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NO. COA11-892  
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Lincoln County  
Nos. 09CRS52250, 52252-4

MICHAEL DORSEY NEEDHAM

Appeal by defendant from judgments entered 18 November 2010  
by Judge Timothy S. Kincaid in Lincoln County Superior Court.  
Heard in the Court of Appeals 13 December 2011.

*Attorney General Roy Cooper, by Special Deputy Attorney  
General Belinda A. Smith, for the State.*

*Russell J. Hollers, III, for defendant appellant.*

McCULLOUGH, Judge.

Michael D. Needham ("defendant") appeals from his  
convictions of first-degree rape of a child, first-degree sex  
offense of a child, indecent liberties with a child, and second-  
degree sexual offense with a child after the age of twelve. For  
the following reasons we find no prejudicial error.

I. Background

Defendant is the father of A.N.<sup>1</sup>, his daughter, who was born on 15 January 1995. On 13 January 2007, defendant was released from prison and returned to his home which he shared with his mother and A.N. At that time defendant had full custody of A.N. On the night of defendant's release from prison, defendant began to inappropriately touch A.N., who was two days short of her twelfth birthday. A.N. woke up to find defendant lying next to her in bed. Defendant removed A.N.'s shirt and pants and she felt him rub his genitals against hers. He subsequently put his penis in her mouth and also told her that he wanted to take her virginity.

Many similar instances followed this initial one. A.N. estimated at trial that there were probably thirty to forty instances between 13 January 2007 and her thirteenth birthday. The instances would usually involve defendant rubbing his penis on A.N.'s vagina until he ejaculated. Occasionally, he would put his penis in her vagina. At one point A.N. was taking a nap after school and awoke to defendant's hand on her vagina. Also, he once made her watch pornographic movies with him. A.N. testified to an instance after she turned thirteen when defendant made her put her hand on his penis and rub up and down

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<sup>1</sup> The victim will be referred to by her initials throughout this opinion to preserve her privacy.

until he ejaculated. Social workers had occasionally come to the house, but A.N. never reported the sexual activity because defendant had threatened to kill her.

In March of 2009, A.N. went to live with her mother in Colorado. Around that time, Allison Black, a child protective services worker, received a report regarding defendant's interaction with A.N. The report stated that defendant had a history of substance abuse and mental illness and that at the time he was not taking his prescribed medications. The report also noted that defendant was making A.N. clean the house at all hours; she was cold and tired at school; the home was without running water; and the home life was unstable. A.N. also complained in the report of the inside of her legs hurting, but when questioned she would not give a straight answer.

A few days after the first report, Ms. Black received another report alleging that A.N. had seen defendant shooting crystal methamphetamine in recent days. A.N. told the reporter that defendant had taught her how to make crystal methamphetamine. As a result of the report, Ms. Black went to defendant's house with law enforcement and a search warrant. Ms. Black advised defendant that he needed to make alternative arrangements for A.N.'s living and care.

On 1 April 2009, A.N. told her mother about the incidents with her father. A.N.'s mother immediately reported the sexual activity to the Colorado Springs Police Department ("CSPD") and then to the Lincoln County Sheriff's Department ("LCSD"). On 5 June 2009, Kelly Schepplebein, an investigative specialist with the CSPD, interviewed A.N. and made recordings of threatening voicemails left by defendant on A.N.'s cell phone. Detective Sally Dellinger with the LCSD, received the reports on 26 June 2009 and subsequently went to defendant's house on 1 July 2009, where she encountered defendant and his girlfriend high on heroin. According to Detective Dellinger, defendant told her that he had tried to teach A.N. things about life. At trial, defendant denied this meant sexual things. He denied any sexual touching of any kind and furthermore questioned why A.N. never mentioned the tattoo on his penis which he received in January 2009. He also denied any claims about a methamphetamine lab or that he made A.N. watch pornographic movies with him.

On 13 July 2009, a Lincoln County grand jury returned true bills of indictment alleging first-degree rape of a child pursuant to N.C. Gen. Stat. § 14-27.2(A)(1), first-degree sex offense with a child pursuant to N.C. Gen. Stat. § 14-27.4(A)(1), indecent liberties with a child pursuant to N.C.

Gen. Stat. § 14-202.1, and second-degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.5(A). The indictments incorrectly cited the offense date as 7 January 2007. Defendant's trial was on 15 November 2009 and on 18 November 2009 the jury found defendant guilty on all charges. The trial court entered consecutive judgments on all the verdicts and committed defendant to the North Carolina Department of Corrections for a term of 809 to 1,001 months. The trial court also ordered defendant to register as a sex offender for thirty years and to enroll in satellite-based monitoring for the rest of his life. Defendant gave notice of appeal on 25 November 2010.

## II. Analysis

### A. Character Evidence and Corresponding Jury Instructions

Defendant raises five issues on appeal. Three of the issues are interrelated, so we will address them together. Defendant first contends the trial court erred in allowing defendant's father, Ronald Needham ("Ronald"), to testify regarding defendant and A.N.'s character for truthfulness, even though defendant had not raised the issue. Furthermore, defendant argues the trial court erred in instructing the jury that it could consider Ronald's testimony regarding defendant and A.N.'s characters for truthfulness. We disagree.

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C.R. App. P. 10(b)(1) (2009). However, our Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Plain error ensues when the error 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 *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but 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).

Defendant claims the trial court erred in allowing Ronald to testify in rebuttal regarding defendant and A.N.'s characters for truthfulness. Defendant claims Ronald testified to defendant

being a liar before defendant made any claim that he was honest and furthermore that his character for honesty was not pertinent to the crime. Defendant cites to *State v. Cardwell*, 133 N.C. App. 496, 516 S.E.2d 388 (1999), where our Court held the defendant's character for honesty was not pertinent to his DWI case. Defendant also notes that character evidence pertaining to a victim may only be presented after a defendant attacks that victim's character. N.C. Gen. Stat. § 8C-1, Rule 404(a)(2) (2009); see *State v. Jones*, 137 N.C. App. 221, 232, 527 S.E.2d 700, 707 (2000). "Rule 404(a) is a general rule of exclusion, prohibiting the introduction of character evidence to prove that a person acted in conformity with that evidence of character." *State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989); see N.C. Gen. Stat. § 8C-1, Rule 404(a). Exceptions to the general rule must be strictly construed. *Id.* at 201, 376 S.E.2d at 751. The testimony in question given by Ronald is:

Q. What is [A.N.'s] reputation for truthfulness?

A. To my knowledge the only thing she's told me that was not true was when I asked how things were at home and she told me okay.

Q. And what is your son's reputation for truthfulness?

A. He personally told me that - well, I don't know that he's ever told me

anything that wasn't a lie since he was thirteen years old.

Defendant claims he never put A.N.'s or his own character for dishonesty at issue. Defendant contends "[g]enerally, the State may not elicit evidence of the defendant's character in a criminal prosecution unless the evidence is relevant for some purpose other than proving character. . . . The State is allowed, however, to rebut evidence of a pertinent character trait offered by the defendant[.]" *Cardwell*, 133 N.C. App. at 508, 516 S.E.2d 396-97; *see also* N.C. Gen. Stat. § 8C-1, Rule 404(a)(1) (2009). Consequently, defendant argues it was plain error and he was prejudiced by the trial court's allowance of Ronald's testimony because the State did not present any physical evidence, thus leaving the jury to decide whether it believed defendant or A.N.

Alternatively, the State contends defendant testified at length directly rebutting the allegations made by A.N., which implies that A.N. made up the story of defendant's inappropriate sexual activity. Specifically, defendant's statements contradicted A.N.'s statements regarding how often she saw her mother; about bringing her home early when she was spending the night with friends; about how long her grandmother lived in the home after defendant returned from prison; and about educating

A.N. sexually. The State also notes a letter written by defendant to A.N., which he never sent, but read aloud in court with his additional comments. In the letter he stated, "Please forgive me. Although you haven't said I'm sorry, I've forgiven you," which he then bolstered with his testimony,

What I'm referring to is her sending the police to my house on 3/6/09. That's the only thing that I'm upset with her about, is her writing this statement saying that I was cooking meth in the house. Period. The truth of the matter was I hadn't really been on meth at that time in a year, really.

Defendant went on to conclude his testimony with the following colloquy:

Q. Have you ever put your penis in her mouth or in her hand?

A. No, absolutely not. No, absolutely not, and no, I have not put my penis in my child's mouth or in her hand. And you know, I sit here wondering, all these detailed accusations, and this is a very vivid story that's been told, very colorful by a very bright individual.

. . . .

. . . And if she can remember all this and that, how can the tattoo on my penis be missed?

The State argues defendant opened the door with this testimony to evidence regarding both his and A.N.'s characters for truthfulness because the testimony directly contradicts

certain testimony given by A.N. Thus, the question for the jury becomes who is telling the truth. That is when the State decided to call Ronald to testify and give his opinion regarding defendant and A.N.'s character for truthfulness. We believe defendant adequately opened the door and therefore the State was entitled to rebut his attacks on A.N.'s character for truthfulness and at the same time question defendant's own character for truthfulness. See *State v. Sexton*, 336 N.C. 321, 360, 444 S.E.2d 879, 901 (1994). This situation is similar to the case of *State v. Davis*, 106 N.C. App. 596, 418 S.E.2d 263 (1992), in which our Court held testimony to be admissible where "officers were merely asked to testify as to the defendant's reputation for truthfulness, which was at issue because his own testimony contradicted the children's testimony." *Id.* at 604, 418 S.E.2d at 268-69. It is reasonable that this would extend to testimony regarding A.N.'s character for truthfulness.

Furthermore, the State notes that "[t]he erroneous admission of evidence on direct examination is held not to be prejudicial when it appears that on cross-examination 'the witness was asked substantially the same question and gave the same answer.'" *State v. Featherston*, 145 N.C. App. 134, 138, 548 S.E.2d 828, 831 (2001) (quoting *Hamilton v. Lumber Co.*, 160 N.C.

48, 52, 75 S.E. 1087, 1089 (1912)). Here, defendant's father testified, as provided above, and on cross-examination defense counsel elicited the following colloquy:

Q. . . . And you say that everything that [defendant's] said since he was thirteen is a lie?

A. That he said on the -

Q. No. Everything that [defendant] has said to you since he was thirteen years old is a lie?

A. I think almost everything, yes, sir.

This exchange is substantially similar to that elicited from Ronald on direct examination and therefore Ronald's direct testimony cannot be held to be prejudicial to defendant. See *Featherson*, 145 N.C. App. at 138, 548 S.E.2d at 831. Thus, the trial court did not err in allowing Ronald to testify regarding defendant and A.N.'s characters for truthfulness.

Defendant also attempts to argue that Ronald's testimony was a factual statement in that A.N. had never lied to him "to [his] knowledge," in violation of N.C. Gen. Stat. § 8C-1, Rule 405 (2009), which requires that character evidence only be given in the form of reputation or opinion. The State, however, contends Ronald testified based on his personal perceptions of A.N., which could not be factual statements. Even further, the

State notes that "[w]here a witness is attempting to communicate the impressions made upon his senses by what he has perceived, any attempt to distinguish between so-called fact and opinion is likely to result in profitless quibbling. Analytically no such distinction is possible.'" 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 175, at 655, n.3 (7th ed. 2011) (quoting *Am. L. Inst. Model Code of Evidence*, Rule 401, Comment c). We cannot agree with defendant that Ronald's statements were factual in nature as they were more his opinions of his granddaughter's tendency for truthfulness.

Defendant finally argues the trial court erred in instructing the jury that it could consider Ronald's testimony as admissible evidence. "A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires . . . ." N.C.R. App. P. 10(a)(2) (2009); *see also State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999). However, jury instructions that did not draw an objection or exception at trial may be reviewed for plain error. *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005).

Here, defendant contends the trial court erred by instructing the jury that it could consider Ronald's testimony regarding defendant and A.N.'s characters for truthfulness. Specifically, the trial court instructed:

When evidence has also been received tending to show with regard to the character of a witness or the Defendant for truthfulness, you may consider this evidence for one purpose only. If you believe all or any part of this evidence and find that it has a bearing upon the witness's truthfulness or the Defendant's truthfulness, you may consider it together with all the other facts and circumstances that bear upon the truthfulness in deciding whether to believe or disbelieve that witness or the Defendant's testimony at this trial. You may not consider this evidence for any other purpose.

On the other hand, the State notes that a jury instruction is "sufficient if it presents the law of the case in such [a] manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]" *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (internal quotation marks and citation omitted). Additionally,

[t]he party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in

light of the entire charge, to mislead the jury.

*Id.* at 297, 610 S.E.2d at 253 (internal quotation marks and citation omitted). Due to our earlier holding that Ronald's testimony was admissible, we cannot now hold that the trial court erred in instructing the jury that it could consider the same testimony. Moreover, the trial court properly gave a limiting instruction to the jury that it could only consider Ronald's testimony for a specific purpose. Thus, this argument is without merit.

#### B. Sufficiency of the Indictment

Defendant next contends the trial court erred in entering judgment in case 09-CRS-52254 where there was an alleged variance between the evidence and the indictment's allegation. We disagree.

"An attack on an indictment is waived when its validity is not challenged in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). "However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *Id.*

Defendant argues the grand jury returned a true bill of indictment charging him with second-degree sex offense of a child over the age of twelve and that it listed the offense date as 7 January 2007. Defendant contends the actual date of the offense argued by the State was 13 January 2007 and more importantly that either day was before A.N. reached the age of twelve. However, defendant did not challenge the validity of the second-degree sex charge at trial and thus waived any attack on the indictments validity. *See Wallace*, 351 N.C. at 503, 528 S.E.2d at 341. Furthermore, the indictment was not invalid on its face as it listed the crime charged and an alleged date of the offense to sufficiently put defendant on notice of the charges against him. *Id.* We note that the State presented sufficient evidence that sexual acts constituting the crime of second-degree sexual offense, under N.C. Gen. Stat. § 14-27.5(A) (2009), occurred after A.N. turned twelve because the evidence tends to show that defendant forced himself on A.N. on 13 January 2007, two days before her twelfth birthday and that these sexual activities continued over the next year.

Additionally, "[w]here time is not of the essence of the offense charged and the statute of limitations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal." *State v.*

*Locklear*, 33 N.C. App. 647, 653-54, 236 S.E.2d 376, 380, *disc. rev. denied*, 293 N.C. 363, 237 S.E.2d 851 (1977). Defendant did not present alibi evidence for the date alleged in the indictment or for the dates shown by the State's evidence; he simply denied committing the offense. As defendant did not rely on the date charged in the indictment, the variation in the State's evidence did not deprive him of his right adequately to present his defense or ensnare him in any way.

*State v. Dillard*, 90 N.C. App. 318, 324, 368 S.E.2d 442, 446 (1988). Thus, defendant failed to preserve this issue for appeal and either way the alleged error did not prejudice him.

#### C. Sex Offender and Satellite-Based Monitoring Registration

Defendant's final argument on appeal is that the trial court erred in ordering him to register as a sex offender and enroll in satellite-based monitoring ("SBM") without having first conducted a special hearing. Defendant also contends the trial court entered the orders while not in session. We disagree.

In determining whether a defendant should be enrolled in SBM, the "trial court is statutorily required to make findings of fact to support its legal conclusions." *State v. Morrow*, 200 N.C. App. 123, 126, 683 S.E.2d 754, 757 (2009), *aff'd*, 364 N.C. 424, 700 S.E.2d 224 (2010). Furthermore,

"[w]e review the trial court's findings of

fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found. We [then] review the trial court's order to ensure that the determination that defendant requires the highest possible level of supervision and monitoring reflects a correct application of law to the facts found."

*Id.* (alteration in original) (quoting *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009)).

There are two procedures for SBM hearings as provided in N.C. Gen. Stat. §§ 14-208.40A & -208.40B (2009).

N.C. Gen. Stat. § 14-208.40A applies in cases in which the district attorney has requested that the trial court consider SBM during the sentencing phase of an applicable conviction. See N.C. Gen. Stat. § 14-208.40A(a). N.C. Gen. Stat. § 14-208.40B applies in cases in which the offender has been convicted of an applicable conviction and the trial court has not previously determined whether the offender must be required to enroll in SBM. See N.C. Gen. Stat. § 14-208.40B(a).

*Kilby*, 198 N.C. App. at 367, 679 S.E.2d at 432-33. Our case falls under N.C. Gen. Stat. § 14-208.40A because the trial court has already determined that defendant must be enrolled in SBM, whether incorrectly or not. N.C. Gen. Stat. § 14-208.40A. According to N.C. Gen. Stat. § 14-208.40A(b), the "court shall determine whether the offender's conviction places the offender

in one of the categories described in G.S. § 14-208.40(a), and if so, shall make a finding of fact of that determination, specifying whether . . . (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A[.]” *Id.* N.C. Gen. Stat. § 14-208.40(a)(3) contains a category for offenders “convicted of G.S. 14-27.2A or G.S. 14-27.4A, who shall be enrolled in the satellite-based monitoring program for the offender’s natural life upon termination of the offender’s active punishment.” *Id.*

Here, two of defendant’s convictions fall under N.C. Gen. Stat. § 14-208.40(a)(3) (2009), requiring mandatory enrollment in SBM for defendant’s natural life upon termination of his active punishment, because he was convicted under both N.C. Gen. Stat. §§ 14-27.2A & -27.4A (2009). However, defendant’s other two convictions, indecent liberties with a child and second-degree sexual offense, do not fit under this category. Consequently, we must vacate the trial court’s orders in 09-CRS-052253 and 09-CRS-052254 ordering defendant to register as a sex offender and also enroll in SBM for life.

Defendant also contends the trial court erred in failing to hold an SBM hearing. While we agree that a trial court is generally required to hold an SBM hearing pursuant to N.C. Gen.

Stat. § 14-208.40A, we do not believe it prejudiced defendant in this situation. Here, the trial court did not formally hold an SBM hearing, but after the jury verdict it addressed the prosecutor and asked, "What says the State on the sentence?" The prosecutor then referenced the testimony at trial, defendant's attempts at manipulating the victim to persuade her not to testify, and defendant's intimidation and witness tampering. The trial court further reviewed his criminal record and tendered him a prior record Level III for felony sentencing. Defendant was asked if he agreed and stipulated to the convictions, which he did. The trial court finally concluded that a sentence in the presumptive range was appropriate. It did not hold a formal SBM hearing, but it obtained the required evidence pursuant to N.C. Gen. Stat. § 14-208.40A(a) and was able to move on to N.C. Gen. Stat. § 14-208.40A(b) to make the required findings of fact. The trial court included the required findings of fact on the form Judicial Findings and Order for Sex Offenders-Active Punishment. It may not have followed the proper procedure in holding a formal SBM hearing, but we cannot hold that it prejudiced defendant because in reality it was not necessary due to the requirement that defendant's convictions under N.C. Gen. Stat. §§ 14-27.2A or -27.4A automatically

subject him to enrollment in SBM. The trial court also ordered defendant to register as a sex offender for thirty years as the standard form requires based on the findings of fact. Therefore, we cannot hold that the trial court's failure to conduct a formal SBM hearing prejudiced defendant, but must vacate the trial court's ordering SBM and sex offender registration in case numbers 09-CRS-052253 and 09-CRS-052254.

### III. Conclusion

Based on the foregoing, we find no error on the part of the trial court except in ordering defendant to register as a sex offender and enroll in SBM based on his convictions in 09-CRS-052253 and 09-CRS-052254. As a result, we must vacate the trial court's orders for sex offender registration and SBM enrollment as to those two cases.

No error in part; vacate in part.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).