pattern Jury Instruction — Criminal 239-55B (hereafter N.C.P.I.—Crim. 239-55B), stating in pertinent part that "[a] sexual act is an immoral, improper or indecent touching or act by the defendant upon the child." Defendant
785 argues giving this jury *785 instruction was legal error, because the definition of "sexual act" that was given was "overbroad."

Defendant relies on *State v. Lark* , 198 N.C. App. 82, 678 S.E.2d 693 (2009), *disc. rev. denied* , 363 N.C. 808, 692 S.E.2d 111 (2010), and *State v. Stokes* , 216 N.C. App. 529, 718 S.E.2d 174 (2011), to argue that a more restrictive definition of "sexual act" should apply to the offense of felonious child abuse by sexual act. Specifically, Defendant argues that the following definition of "sexual act" in N.C. Gen. Stat. § 14-27.20(4) should apply to the offense in N.C.G.S. § 14-318.4(a2) :

> Sexual act [means] [c]unnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body. It is an affirmative defense that the penetration was for accepted medical purposes.

N.C. Gen. Stat. § 14-27.20(4) (2017).[1] Defendant argues this Court "applied the definition of 'sexual act' in ... [N.C.G.S.] § 14-27.20(4) [ ] to [N.C.G.S.] § 14-318.4(a2)" in *Lark* and *Stokes* . The State, in turn, argues that although this Court cited the Article 7B definition of "sexual act" in these cases, in both instances that was *obiter dicta* because the question of the appropriate jury instruction for the "sexual act" element of felony child abuse by sexual act was not before the Court.

[1] N.C.G.S. § 14-27.20(4) was recodified from N.C.G.S. § 14-27.1(4) in 2015. The article of which the statute was a subsection was also recodified in 2015 from Article 7A to Article 7B. *See* An Act to Reorganize, Rename, and Renumber Various Sexual Offenses to Make Them More Easily Distinguishable From One Another as Recommended by the North Carolina Court of Appeals in "State of North Carolina v. Slade Weston Hicks, Jr.," and to Make Other Technical Changes, S.L. 2015-181, §§ 1, 2, 2015 N.C. Sess. Laws 460, 460. For consistency, all references herein will refer to the recodified language at N.C.G.S. § 14-27.20(4) and Article 7B.

We need not determine whether this Court's citation to the Article 7B definition of "sexual act" in *Lark* and *Stokes* was *dicta* , however. Since the case before us was heard by this Court, the Supreme Court of North Carolina has directly resolved the question of whether, as Defendant argues here, giving the jury instruction in N.C.P.I.—Crim. 239.55B is error because the Article 7B definition of "sexual act" applies to and limits the use of that term in the offense of felony child abuse by sexual act in N.C.G.S. § 14-318.4(a2).

A panel of this Court held in *State v. Alonzo* , 261 N.C. App. 51, 54–55, 819 S.E.2d 584, 587 (2018), that *Lark* 's application of the definition of "sexual act" in N.C.G.S. § 14-27.20(4) (referenced therein in its prior codification as N.C.G.S. § 14-27.1(4)) to the offense of felony child abuse by sexual act under N.C.G.S. § 14-318.3(a2) was part of that decision's holding and thus binding on this Court. This Court thus held that the trial court erred in using the jury instruction in N.C.P.I.—Crim. 239.55B because "[w]hile the Pattern Jury Instruction allows a broader categorization of what qualifies as a 'sexual act,' our precedent defines the words more narrowly." *Id.* at 55, 819 S.E.2d at 587 (citation omitted). This Court in *Alonzo* called for N.C.P.I.—Crim. 239.55B to be updated to "conform with this Court's definition in *Lark.* " *Id.* This Court held the defendant in *Alonzo* was not prejudiced by the trial court's error. *Id.* at 56, 819 S.E.2d at 588.

Our Supreme Court allowed discretionary review of *Alonzo* and modified and affirmed this Court's decision. *State v. Alonzo* , 373 N.C. 437, 437, 838 S.E.2d 354, 355 (2020). The Supreme Court conducted a statutory analysis of the relevant provisions, noting that N.C.G.S. § 14-27.20 expressly limited the applicability of its definitions—including the definition of "sexual act"—to Article 7B. *Alonzo* , 373 N.C. at 441, 838

S.E.2d at 357. It further noted that "sexual act" as defined in N.C.G.S. § 14-27.20(4) has been interpreted "as arising from the specific elements of the crimes listed in Article 7[B,]" providing a further reason to conclude the definition was intended to apply only to first and second degree sexual offense within that article. *Id.* at 442, 838 S.E.2d at 358 (alteration reflecting recodification). Our Supreme Court concluded:

> [T]he legislative history demonstrates that from the time N.C.G.S. § 14-27.1 was enacted

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> in 1980, until it took its current form in N.C.G.S. § 14-27.20, the legislature intended for the definitions in the statute to apply only within the respective article. Accordingly, it was error for the Court of Appeals to conclude that the definition of "sexual act" contained in N.C.G.S. § 14-27.[20](4) was applicable to offenses under N.C.G.S. § 14-318.4(a2), which is contained in a separate article, Article 39.

Id. Our Supreme Court has, therefore, rejected precisely the argument Defendant advances here. Based on *Alonzo* , we hold the trial court did not err, nor plainly err, in providing a jury instruction based on N.C.P.I.—Crim. 239.55B and not providing an instruction based on the definition of "sexual act" under N.C.G.S. § 14-27.20(4).

B. Ms. Ellis's testimony about M.K.

Defendant next argues that the trial court erred by permitting Ms. Ellis to testify that she believed M.K. did not make a full disclosure and that "[her interview] w[as] a tentative disclosure," because under this Court's decision in *State v. Giddens* , 199 N.C. App. 115, 681 S.E.2d 504 (2009), Ms. Ellis was a witness impermissibly "vouch[ing] for the credibility of a victim." *State v. Giddens* , 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd per curiam* , 363 N.C. 826, 689 S.E.2d 858 (2010). As Defendant did not timely object at trial, Defendant has requested we review this unpreserved issue for plain error. N.C. R. App. P. 10(a)(4) (2017); *Lawrence* , 365 N.C. at 518, 723 S.E.2d at 334.

In *Giddens* , the defendant was charged with multiple sexual offenses committed on his minor daughter and stepson. *Giddens* , 199 N.C. App. 115, 121, 681 S.E.2d at 505. A child protective services investigator assigned to the case interviewed the children and arranged a medical examination. *Id.* at 118, 681 S.E.2d at 506. At trial, the investigator testified that the defendant's actions were "substantiated," meaning that the examiners "found evidence throughout the course of their investigation to believe that the alleged abuse and neglect did occur." *Id.* (internal quotation marks and brackets omitted). The jury found the defendant guilty of all the charges. *Id.* at 119, 681 S.E.2d at 507. On appeal, this Court ordered a new trial, holding that the trial court plainly erred by permitting the investigator to testify that her investigation substantiated the children's abuse allegations. *Id.* at 123, 681 S.E.2d at 509. We reasoned that the investigator's testimony, which was based on more evidence than just the statements of the children, went beyond permissible corroboration by prior consistent statements and, furthermore, that "[o]ur case law has long held that a witness may not vouch for the credibility of a victim." *Id.* at 120–22, 681 S.E.2d at 507–08. This Court further held the trial court's error prejudiced the defendant because, "without [the investigator]'s testimony, the jury would have been left with only the children's testimony and the evidence corroborating their testimony[; t]hus ... 'the central issue to be decided by the jury was the credibility of the victim[s].' " *Id.* at 123, 681 S.E.2d at 509.

In the present case, Ms. Ellis testified about forensic interview procedures in general and explained that children disclose abuse in various ways. Videos of the interviews she conducted were admitted into evidence and played to the jury, after which the prosecutor asked Ms. Ellis "

[h]ow would you describe [M.K.]'s personality, now that we've all had a chance to sort of witness the interview?" She responded that M.K. was "a very quiet child," and that "a lot of the questions were answered with, 'I don't know,' and 'I don't remember' ..." The transcript then shows the following exchange between the prosecutor and Ms. Ellis:

> Q: Did she seem at all on a mission to tell you much of anything?
>
> A: Nothing.
>
> Q: Much less make a full detailed disclosure like you've described some interviews do.
>
> A: Yes.
>
> Q: Would you describe [M.K.]'s disclosure —of the four you mentioned earlier, how would you describe her disclosure? What categories did that fit into?
>
> ....
>
> A: She would be a tentative disclosure. She—just based on my interaction with her and her lack of wanting to talk, she's a child who falls into the I want to tell

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> someone so this will stop, but I don't really want it to go past that, and I just want it to be done.

Defense counsel did not object or move to strike the answer. The trial court excused the jury and asked the prosecutor whether the line of questioning would continue, in response to which the prosecutor offered to stop. The trial court said the following:

> Okay. I—the witness's answers to the question are going beyond, I believe, what the Supreme Court laid out in [*State v.*] *Towe* [210 N.C.App. 430, 707 S.E.2d 770 (2011)] as that line that the doctor had crossed in that case as well. So without there being any physical findings and—I didn't—I think the questions earlier about the characteristics were proper, but when she starts trying to put this child into a specific category about disclosure—the jury has seen the interview. They've heard the child's statement, and they've seen her testify. It's for the jury to determine that credibility issue.

The court told the prosecutor not to ask further questions; however, when the jury returned, the court did not instruct the jury to disregard the previous testimony. Moreover, Defendant did not move to strike the testimony at that time.

Defendant now argues, relying on *Giddens* , that Ms. Ellis's testimony was impermissible vouching of M.K.'s credibility. We need not decide whether the trial court erred in failing to strike the testimony however, because even assuming, *arguendo* , that failing to strike the testimony was error, Defendant cannot show he was prejudiced by the error. Defendant here cannot show any error was fundamental—that it " 'had a probable impact on the jury's finding that the defendant was guilty.' " *Lawrence* , 365 N.C. at 518, 723 S.E.2d at 334 (citation omitted). In particular, besides the interviews and the trial testimony of M.K., the record also shows Defendant's own written statement that he touched M.K.'s private area near her clitoris for a few minutes, which is itself consistent with M.K.'s testimony. Although Defendant specifically denied there was any digital penetration of M.K.'s genitalia in his statement, as we noted above, the restrictive definition of "sexual act" in N.C.G.S. § 14-27.20(4), on which Defendant relies for his argument that penetration is required to establish felony child abuse by sexual act under N.C.G.S. §

14-318.4(a2) does not apply to that offense. Regardless of Ms. Ellis's testimony, Defendant's written statement and M.K.'s testimony independently support the jury's conclusion that Defendant committed the offense at issue. As Defendant cannot show Ms. Ellis's testimony had a probable impact on the jury's finding of guilt, he cannot show any error was fundamental and, therefore, we hold there was no plain error.

C. Calculation of maximum term of imprisonment

Finally, Defendant argues the trial court committed clerical error in the calculation of the maximum term of imprisonment. Defendant was found guilty of two counts of taking indecent liberties with a child, each a Class F felony, and two counts of felony child abuse by sexual act, each a Class D felony. The trial court consolidated the Class D and F felonies in each case. As Defendant did not have any prior criminal history points, the trial court determined he was prior record level I. The trial court found the offenses were reportable convictions under N.C. Gen. Stat. § 14-208.6 and imposed a term of 64 to 137 months in each case.

Defendant argues the trial court erred in calculating the maximum sentence because N.C. Gen. Stat. § 15A-1340.17(f) provides that, for offenders sentenced for reportable convictions that are Class B1 through E felonies, the maximum term of imprisonment "shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus 60 additional months." N.C. Gen. Stat. § 15A-1340.17(f) (2017). Defendant argues that, because N.C.G.S. § 15A-1340.17(c) provides the mandatory minimum term of imprisonment for a Class D felony, prior record level I, is 51 months, the trial court should have used that term in computing the maximum term of imprisonment for his sentence, rather than the 64 months it used based on the minimum term actually imposed. Specifically, because 10.2 months is twenty 788 percent of 51 months, *788 which is in turn rounded up to 11, Defendant argues the trial court should have added 51 months plus 11 months plus 60 months to yield a maximum of 122 months.

Defendant relies on *State v. Parker* , 143 N.C. App. 680, 550 S.E.2d 174 (2001), to support the proposition that the Structured Sentencing Act permits discretion in setting a minimum, but "no discretion in the determination of maximum sentences." But the State correctly notes that the portion of *Parker* relied upon by Defendant in fact supports the contrary argument. In *Parker* , this Court held as follows:

> The Structured Sentencing Act clearly provides for judicial discretion in allowing the trial court to choose a minimum sentence within a specified range. However, the language of the Act provides for no such discretion in regard to maximum sentences. The legislature did not provide a range of possible maximum sentences nor did it create a vehicle to alter the maximum sentences based on the circumstances of the case as with minimum sentences. *Rather, the Act dictates that once a minimum sentence is determined, the "corresponding" maximum sentence is "specified" in a table set forth in the statute.*

State v. Parker , 143 N.C. App. 680, 685–86, 550 S.E.2d 174, 177 (2001) (citations omitted) (emphasis added). The "minimum term of imprisonment" used to determine the maximum term under N.C.G.S. § 15A-1340.17(f) is thus not the absolute minimum mandatory duration within the range identified in the chart set forth under N.C.G.S. § 15A-1340.17(c), but the minimum term of imprisonment actually imposed in the sentence.

The presumptive range of minimum durations for a Class D felony for an offender at prior record level I is 51 to 64 months. N.C. Gen. Stat. § 15A-1340.17(c) (2017). The trial court exercised its

discretion to sentence Defendant at the top end of that presumptive range, to a minimum term of imprisonment of 64 months. Once that minimum was set, the trial court properly applied N.C.G.S. § 15A-1340.17(f), which provides that "the maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus 60 additional months." N.C.G.S. § 15A-1340(f). As the minimum term of Defendant's imprisonment was set at 64 months, the trial court added 64 plus 13 (being twenty percent of 64, 12.8, rounded to the next highest month) plus 60, totaling 137 months. The trial court thus did not commit clerical error in sentencing Defendant to a maximum term of imprisonment of 137 months.

III. Conclusion

Defendant argued three issues on appeal. We hold the trial court did not plainly err in instructing the jury based on N.C.P.I.—Crim. 239-55B, instead of the definition of sexual act in N.C.G.S. § 14-27.20(4). We also hold the trial court did not plainly err in not striking Ms. Ellis's testimony characterizing M.K.'s interview, because even if it was error, Defendant cannot show the error was prejudicial. Finally, we hold the trial court did not commit clerical error in sentencing Defendant.

NO ERROR.

Judges BRYANT and BERGER concur.