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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-747

Filed: 15 May 2018

McDowell County, No. 09 CRS 51654

STATE OF NORTH CAROLINA

v.

TIMOTHY GLEN MILLS

Appeal by defendant from order entered 13 September 2016 by Judge Marvin P. Pope, Jr. in McDowell County Superior Court. Heard in the Court of Appeals 13 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri H. Lawrence, for the State.

NC Prisoner Legal Services, Inc., by Mary E. McNeill, for defendant-appellant.

DAVIS, Judge.

At the criminal trial of Timothy Glen Mills ("Defendant"), evidence of his prior sexual acts was erroneously admitted pursuant to Rule 404(b) of the North Carolina Rules of Evidence without any objection by his trial counsel. The improper admission of this evidence was the sole issue Defendant sought to raise on direct appeal.

However, this Court dismissed the appeal without reaching the merits of Defendant's argument because (1) the issue had not been properly preserved at trial for appellate review; and (2) Defendant's appellate counsel had failed to specifically request plain error review. Defendant subsequently filed a motion for appropriate relief ("MAR") alleging ineffective assistance of appellate counsel, which was denied by the trial court. Because we conclude that Defendant has made a sufficient showing of both deficient performance by his appellate counsel and actual prejudice suffered by him as a result, we reverse.

Factual and Procedural Background

The facts giving rise to this appeal are briefly discussed in our opinion dismissing Defendant's direct appeal from his convictions. *See State v. Mills*, 230 N.C. App. 145, 752 S.E.2d 258, 2013 N.C. App. LEXIS 1071 (unpublished) (hereinafter "*Mills I*"), *disc. review denied*, 367 N.C. 283, 752 S.E.2d 151 (2013). However, we have set out the relevant facts in more detail below.

The State presented evidence at Defendant's trial tending to establish the following facts: Defendant began dating a woman in 1995 who was pregnant. After the woman gave birth to her daughter ("Nora"),[1] Defendant treated Nora as his own daughter despite the fact that he was not Nora's biological father. Between 1995 and 2002, Defendant and Nora's mother had two daughters of their own ("Emma" and

[1] Pseudonyms are used throughout this opinion for the privacy of the minor children and for ease of reading.

"Mia"), who were half-sisters to Nora. In 2002, the children's mother abandoned the family when Nora was seven years old, and Defendant served thereafter as a single father to Nora, Emma, and Mia. All three girls lived with Defendant at all times relevant to this action.

I. Nora's Allegations

In 2009, Defendant was charged with two counts of statutory sexual offense, two counts of sex offense by a substitute parent, two counts of indecent liberties with a minor, and two counts of sexual battery. All of these charges were based on Nora's allegations that Defendant had engaged in sexual conduct with her. The charges were based on two separate incidents, one allegedly occurring in 2008 and the other in 2009. Each incident — based on the testimony of Nora — is summarized below.

A. The 2008 Incident

In the summer of 2008, Defendant's house was in foreclosure, and he decided his family would move in with his mother in her trailer in Marion, North Carolina. One evening in August of 2008, Nora's sisters were at their grandmother's trailer while she and Defendant were alone in their house moving boxes into their van. They were using flashlights to see because the power in the house had been turned off.

At some point that evening, Defendant told Nora to come inside the house and "to go onto the couch." Defendant instructed Nora to "stick [her] bottom up in the air

and he pulled [her] pants down." She testified that he then had anal intercourse with her.

Later that night, Nora used her grandmother's cell phone to text Defendant's adult niece ("Melissa") that she "needed to tell [Melissa] something, but she was afraid to . . . ." Nora ultimately told Melissa that she and Defendant had gone "to move some furniture out of the . . . home, and while they were there he had her bend over onto the couch and he had anal intercourse." Melissa responded to Nora that this "was a very strong allegation, that if she wasn't being completely honest that she would put her father, [Defendant], into a serious situation, that he could go to jail." Melissa further stated that Nora "needed to be completely honest." Nora responded that "she was being honest and truthful and she understood what could happen."

Melissa informed Nora's uncle about the incident, and he told his wife, Tammy — Defendant's sister — who had served as a "mother figure" to Nora, Emma, and Mia. Nora's grandmother also learned about the incident around this same time. When her grandmother asked if the incident had actually occurred, Nora "[t]old [her] grandma it didn't [happen]." On two to three occasions over the next ten days, Tammy asked Nora about the "rumors that something had happened between her and her dad." During these conversations, Nora "would either not say anything or say, no, it didn't happen, or I don't want to talk about it."

In November or December 2008, Nora was sitting in church with another one of Defendant's adult nieces, Leslie, when Nora wrote on a piece of paper, "Did you hear what happened to me? . . . Between me and my dad." Leslie responded "No" but then wrote, "Sexually?" Leslie testified that Nora "just kind of gave me the eye."

That same day, Nora told Leslie that "something had happened" between her and Defendant. Nora did not provide specific details to Leslie and stated that she did not want to involve law enforcement. Leslie told Nora that "[m]aybe [Defendant], at the time, was on drugs or maybe he had been drinking and did not mean to do what he had done." Leslie also said that "if anything ever happened again that [Nora] was to run, scream, hide, something and let somebody know to not ever let it happen again."

B. The 2009 Incident

In the summer of 2009, Defendant and the three girls moved from his mother's trailer into another trailer (the "single-wide trailer") that had previously been occupied by Defendant's adult nephew ("Tony"). The single-wide trailer required a substantial amount of painting and cleaning so Defendant and the girls spent the majority of the summer working on it.

Nora testified that on 25 July 2009 all of the family members were cleaning the trailer and she was painting the living room. She stated that at some point during that afternoon Defendant instructed Emma and Mia to go outside. Defendant then

told Nora to come to the kitchen and then directed her to "get down on [her] knees" and "pull [her] pants down." She testified that Defendant had anal intercourse with her while she was crying on the kitchen floor. Afterward, Nora put her pants back on, walked outside, and sat on the front steps with her sisters, who had been playing outside on the porch.

Both Emma and Mia testified that while Nora and Defendant were inside the trailer, they were playing on the porch and throwing rocks at one another. They each stated that it was a hot day and that the windows of the trailer were open as was the front door of the trailer. Emma testified that she was able to see Defendant and Nora painting and never witnessed any sexual contact between them. Mia testified that while she was outside playing she could see Defendant in his bedroom and Nora in the living room. Both girls stated that Nora did not appear to be upset when she came out of the trailer. Neither girl testified that Nora ever told them that Defendant had engaged in sexual conduct with her.

Later that evening, Nora texted Leslie from her grandmother's cell phone that Defendant "had kissed her and had had anal and vaginal intercourse with her while they were working in the trailer that day." The following day, Leslie informed several of Nora's family members, and Nora was eventually taken to the Burke County Sheriff's Office. She was interviewed by Detectives Kevin Fineberg and Dan Shook at the Sheriff's Office. Nora told Detective Fineberg that in 2008 Defendant had told

her to kneel down on a couch and then begun to have anal intercourse with her. She also stated that in the summer of 2009 Defendant asked her sisters to go outside and then told her to "kneel down, pull her pants down, and in her words at that time, the same thing happened again that happened before."

On 3 August 2009, Nora met with Michael Jaquins, the director of the South Mountain Children and Family Services Center (the "Gingerbread House") — a child advocacy center located near Burke and McDowell Counties. She also met with Elizabeth Browning, a sexual assault nurse who worked at the Gingerbread House. Jaquins and Browning each interviewed Nora separately, and Browning conducted a medical examination of Nora.

Nora informed both Jaquins and Browning that the first time "her dad had had her have sex with him" was "at their old house." She said this incident had occurred "last year or the year before that" and that he had "told her to go in there and put her butt up towards the ceiling, then he came in there and stuck his penis in her butt." She recounted that the second time it happened "they were over at the trailer" and he "started touching her on her breasts and her butt" and then "told [her] to stick [her] butt up in the air, and he stuck his penis in [her] butt again." She stated that the first incident occurred on the couch in the family's living room and that the second incident occurred when her sisters were outside painting the trailer. Nora informed

Browning that "she had told Leslie" about the incident and that "Leslie said they were going to do something about it."

II. Defendant's Criminal Trial

As noted above, Defendant was charged with two counts of statutory sexual offense, two counts of sex offense by a substitute parent, two counts of indecent liberties with a minor, and two counts of sexual battery. His jury trial was scheduled for 8 October 2012 in McDowell County Superior Court.

A. The Rule 404(b) Witnesses

On 22 May 2012, Defendant filed two motions *in limine* to preclude the anticipated testimony of Melissa and Tony (his adult niece and nephew) regarding sexual encounters with Defendant that had allegedly occurred while Defendant was a teenager. The trial court deferred ruling on these motions until trial.

Defendant's trial began on 8 October 2012 before the Honorable James U. Downs. On the third day of trial, the court conducted a hearing on Defendant's motions *in limine*. After hearing the testimony of both Melissa and Tony out of the jury's presence, the court denied Defendant's motions and ruled that the two witnesses could testify pursuant to Rule 404(b). Prior to their testimony, the court gave a limiting instruction, informing the jury that it was not permitted to consider the testimony as evidence of Defendant's character but only "as proof of . . . motive, opportunity, or plan, or scheme with regard to the charges he is facing here."

Without any contemporaneous objection by defense counsel, Melissa and Tony both testified regarding the following events from their childhood.

1. Melissa's Testimony

Melissa testified that in 1987 when she was in seventh grade and Defendant was in tenth grade, he asked her to perform oral sex on him while they were in the bedroom of the family's trailer. She complied with his request.

She also testified about a second sexual interaction that occurred a month later during which Defendant asked her to take her pants off and "sit on top of him" while they were in the same bedroom in the family trailer. She testified that he briefly stuck his penis into her vagina and that the entire sexual interaction lasted "[n]ot even a minute." Melissa described both of these encounters as "mutual" rather than coercive.

2. Tony's Testimony

Tony testified that in the summer of 1985 when he was eleven years old and Defendant was approximately fifteen years old, the two boys were staying at Tony's grandmother's house. He stated that they were sleeping in the same room and that one night Defendant locked the door, pulled off Tony's underwear, "la[id] me on my front side, got on top of me, and stuck his penis in my [anus]." Tony's grandmother then entered the room at which point Defendant stopped the intercourse, but once

she left the room he resumed the sexual act. Tony stated that the intercourse lasted "[m]aybe less than a minute."

B. Remainder of Trial

In addition to the testimony of Tony and Melissa, the State also presented testimony from Nora, Detective Fineberg, Jaquins, Browning, Leslie, Emma, and Mia. Defendant testified on his own behalf and denied ever engaging in any sexual conduct with Nora. Defendant also presented testimony from Tammy and two character witnesses.

On 11 October 2012, the jury found Defendant guilty of the four sexual offenses relating to the 2008 incident. The jury acquitted him, however, as to the four sexual offenses relating to the 2009 incident. On that same date, the trial court sentenced Defendant to 288 to 355 months imprisonment.

III. Defendant's First Appeal

Defendant appealed his convictions to this Court. The Office of the Appellate Defender ("OAD") appointed Michael Casterline as Defendant's appellate counsel. Casterline filed an appellate brief on behalf of Defendant containing the sole argument that the trial court's admission of the testimony of Melissa and Tony was improper under Rule 404(b). However, Casterline's brief (1) ignored the fact that Defendant's trial counsel had failed to object to the Rule 404(b) testimony at the time

it was offered; and (2) did not seek plain error review.[2] Instead, the brief merely referenced the fact that a motion *in limine* had been unsuccessfully made by Defendant in the trial court with regard to this evidence.

After the brief was filed with this Court, Emily Davis, an Assistant Appellate Defender with the OAD, conducted a cursory review of the brief in accordance with the standard practice of the OAD and realized that the brief failed to state whether the issue concerning the Rule 404(b) evidence had been preserved for appellate review. On 18 June 2013, Davis contacted Casterline via email to "express concern over the fact that [he] did not allege plain error in his brief." The following day, she sent a second email to him suggesting that he either file a substitute brief requesting plain error review or submit a reply brief explaining how the issue had, in fact, been preserved.

Casterline responded to Davis by means of an email stating his belief that "it was not necessary to allege plain error." He noted that the State's appellate brief did not contain an argument as to lack of preservation and that, as a result, he did not think the North Carolina Rules of Appellate Procedure permitted him to file a reply brief as to an issue not raised in the appellee's brief.

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[2] As discussed in more detail below, the only means a defendant has to obtain appellate review over a trial court's decision to admit or exclude evidence where the issue has not been properly preserved by objection in the lower court is to specifically and distinctly seek plain error review in this Court. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("To have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error." (citing N.C. R. App. P. 10(a)(4))).

On 15 October 2013, a panel of this Court held that Defendant had "failed to preserve this issue for our review" because his trial counsel had failed to object at trial to the introduction of the Rule 404(b) evidence. *Mills I*, 2013 N.C. App. LEXIS 1071, at *3. We further stated that "this Court will not review an appeal for plain error where the defendant does not specifically and distinctly contend that the alleged error constitutes plain error." *Id.* (citation and quotation marks omitted). For these reasons, we dismissed Defendant's appeal. *Id.*

Upon the advice of the OAD, Casterline filed a motion to stay the mandate of this Court. After that motion was denied, he filed a petition for discretionary review with our Supreme Court, which was also denied. *See State v. Mills*, 367 N.C. 283, 752 S.E.2d 151 (2013).

On 11 March 2015, Defendant filed an MAR asserting that Casterline's failure to assert plain error had deprived him of his right to effective assistance of counsel. Defendant attached to the MAR affidavits from Casterline and Davis.

On 12 August 2016, a hearing was held on the MAR before the Honorable Marvin P. Pope, Jr. in McDowell County Superior Court. At the hearing, Defendant presented testimony from Casterline and Davis. During his testimony, Casterline acknowledged that his representation of Defendant had been "deficient."

On 13 September 2016, Judge Pope entered an order (the "MAR Order") denying Defendant's MAR. Judge Pope found that Casterline's performance did not

prejudice Defendant because "even had appellate counsel argued plain error there is no reasonable probability that the Court of Appeals would have found plain error and reversed the conviction."

On 14 February 2017, Defendant filed a petition for writ of *certiorari* seeking review of the MAR Order. We granted *certiorari* on 28 November 2017.

Analysis

Defendant's sole argument in this appeal is that his MAR was erroneously denied. "Our review of a trial court's ruling on a defendant's MAR is whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Peterson*, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 367 N.C. 284, 752 S.E.2d 479 (2013).

This Court has held that "[t]o show ineffective assistance of appellate counsel, Defendant must meet the same standard for proving ineffective assistance of trial counsel." *State v. Simpson*, 176 N.C. App. 719, 722, 627 S.E.2d 271, 275 (citation omitted), *appeal dismissed*, 360 N.C. 653, 637 S.E.2d 191 (2006). In order to prevail on an ineffective assistance of counsel claim under the test announced in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced

the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176, (2012).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. . . . Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). "To show prejudice in the context of appellate representation, a petitioner must establish a reasonable probability he would have prevailed on his appeal but for his counsel's unreasonable failure to raise an issue." *State v. Spruiell*, __ N.C. App. __, __, 798 S.E.2d 802, 805, *disc. review denied*, __ N.C. __, 804 S.E.2d 521 (2017).

Thus, in order to prevail on his MAR, Defendant was required to demonstrate both deficiency and prejudice in connection with his ineffective assistance of counsel claim. In order to show deficiency, he was required to demonstrate that Casterline's failure to assert plain error fell below an objective standard of reasonableness for an appellate attorney. To establish prejudice, he was required to show a reasonable probability existed that this Court would have found on direct appeal both that (1) the admission of the testimony of Melissa and Tony under Rule 404(b) constituted

error; and (2) the error in admitting this evidence was so prejudicial that it rose to the level of plain error.

Because the MAR Order only addressed the prejudice prong of the test for ineffective assistance of counsel, we begin our analysis by determining whether the trial court erred in concluding that Defendant had failed to show prejudice under *Strickland*.

I. Prejudice Prong of *Strickland* Test

In order to determine whether Defendant established prejudice, we must decide whether there is a reasonable probability that the result of Defendant's first appeal would have been different had Casterline asserted plain error in his appellate brief. "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be 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 (internal citations, quotation marks, and brackets omitted).

A. Admission of Testimony of Melissa and Tony Under Rule 404(b)

In order to determine whether Defendant could have successfully asserted plain error in his direct appeal, we must first determine whether the introduction of the Rule 404(b) evidence constituted error at all. Rule 404(b) provides, in pertinent part, as follows:

> (b) **Other crimes, wrongs, or acts.** — 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. . . .

N.C. R. Evid. 404(b).

"[U]nder Rule 404(b), evidence of prior sex acts may have some relevance to the question of [the] defendant's guilt of the crime charged if it tends to show a relevant state of mind such as intent, motive, plan, or opportunity." *State v. Delsanto*, 172 N.C. App. 42, 50, 615 S.E.2d 870, 875 (2005) (citation and quotation marks omitted). Our Supreme Court has held, however, that "[t]hough it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity." *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012) (citation and quotation marks omitted); *see also State v. Faircloth*, 99 N.C.

App. 685, 689-90, 394 S.E.2d 198, 201 (1990) ("To be admissible, evidence of prior sexual abuse must relate to incidents sufficiently similar and not so remote in time that they are more probative than prejudicial under the balancing test of [Rule] 403." (citation omitted)).

Here, the trial court allowed the Rule 404(b) evidence to be introduced to the jury "as proof of motive in these cases, opportunity, plan, and/or scheme." Defendant contends that the evidence was inadmissible for any of these purposes. The State, conversely, asserts that the evidence was admissible to establish that (1) Defendant's actions depicted a common plan or scheme of abuse; and (2) Defendant had a motive to engage in sexual acts with Nora. We address each of these arguments in turn.

1. Common Plan or Scheme

Our Supreme Court has held that "evidence that the defendant committed similar offenses is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *State v. Frazier*, 319 N.C. 388, 390, 354 S.E.2d 475, 477 (1987) (citations and quotation marks omitted).

Our appellate courts have "been very liberal in admitting evidence of similar sex crimes in construing the exceptions to the general rule." *Id.* at 390, 354 S.E.2d at 477 (citation and quotation makes omitted). In such cases, evidence of prior bad acts

"is often viewed as showing a common scheme or plan by the defendant to sexually abuse the victim." *Faircloth*, 99 N.C. App. at 689, 394 S.E.2d at 201 (citation and quotation marks omitted). However, as noted above, the admissibility of Rule 404(b) evidence to show a common plan or scheme is limited by the requirements of similarity and temporal proximity. *Delsanto*, 172 N.C. App. at 50, 615 S.E.2d at 875 (citation and quotation marks omitted).

a. Similarity

We first address whether the acts described in the testimony of Melissa and Tony were sufficiently similar to the incidents alleged by Nora such that their testimony met the similarity requirement of Rule 404(b). With regard to the similarity requirement, "[p]rior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them. We do not require that the similarities rise to the level of the unique and bizarre." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159; *see, e.g.*, *State v. Love*, 152 N.C. App. 608, 614, 616, 568 S.E.2d 320, 324, 326 (2002) (defendant "made the victim[s] sit on his face and licked the child[ren]'s genitalia," both children were related to defendant, and both children received "candy and dollars in return" for their silence), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 66 (2003); *State v. Beckham*, 145 N.C. App. 119, 121, 550 S.E.2d 231, 234 (2001) (defendant had previously "expose[d] his genitals and play[ed] with his penis" in front of elementary-

school-aged witnesses and later masturbated in front of elementary-school-aged victims).

In our Supreme Court's recent decision in *Beckelheimer*, the Court discussed in some detail the similarity requirement under Rule 404(b). As an initial matter, we note that *Beckelheimer* involved the introduction of evidence for the purpose of showing *modus operandi* under Rule 404(b) rather than a common plan or scheme. Nevertheless, because the similarity requirement is the same for both, *Beckelheimer* is instructive for purposes of demonstrating how the similarity analysis must be conducted.

In *Beckelheimer*, the defendant was charged with first-degree sexual offense based on the actions he took with the victim, his 11-year-old male cousin. The State sought to introduce Rule 404(b) evidence from the victim's half-brother, who testified that the defendant had performed similar sexual acts on him when he was 12 years old. Both the victim and the Rule 404(b) witness were male relatives of the defendant that had been sexually abused by him in similar ways. *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159.

Our Supreme Court reversed this Court's determination that the Rule 404(b) evidence was inadmissible, stating the following:

> Here the alleged crimes and the 404(b) witness's testimony contained key similarities. The trial court found that "the age range of [the 404(b) witness] was close to the age range of the alleged victim," a finding supported by the evidence:

the victim was an eleven-year-old male cousin of defendant, and the witness was also defendant's young male cousin who was around twelve years old at the time of the alleged prior acts. The trial court found similarities in "the location of the occurrence," a finding also supported by the evidence: defendant and the victim spent time playing video games in defendant's bedroom where the alleged abuse occurred, and defendant and the witness also spent time playing video games together and in defendant's bedroom where the alleged abuse occurred. Finally, the trial court found similarities in "how the occurrences were brought about," a finding supported by the evidence: the victim described two incidents during which the defendant placed his hands on the victim's genital area outside of his clothes while pretending to be asleep; he also described an incident during which defendant lay on him pretending to be asleep, then reached inside the victim's pants to touch his genitals, then performed oral sex on the victim. The witness testified to a similar progression of sexual acts, beginning with fondling outside the clothing and proceeding to fondling inside the pants and then to oral sex; he also described how defendant would pretend to be asleep while touching him. We conclude that these similarities are sufficient to support the State's theory of modus operandi in this case.

Instead of reviewing these similarities noted by the trial court, the Court of Appeals focused on the differences between the incidents and determined they were significant. . . . The Court of Appeals found that the 404(b) witness's account resembled "apparently consensual" "[s]exual exploration" by young people rather than a forcible sexual offense, . . . a finding that was not made by the trial court and that we conclude is not supported by the record. The 404(b) witness did not testify that the acts were consensual and explained his single act of oral sex on the defendant as an attempt to stop defendant's efforts to penetrate him anally. Moreover, even if the record had shown voluntary actions by the witness, as a matter of law a child under age thirteen cannot consent to a sex act with

> a person more than four years older than he.

Id. at 131-32, 726 S.E.2d at 159-60 (internal citations omitted).

In the present case, we note that a number of factual differences exist between the incidents described by Melissa and Tony and the incidents described by Nora. Nevertheless, *Beckelheimer* requires that we look for the similarities between a prior sexual act and the act giving rise to the charged offense rather than focus on the differences.

First, with regard to Melissa, she and Nora were both approximately thirteen years old at the time of the sexual incidents that occurred with Defendant. Both girls were related to Defendant, and the incidents each occurred in a familial residence. Second, with regard to Tony, both his and Nora's testimony described similar acts of forcible anal intercourse. Tony was also related to Defendant and was close in age to Nora at the time of the incident described. Furthermore, the incidents with both Tony and Nora occurred in a family residence.

Even assuming *arguendo* that the acts described by Melissa and Tony were sufficiently similar to Nora's allegations for purposes of Rule 404(b), however, for the reasons set out in the next section we conclude the temporal proximity requirement rendered the testimony of Tony and Melissa inadmissible.

b. Remoteness in Time

Our Supreme Court has held that in determining whether Rule 404(b) evidence can be introduced to show a common scheme or plan "the passage of time must play an integral part in the balancing process to determine admissibility of such evidence." *State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 825 (1988).

> Remoteness [in time] for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered. For some 404(b) purposes, remoteness in time is critical to the relevance of the evidence for those purposes; but for other purposes, remoteness may not be as important. . . . *[R]emoteness in time may be significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan*; but remoteness is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident.

State v. Hipps, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998) (internal citations omitted and emphasis added), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999); *see also State v. Carter*, 338 N.C. 569, 589, 451 S.E.2d 157, 168 (1994) ("The prior crime here . . . is not being offered to show common plan or scheme, but to show identity. Therefore, the passage of time in this case affects the weight of the evidence rather than its admissibility."), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995); *Delsanto*, 172 N.C. App. at 50, 615 S.E.2d at 875 ("[R]emoteness in time between an uncharged crime and a charged crime is more significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan." (citation and quotation marks omitted)).

A review of applicable case law from our appellate courts reveals that in order for evidence of prior acts that are remote in time to be admissible to show a common plan or scheme, there must have been recurring instances of sexual abuse between the time of the defendant's first sexual act and the sexual conduct giving rise to the charged offense. *See, e.g.*, *State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) (evidence showed only a single five-month lapse in time over the course of twenty years of otherwise continual sexual abuse of multiple daughters by defendant); *State v. McKinney*, 110 N.C. App. 365, 372-73, 430 S.E.2d 300, 304 (defendant repeatedly "brought little girls to his residence to watch adult films and to spend the night with defendant in his bed" over course of seven years "in order to molest them"), *appeal dismissed and disc. review denied*, 334 N.C. 437, 433 S.E.2d 182 (1993).

North Carolina courts have also permitted the introduction of Rule 404(b) evidence of a defendant's prior sexual acts with children that were remote in time where the gaps in time between the prior episodes of sexual conduct and the charged offense were caused by the defendant's lack of physical access to suitable victims in the interim. *See, e.g.*, *Frazier*, 344 N.C. at 616, 476 S.E.2d at 300 (defendant regularly abused his five daughters over 26 years except for limited periods of time when none of his daughters were living at home); *State v. Pierce*, 238 N.C. App. 537, 547, 767 S.E.2d 860, 867 (2014) ("Although the sexual abuse of Cathy and Lisa occurred

between 10 and 20 years prior to trial, the lapses of time between the instances of sexual misconduct involving Cathy, Lisa, Melissa, and Maggie can be explained by defendant's incarceration and lack of access to a victim."); *State v. Jacob*, 113 N.C. App. 605, 611-12, 439 S.E.2d 812, 816 (1994) (over course of 14 years, defendant routinely raped prepubescent daughter from first marriage, stopped abuse after he lost access to her upon divorce from his first wife, and began molesting daughter born during second marriage once she reached prepubescent age); *State v. Matheson*, 110 N.C. App. 577, 583, 430 S.E.2d 429, 432 (1993) (lapse in time between defendant's sexual abuse of his first stepdaughter from 1979 to 1981 and his sexual abuse of his second stepdaughter from 1984 to 1991 was due to his intervening three-year incarceration).

However, in cases involving Rule 404(b) evidence consisting of sexual acts that were remote in time and did not fall within one of the categories listed above, our courts have refused to allow the admission of such evidence to show a common plan or scheme. Our Supreme Court's decision in *Jones* is the seminal case in North Carolina directly addressing the issue of whether a lack of temporal proximity merely goes to the *weight* of the evidence showing a common plan or scheme under Rule 404(b) in cases involving sexual acts with a minor or, alternatively, whether it actually goes to the *admissibility* of the Rule 404(b) evidence.

In *Jones*, the defendant was convicted of two counts of first-degree rape and three counts of taking indecent liberties with a child. The State's evidence showed that the crimes occurred between December 1982 and October 1985 and that the victim (the defendant's stepdaughter) was 12 years old when the episodes of abuse began. *Jones*, 322 N.C. at 586, 369 S.E.2d at 822. Evidence was presented that the defendant would force the victim to have vaginal intercourse with him when her mother was working outside the home and would threaten her with a gun. *Id.*

The State also introduced testimony under Rule 404(b) from a woman ("Veronica") who stated that she had repeatedly been assaulted by the defendant between 1970 and 1975 while the defendant had been living with her adult sister. *Id.* at 586-87, 369 S.E.2d at 823. Veronica testified that the assaults began when she was 11 years old and the defendant would force her to have vaginal intercourse with him during the years that he was living in the same household as her. *Id.* at 587, 369 S.E.2d at 823.

Our Supreme Court held that the admission of Veronica's testimony was erroneous, explaining its ruling as follows:

> The State's own evidence tended to show that the alleged assaults against [Veronica] occurred between the years 1970 and 1975. The crimes for which defendant was indicted occurred between the years 1982 and 1985. Thus, there was a twelve-year lapse of time between the start of the alleged assaultive conduct against [Veronica] by defendant and the start of assaultive behavior against the victim in this case. Furthermore, the time differential

between the commencement of the assault against the prosecutrix was seven years after the last of the alleged assaultive episodes against Verona [sic] . . . . Such an extreme time lapse raises serious concerns about the probative nature of such evidence.

. . . .

The State argues that remoteness of time should go to the weight and credibility to be given this type of evidence and not to its admissibility. The State directs this Court to *Cooper v. State*, 173 Ga. App. 254, 325 S.E. 2d 877 (1985), where a Georgia court held that the lapse of time between prior occurrences and the offenses charged goes only to the weight and credibility of such testimony and would not prevent its admissibility. Our cases, however, are to the contrary, and we support their reasoned conclusion that the passage of time must play an integral part in the balancing process to determine admissibility of such evidence. . . .

It seems incongruous that such testimony should be allowed into evidence when its probative impact has been so attenuated by time that it has become little more than character evidence illustrating the predisposition of the accused. Such is proscribed by Rules 403 and 404 of our rules of evidence. We think that a process that allows for the passage of time to be weighed in a court's initial decision to admit such evidence is the better reasoned approach and one that ensures that an accused is tried only for the acts for which he has been indicted. We therefore decline to follow *Cooper v. State*, 173 Ga. App. 254, 325 S.E. 2d 877.

We hold that the admission of the testimony relating to the alleged assaultive conduct against Verona [sic] Ellis was prejudicial to the defendant's fundamental right to a fair trial on the charges for which he was indicted because the prior acts were too remote in time.

Id. at 589-91, 369 S.E.2d at 824-25 (internal citations omitted).

Similarly, *Delsanto* involved a defendant who was convicted of first-degree sexual offense and taking indecent liberties with a child based on the State's evidence that he had penetrated his three-year-old granddaughter's vagina with his finger. *Delsanto*, 172 N.C. App. at 44, 615 S.E.2d at 871-72. The State introduced testimony under Rule 404(b) from the defendant's 27-year-old niece, who testified that the defendant was her babysitter when she was four years old. She stated that he "would tell her to lie on the bed, then he would remove her pants and underwear, touch her genital area and perform oral sex on her." *Id.* at 45, 615 S.E.2d at 872. She also testified that "on one occasion defendant made her touch and kiss his penis." *Id.* The defendant sought to exclude this testimony at trial, but the trial court overruled his objection based on the State's theory that the evidence tended to show a common scheme or plan. *Id.*

On appeal, this Court held that the testimony was improperly admitted under Rule 404(b). We determined that "the State has offered no evidence that defendant did not have any access to his preferred victim during the twenty-three year time span between the alleged instances of abuse." *Id.* at 51, 615 S.E.2d at 876. Thus, we ruled that "[t]he State has failed to establish that defendant's plan was interrupted and then resumed twenty-three years later. The admission of this evidence was in error and should not be admitted at his new trial." *Id.* at 51-52, 615 S.E.2d at 876.

In *Beckelheimer*, our Supreme Court rejected an argument by the defendant in that case that the prior sexual acts at issue were too remote in time for evidence of them to be admissible under Rule 404(b), stating as follows:

> Remoteness in time is less important when the other crime is admitted *because its modus operandi is so strikingly similar to the modus operandi of the crime being tried as to permit a reasonable inference that the same person committed both crimes*. . . . In such cases, remoteness in time goes to the weight of the evidence rather than its admissibility.

Beckelheimer, 366 N.C. at 132-33, 726 S.E.2d at 160 (citation and quotation marks omitted and emphasis added).

Critically, however, the Rule 404(b) evidence in the present case — unlike in *Beckelheimer* — was *not* introduced for the purpose of showing *modus operandi*. Moreover, none of the cases cited by the Court in *Beckelheimer* in which evidence of prior sexual acts had been admitted despite their remoteness in time were applying the common plan or scheme prong of Rule 404(b). *See Hipps*, 348 N.C. at 405, 501 S.E.2d at 642 (evidence was admissible to show knowledge and intent); *Carter*, 338 N.C. at 589, 451 S.E.2d at 168 (1994) (evidence was admissible to show identity).

Having examined the applicable case law, we now consider the temporal proximity between the events alleged by the Rule 404(b) witnesses and the two incidents alleged by Nora. Melissa testified regarding two encounters that occurred

in 1987 while Tony described an incident that occurred in 1985. Thus, each of these acts occurred over twenty years prior to the first incident described by Nora.

In the MAR Order, the trial court compared the facts of the present case to those in *Shamsid-Deen* and *Frazier* in an attempt to show that prior sexual acts occurring up to twenty years earlier could still be admissible under Rule 404(b). However, in both of those cases — unlike in the present case — the Rule 404(b) evidence showed *recurring* sexual acts. *See Frazier*, 344 N.C. at 616, 476 S.E.2d at 300 (defendant consistently fondled and raped five stepdaughters, step-granddaughters, and daughter-in-law over period of 26 years); *Shamsid-Deen*, 324 N.C. at 445, 379 S.E.2d at 847 (defendant forcibly raped three daughters over 20-year period except for a five-month lapse in 1983). The continual sexual acts present in those two cases simply do not exist here.

Nor did the State establish that Defendant's lack of access to children was the reason there were no allegations of sexual contact between Defendant and minors during the intervening decades.[3] Thus, as in *Jones* and *Delsanto*, any probative value of Tony's or Melissa's testimony "has been so attenuated by time that it has become little more than character evidence illustrating the predisposition of the accused." *Jones*, 322 N.C. at 590, 369 S.E.2d at 825.

[3] Indeed, several of Defendant's extended family members testified that he had continued access to prepubescent and teenage children during this time period and that no other child had reported sexual encounters with him.

In arguing that the temporal proximity issue should be considered under Rule 403 — rather than Rule 404(b) — of the North Carolina Rules of Evidence, the dissent applies an analysis that is utterly inconsistent with the Supreme Court's ruling in *Beckelheimer* and in subsequent cases. The dissent appears to be arguing that whether a prior sexual act is too remote in time to be admissible is a matter within the trial court's discretion under Rule 403 to determine whether the probative value of evidence is substantially outweighed by its prejudice to the adverse party. *See* N.C. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). This assertion is fundamentally at odds with black letter law articulated by our Supreme Court.

While the dissent cites earlier cases from our appellate courts that confuse the interplay between 404(b) and 403 in this context, the Supreme Court in *Beckelheimer* has resolved any confusion that may have previously existed on this issue. Nevertheless, despite the clarity of *Beckelheimer* in its holding that the temporal proximity requirement is a part of the Rule 404(b) analysis rather than the Rule 403 analysis and is therefore not reviewed under an abuse of discretion standard, the dissent persists in arguing that the opposite is true. As is shown below, such an argument simply cannot be squared with the Supreme Court's opinion in *Beckelheimer*.

In *Beckelheimer*, the Supreme Court expressly discussed the appropriate standard of review for a trial court's admission of evidence under Rule 404(b). The Supreme Court noted that "[t]he *Court of Appeals* has consistently applied an abuse of discretion standard in evaluating the admission of evidence under Rules 404(b) and 403." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 158 (citation omitted and emphasis added). The Supreme Court then explained why the application of an abuse of discretion standard for a Rule 404(b) ruling was incorrect. The Court stated that — unlike the Court of Appeals — the *Supreme Court* "ha[d] consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of probative value and unfair prejudice under Rule 403." *Id.* The Supreme Court then used clear and unambiguous language to ensure that in future cases the Court of Appeals would utilize the Supreme Court's *de novo* standard when reviewing Rule 404(b) rulings. "For the purpose of clarity, we now explicitly hold that when analyzing rulings applying Rule 404(b) and 403, we conduct *distinct* inquiries with *different* standards of review." *Id.* at 130, 726 S.E.2d at 159 (emphasis added). The Court then explained that an appellate court must "review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We *then* review the trial court's Rule 403 determination for abuse of discretion." *Id.* (emphasis added).

Having clarified the differing standards of review for Rule 404(b) and Rule 403 analyses, the Supreme Court then proceeded to analyze the issues in *Beckelheimer* based on this framework. First, the Court conducted its Rule 404(b) analysis, making clear at the outset that "Rule 404(b) is . . . constrained by the requirements of similarity and temporal proximity." *Id.* at 131, 726 S.E.2d at 159 (citation and quotation marks omitted). The Supreme Court then examined the similarity and temporal proximity factors *as part of its Rule 404(b) analysis*. *Id.* at 130-33, 726 S.E.2d at 159-60.

Only *after* the Supreme Court had completed its Rule 404(b) determination did it then turn to the Rule 403 issue, stating the following: "Having determined that the 404(b) evidence was sufficiently similar and not too remote in time, *we now review the trial court's 403 determination for abuse of discretion*." *Id.* at 133, 726 S.E.2d at 160. The Court then proceeded to conduct its analysis under Rule 403. *Id.*

Thus, while the dissent relies on language in cases from our appellate courts *prior to Beckelheimer* confusing both (1) the respective standards of review for Rule 404(b) and Rule 403; and (2) whether temporal proximity is to be reviewed as part of the Rule 404(b) or the Rule 403 analysis, *Beckelheimer* put such confusion to rest by making clear both that Rule 404(b) rulings are *not* subject to an abuse of discretion standard and that remoteness in time must be considered as part of the court's Rule 404(b) analysis.

Moreover, contrary to the conclusion reached by the dissent, Rule 404(b) rulings can — and repeatedly have been — reviewed under plain error review by both our Supreme Court and by this Court. *See, e.g.*, *State v. Maready*, 362 N.C. 614, 622, 669 S.E.2d 564, 569 (2008) (applying plain error review where defendant failed to object to evidence of his driving record admitted at trial pursuant to Rule 404(b)); *State v. Lee*, 348 N.C. 474, 483, 501 S.E.2d 334, 339 (1998) (holding that admission of evidence of prior bad acts under Rule 404(b) did not amount to plain error); *State v. Syriani*, 333 N.C. 350, 376, 428 S.E.2d 118, 132 (1993) (applying plain error review where evidence "of specific instances of misconduct toward [defendant's] wife and children was elicited from his children" to show motive, opportunity, intent, preparation, and absence of mistake or accident under Rule 404(b)), *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1994); *State v. Bowman*, 188 N.C. App. 635, 644, 656 S.E.2d 638, 646 (holding that improper admission of Rule 404(b) evidence did not amount to plain error), *disc. review denied*, 362 N.C. 475, 666 S.E.2d 649 (2008); *State v. Jones*, 176 N.C. App. 678, 686, 627 S.E.2d 265, 270 (2006) (ruling that evidence regarding defendant's involvement in second robbery admitted under Rule 404(b) was not plain error). Thus, while — as the dissent asserts — discretionary rulings by trial courts are not reviewable for plain error, issues of admissibility under Rule 404(b) *are* subject to plain error review.

While the dissent then cites cases from other jurisdictions such as Kentucky and West Virginia that apparently take a different approach to Rule 404(b) issues than North Carolina courts do, such cases are obviously irrelevant. Because the Supreme Court of North Carolina has definitively spoken on this issue, we are of course bound to follow the decisions of our State's highest court.

Thus, the issue of whether the testimony of Melissa and Tony was admissible to show a common plan or scheme despite the remoteness in time of the acts they related involves the purely legal question of whether the evidence met the test for admissibility under Rule 404(b). Only once it is determined that the evidence was, in fact, admissible under Rule 404(b) despite the lack of temporal proximity would it be appropriate to then conduct the entirely *separate* analysis of whether the trial court properly applied the Rule 403 balancing test with regard to this evidence.

Similarly, to the extent the dissent is arguing that remoteness in time should go merely to the weight of the evidence rather than its admissibility, such an approach is in direct conflict with the prior decisions discussed in detail above from our appellate courts with regard to the common plan or scheme prong of Rule 404(b). *See, e.g.*, *Jones*, 322 N.C. at 590, 369 S.E.2d at 825 (holding that remoteness in time goes to admissibility of evidence to prove common plan or scheme); *Delsanto*, 172 N.C. App at 51-52, 615 S.E.2d at 876 (holding that evidence was inadmissible to prove

common plan or scheme under Rule 404(b) due to remoteness in time between incidents).

2. Motive

The State alternatively contends that the trial court properly admitted the Rule 404(b) evidence on the theory that it tended to establish Defendant's motive for committing the offenses alleged by Nora. Once again, we disagree.

Our Supreme Court has held that the State may introduce "evidence of motive as circumstantial evidence to prove its case where the commission of the act is in dispute 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. Hightower*, 331 N.C. 636, 642, 417 S.E.2d 237, 240-41 (1992) (citation, quotation marks, and brackets omitted).

However, in order to establish "motive" under Rule 404(b), it is not enough to simply show that a defendant has engaged in prior sexual acts. Instead, our courts have required more. *See, e.g.*, *State v. Rayfield*, 231 N.C. App. 632, 653, 752 S.E.2d 745, 760 (defendant's possession of pornography depicting him having intercourse with unknown female was admissible to show motive because child victim's testimony established that defendant had shown pornography to her prior to sexually assaulting her), *disc. review denied*, 367 N.C. 504, 758 S.E.2d 871 (2014); *State v. Brown*, 211 N.C. App. 427, 449, 710 S.E.2d 265, 280 (2011) (where defendant was convicted of rape of his daughter, his "possession of a publication containing descriptions of

incestuous encounters in graphic detail" showed that he "fantasize[d] about incest" and had acted on this desire), *aff'd per curiam*, 365 N.C. 465, 722 S.E.2d 508 (2012).

No comparable facts exist with regard to the Rule 404(b) evidence at issue here. Testimony suggesting that a defendant committed a sexual act with a minor in the past is simply not enough *by itself* to warrant the admission of such evidence under the "motive" prong of Rule 404(b). To the contrary, such testimony – without more – merely seeks "to prove the character of [Defendant] in order to show that he acted in conformity therewith[,]" N.C. R. Evid. 404(b), which is precisely the type of propensity evidence that is not permitted. *See State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) ("[T]he dangerous tendency of Rule 404(b) evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts." (citation, quotation marks, and brackets omitted)).

* * *

We recognize that the bar to admissibility under Rule 404(b) of a defendant's prior sexual acts toward minors is in many cases a low one. However, our Supreme Court has made clear that the temporal proximity requirement serves as a barrier to the admissibility of such evidence in cases like the present one where it is offered under the common plan or scheme prong of Rule 404(b). In *Jones*, the Supreme Court expressly considered the precise issue of whether remoteness in time serves to

preclude the admissibility of common plan or scheme evidence or, alternatively, whether such lack of temporal proximity merely goes to the *weight* of the evidence rather than its admissibility. While the Court has since distinguished *Jones* on other grounds, it has never overruled the portion of its analysis in that case addressing this specific issue.

It is axiomatic that our Court is bound to follow the precedents of our Supreme Court. *See Mahoney v. Ronnie's Rd. Serv.*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996) ("[I]t is elementary that we are bound by the rulings of our Supreme Court . . . ."), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997). Under the existing case law from the Supreme Court, isolated prior acts of sexual conduct that are too remote in time such as those at issue here are simply not admissible under Rule 404(b) as evidence of a common plan or scheme. Therefore, we hold that the trial court erred at Defendant's criminal trial in admitting the testimony of Tony and Melissa.

B. Prejudice to Defendant

Having determined that the testimony of Melissa and Tony was improperly admitted under Rule 404(b), we must next consider whether Defendant has met his burden of showing a reasonable probability that this Court in *Mills I* would have found its admission constituted plain error had Casterline properly sought plain error review. In the MAR Order, the trial court concluded that "even had appellate counsel

argued plain error there is no reasonable probability that the Court of Appeals would have found plain error and reversed the conviction." We disagree.

In determining whether its impact on the jury was sufficiently prejudicial so as to rise to the level of plain error, the inadmissible Rule 404(b) testimony must be viewed in conjunction with the jury's assessment of Nora's credibility and the weaknesses in the State's case. We discuss each of these factors in turn.

1. Nora's Credibility

The defense impeached Nora's credibility by showing that (1) she recanted her allegations regarding the 2008 incident in the weeks that followed; (2) Nora admitted that she had embellished her allegations regarding the 2009 incident to make them more believable; (3) her sisters did not witness any sexual acts take place at the time of the alleged 2009 incident despite being right outside the trailer and able to see inside through the open windows and door; and (4) Nora had a motive to lie about these events. Finally, the jury's acquittal of Defendant with regard to *all* of the offenses relating to the alleged 2009 incident unambiguously demonstrates that it found significant portions of Nora's testimony to lack credibility.

First, Nora recanted her original account of the 2008 incident in the weeks following its occurrence. Tammy and Nora's grandmother questioned Nora on multiple occasions as to whether her allegations were true. Tammy testified that — at various times — Nora either denied that the incident had occurred, claimed she

had made the story up, or declined to speak at all as to the veracity of her previous allegations. Nora admitted at trial that when her grandmother approached her about the allegations she denied that they were true.

Second, the defense also introduced evidence that immediately after the 2009 incident occurred Nora embellished her account of the incident by texting Leslie that Defendant had forced her to have *both* anal and vaginal intercourse. Nora testified that she had lied about Defendant forcing her to have vaginal intercourse because she "wanted [Leslie] to believe [her]."

Third, Nora's younger sisters testified that they were present on the front porch of the trailer when the 2009 incident allegedly occurred and were able to see Defendant and Nora through the open windows and door on the front porch. They both stated that they never observed any sexual conduct take place.

Fourth, Defendant provided evidence of a motive for Nora to lie about the incidents at issue. Nora learned in 2007 that Defendant was not her biological father while doing an assignment in her genetics class and realized that Defendant had lied to her about his status as her natural father. Defendant testified that Nora had begun misbehaving in the subsequent months. Nora herself admitted that she was "upset" to learn that Defendant had been untruthful to her about this subject.

The defense also offered evidence showing that Defendant's parenting style and use of disciplinary measures had engendered resentment in Nora. Defendant

testified that he did not allow Nora to have a Facebook account because he felt she was too young. Nora created her own Facebook account, however, by setting it up on a friend's computer without Defendant's permission.

During the summer of 2008, Defendant learned that Nora was using her cell phone to send and receive messages that he deemed "inappropriate" for a thirteen-year-old. As punishment, he confiscated her cell phone for the entire summer. Nora testified that she was "pretty upset" with Defendant's punishment of her in this fashion. It was later that summer when Nora first alleged that Defendant had engaged in sexual conduct with her.

At some point in July 2009 — the following summer — Nora's cell phone privileges were revoked by Defendant once again due to inappropriate texting. At the end of July, Nora alleged that Defendant had committed a sexual act against her while they were painting the trailer. Thus, the defense showed that in both instances the accusations made by Nora corresponded with periods of time when her cell phone privileges had been revoked by Defendant.

The greatest testament to the existence of concerns by the jury about Nora's credibility is the fact that it acquitted Defendant of all the offenses related to the alleged 2009 incident. Because the trial boiled down to a credibility contest between Defendant and Nora over whether her allegations of sexual conduct by Defendant

were true, the only rational inference from its verdict is that the jury concluded that she had fabricated the 2009 incident during her sworn in-court testimony.

2. Other Weaknesses in State's Case

The State's case was also hampered by (1) the absence of physical evidence or expert testimony to support Nora's allegations; (2) the lack of eyewitnesses; and (3) Nora's vague trial testimony.

The State's case lacked physical evidence as no rape kit was ever collected from Nora. Nor did the State present expert testimony to establish that Nora possessed clinical symptoms associated with sexual abuse. *See Delsanto*, 172 N.C. App at 49, 615 S.E.2d at 875 (holding that improperly admitted testimony constituted plain error in child sex abuse case where there was "no evidence that [victim's] behavior was symptomatic of having suffered sexual abuse"). Moreover, there were no witnesses to the 2008 incident, and — as noted above — the two witnesses at the time of the alleged 2009 incident (Mia and Emma) denied seeing any sexual conduct occur.

Finally, Nora's testimony regarding the events of the 2008 incident lacked specificity. At trial, she was unable to recall numerous details about the 2008 incident, including the placement of Defendant's hands on her body; the duration of the incident; whether Defendant had removed any of his clothing; whether Defendant had ejaculated; the time of night the incident had occurred; the clothes she had been wearing; or the color of the living room couch.

The impact of the Rule 404(b) evidence on the jury's verdict is made even more apparent by the fact that during its deliberations the jury specifically asked the trial court, "[W]hat level do we consider [Melissa's] and [Tony]'s statements[?]" The logical conclusion from the jury's question is that the Rule 404(b) evidence figured prominently in the minds of the jurors as they deliberated.

In the MAR Order, the trial court relied on the fact that Defendant had been acquitted of the offenses relating to the 2009 incident to support its conclusion that Defendant had not actually been prejudiced by Casterline's conduct. Cases from our appellate courts, however, support the contrary proposition — that is, the likelihood that absent the improperly admitted evidence the jury would have acquitted Defendant on *all* charges. *State v. Cook*, 165 N.C. App. 630, 638, 599 S.E.2d 67, 73 (2004) ("The evidence against defendant, in the absence of the [Rule 404(b) evidence], was not overwhelming and the result hinged on the jury's assessment of his credibility. It is significant to this [prejudice] analysis that the jury acquitted defendant of the two counts of embezzlement arising from the 10 June 2001 and 20 June 2001 incidents."); *State v. Couser*, 163 N.C. App. 727, 732, 594 S.E.2d 420, 423 (2004) (defendant's acquittal of rape offense and the fact that he was convicted only of attempted rape did not render improper admission of expert testimony harmless under plain error review); *State v. McMillan*, 55 N.C. App. 25, 33, 284 S.E.2d 526,

531 (1981) (fact that defendant was acquitted of one charge "takes on added significance" in determining whether error regarding second charge was harmless).

Thus, we conclude that Defendant has met his burden of showing a reasonable probability that the introduction of the Rule 404(b) evidence at Defendant's trial "tilted the scales" and had a probable impact on the jury's conviction of Defendant as to the 2008 incident. *See State v. Bush*, 164 N.C. App. 254, 260, 595 S.E.2d 715, 719 (2004) (improper admission of evidence in child sex abuse case constituted plain error where all corroborating evidence of assault was rooted solely in victim's version of events); *see also State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986) (erroneous jury instruction may have "tilted the scales" and caused jury to convict defendant).

Having determined that Defendant has satisfied the prejudice prong of the *Strickland* test, we must now assess whether he has likewise met his burden as to the deficiency prong.

II. Deficiency Prong of *Strickland* Test

The deficiency prong of the test for ineffective assistance of counsel requires "a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *State v. Todd*, 369 N.C. 707, 710, 799 S.E.2d 834, 837 (2017) (citation and quotation marks omitted). Our Supreme Court has explained that "[r]ather than articulating specific guidelines for

appropriate attorney conduct, the Court in *Strickland* emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 711, 799 S.E.2d at 837-38 (citations, quotation marks, and brackets omitted). Strategic choices by appellate counsel are not subject to challenge in an ineffective assistance of counsel claim. *Id.* at 711, 799 S.E.2d at 838 (citation and quotation marks omitted).

In the present case, the sole argument raised on appeal by Casterline in *Mills I* was that the trial court's admission of the testimony of Melissa and Tony was erroneous under Rule 404(b). In his appellate brief, however, Casterline ignored the fact that Defendant's trial counsel had failed to object to the Rule 404(b) testimony at the time it was offered, meaning that the issue had not been properly preserved for appeal. Although a request for this Court to conduct plain error review was the only recourse available under these circumstances, Casterline failed to invoke the plain error doctrine in his appellate brief on behalf of Defendant.

After Defendant's appellate brief was filed on 14 June 2013, Emily Davis, an Assistant Appellate Defender with the OAD, conducted a review of his brief — a routine practice by the OAD. Upon doing so, she immediately realized that the brief made no mention of how Defendant had preserved for appellate review the issue relating to the admission of the Rule 404(b) evidence. Instead, the brief merely

referenced the fact that a motion *in limine* had been made by Defendant in the trial court and that the motion had been denied.

On 18 June 2013, Davis emailed Casterline to ask if "defendant's objection [was] made in front of the jury?" He responded the following day that there was "no objection in front of the jury" and that the court had stated "exception noted by the defendant to the court's [motion *in limine*] ruling . . . ." Davis remained concerned about the preservation issue and forwarded Casterline's email to Appellate Defender Staples Hughes. That same day, Hughes suggested to Davis that Casterline could file either a substitute brief asserting plain error or a reply brief explaining why he believed the issue actually had been properly preserved.

On 19 June 2013, Davis emailed Casterline for a second time to "express concern over the fact that [he] did not allege plain error in his brief." In this email, she suggested that he determine whether the preservation issue in Defendant's case was identical to that in *State v. Hazelwood*, 187 N.C. App. 94, 654 S.E.2d 63 (2007), *cert. denied*, 363 N.C. 133, 673 S.E.2d 867, *cert. denied*, 558 U.S. 1013, 175 L. Ed. 2d 385 (2009). *See id.* at 97-98, 654 S.E.2d at 65 (holding that plain error review was unnecessary because defendant had objected in front of jury to question calling for hearsay testimony before witness actually made inadmissible statement rather than simply relying on motion *in limine* to preserve issue). Davis stated that (1) if Casterline determined *Hazelwood* was applicable he should file a reply brief citing

that case to show the issue had, in fact, been preserved; or, alternatively, (2) if he determined *Hazelwood* was inapplicable, he should file a substitute brief expressly asserting plain error.

On 20 June 2013, Casterline responded to Davis by email, stating that he believed "it was not necessary to allege plain error" in light of his reading of *Hazelwood*, which he believed stood for the proposition that Defendant's argument regarding the Rule 404(b) evidence had been preserved. He also noted that the State's appellate brief did not contain an argument as to lack of preservation and that, as a result, Casterline was of the view that the North Carolina Rules of Appellate Procedure did not permit him to file a reply brief as to an issue not raised in the appellee's brief.

This Court ultimately held in *Mills I* that Defendant had "failed to preserve this issue for our review" and that "this Court will not review an appeal for plain error where the defendant does not specifically and distinctly contend that the alleged error constitutes plain error." *Mills I*, at *3 (citation and quotation marks omitted). After his motion to stay the mandate was denied by this Court and his petition for discretionary review was denied by the Supreme Court, Defendant filed his MAR in the trial court. At the MAR hearing, both Casterline and Davis testified regarding the entire sequence of events set out above.

In determining whether Casterline's performance was deficient, we first examine the reasonableness of his belief that Defendant's receipt of an adverse ruling on his motion *in limine* was sufficient to preserve his challenge to the Rule 404(b) evidence despite the expressions of concern by the OAD. It has long been the law in this State that a motion *in limine* by itself is not sufficient to preserve for appellate review an issue relating to the admission of the evidence that the party sought to exclude. *See, e.g.*, *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) ("This Court has consistently held that a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." (citation, quotation marks, and brackets omitted)); *T&T Dev. Co. v. S. Nat'l Bank*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 349 ("A party objecting to an order granting or denying a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to object to the evidence at the time it is offered at the trial . . . ." (citations omitted)), *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997).

Based on this rule, our appellate courts have repeatedly dismissed appeals where a criminal defendant filed a motion *in limine* but later failed to object to the introduction of that evidence in the presence of the jury. *See, e.g.*, *State v. McNeil*, 350 N.C. 657, 681, 518 S.E.2d 486, 501 (1999) (assignment of error was waived where defendant filed motion *in limine* but failed to object to challenged evidence at time

State questioned witness), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000); *State v. Bethea*, 156 N.C. App. 167, 170, 575 S.E.2d 831, 834 (2003) (defendant failed to preserve issue of whether trial court correctly denied motion *in limine* to exclude Rule 404(b) evidence because he did not object when testimony was offered at trial); *State v. Gaither*, 148 N.C. App. 534, 540, 559 S.E.2d 212, 216 (2002) (issue was not preserved for appellate review where defendant received ruling denying motion *in limine* but failed to object to challenged testimony at trial).

Thus, it should have been abundantly clear to any appellate attorney in this state that the denial of a motion *in limine* alone is not sufficient to preserve for appeal a defendant's challenge to the admission of evidence. Despite this settled proposition of law, the record shows that Casterline was unaware of the existence of any preservation concerns prior to the filing of his appellate brief and, as a result, his brief was devoid of any effort to explain how the issue had been preserved.

Moreover, Casterline continued to operate under the mistaken belief that no further action on his part was necessary even after he was expressly made aware of the OAD's concerns about this issue. No reasonable basis existed for Casterline to rely on *Hazelwood* under these facts. In that case, the defendant's trial counsel had objected *during trial* to a question directed at an officer "moments before Defendant expected [him] to deliver an allegedly inadmissible statement to the jury." *Hazelwood*, 187 N.C. App. at 98, 654 S.E.2d at 65. We held that the defendant's

objection to the evidence in the presence of the jury preserved the issue for appellate review. *Id.* at 98, 654 S.E.2d at 65-66.

It was manifestly unreasonable for Casterline not to recognize that the facts of Defendant's case were materially different from those in *Hazelwood* given that Defendant's trial counsel never objected to the Rule 404(b) evidence in the presence of the jury. As such, it should have been apparent to Casterline that plain error review was the only avenue by which this Court was authorized to consider the Rule 404(b) issue. Nevertheless, due to either his lack of understanding of the law or his unfamiliarity with the trial transcript, Casterline informed Davis that he believed *Hazelwood* applied and that plain error review did not need to be requested.

In connection with Defendant's MAR, Defendant provided affidavits, emails, and testimony from Casterline and Davis establishing that Casterline's failure to ensure that this Court addressed the substance of Defendant's appeal was due to his own negligence as opposed to a strategic decision. We are satisfied that Defendant has met his burden under *Strickland* of showing deficient performance on the part of Casterline. Casterline's most basic duty as appellate counsel was to ensure that the sole substantive issue Defendant sought to raise on appeal was actually considered on the merits by this Court. The trial transcript clearly showed this issue had not been properly preserved in the trial court. All Casterline had to do was specifically argue in his appellate brief that the admission of the Rule 404(b) evidence amounted

to plain error. To make matters worse, Casterline was advised of his error in time to take remedial action based on his communications with the OAD but failed to do so.

It is worthy of emphasis that this case does not present a scenario where an appellate attorney made a strategic decision that turned out, in hindsight, to be ill-advised. To the contrary, making a plain error argument in his appellate brief was a matter of necessity in order to have the merits of Defendant's appeal actually reached by this Court. Even the assertion of plain error as an *alternative* basis for this Court's review would have saved Defendant's appeal.

Nor was this a case in which appellate counsel had to choose between multiple potential arguments on appeal and strategically decide which issues should be pursued most vigorously. *See Jones v. Barnes*, 463 U.S. 745, 751-52, 77 L. Ed. 2d 987, 994 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."). Instead, this case involved a one-issue appeal where even a cursory reading of *Hazelwood* and the transcript of Defendant's trial should have demonstrated to Casterline that Defendant's sole appellate issue had not been preserved and, therefore, a plain error argument was required. *See Hyman v. Aiken*, 824 F.2d 1405, 1416 (4th Cir. 1987) ("Counsel's lack of preparation and research cannot be considered the result of deliberate, informed

trial strategy."). Thus, none of Casterline's actions can be characterized as strategic in nature.

While North Carolina's appellate courts have not addressed this issue, courts in other jurisdictions have held that an appellate counsel's failure to assert plain error is sufficient to establish deficient performance under the *Strickland* test. *See, e.g.*, *Payne v. Stansberry*, 760 F.3d 10, 12, 18 (D.C. Cir. 2014) (appellate counsel's performance was deficient in failing to seek plain error review of trial court's instruction to jury that they "must find [him] guilty even if the government failed to prove any element of a charged offense beyond a reasonable doubt" due to reasonable probability that assertion of plain error would have impacted result (quotation marks omitted)); *Roe v. Delo*, 160 F.3d 416, 419 (8th Cir. 1998) (appellate counsel's decision to forego plain error claim where "instruction error was significant and would have been apparent to a reasonably competent appellate attorney" constituted deficient performance under *Strickland* test).

We therefore conclude that Casterline's performance was deficient. Accordingly, Defendant has satisfied both elements of the *Strickland* test.[4]

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[4] Although Judge Pope did not reach the issue of whether Casterline's representation was deficient under the first prong of the *Strickland* test, we need not remand for the trial court to rule on this issue. The facts bearing on this question are not in dispute, and the issue of whether these facts establish deficient performance under the *Strickland* test is a legal one. *See State v. Curry*, __ N.C. App. __, __, 805 S.E.2d 552, 558 (2017) ("No further investigation is necessary in this matter as there is ample evidence in the record to decide Defendant's two IAC claims."). This distinguishes the present case from *Todd* in which our Supreme Court remanded the case to the trial court for such a determination because no evidentiary hearing had been conducted. *Todd*, 369 N.C. at 712, 799 S.E.2d

* * *

We wish to emphasize the unique nature of this case. Defendant's MAR presents a rare combination of circumstances consisting of (1) improperly admitted evidence under Rule 404(b); (2) accompanying prejudice to a defendant that meets the heavy burden necessary to establish plain error; and (3) clearly deficient representation by the defendant's appellate counsel. In short, the MAR raises the "perfect storm" of unusual facts and circumstances giving rise to a meritorious ineffective assistance of appellate counsel claim.

III. Remedy

The only remaining question before us is whether Defendant should be granted a new trial or whether he is simply entitled to a new appeal. We have been unable to find any North Carolina case law shedding light on this issue.

Other jurisdictions have employed diverse remedies where a defendant successfully asserted an analogous claim for ineffective assistance of appellate counsel. *See, e.g. Payne*, 760 F.3d at 18 (affording defendant "a new appeal in which he may raise the burden of proof instruction issue omitted from his original direct appeal"); *Roe*, 160 F.3d at 420 (providing that district court should "issue a writ of habeas corpus unless . . . [defendant] is afforded a new appeal in which he may raise

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at 838. Here, conversely, the trial court did conduct an evidentiary hearing and, once again, the only remaining issue is a purely legal one.

the first degree murder instruction issue omitted from his original direct appeal or, in the alternative, is granted a new trial"); *Miller v. State*, 268 P.3d 506, 2012 Kan. App. Unpub. LEXIS 87, *25 (Kan. Ct. App. 2012) (unpublished) (reversing district court's denial of defendant's motion for relief and remanding with instructions that motion be granted and defendant be given a new trial), *aff'd*, 318 P.3d 155 (Kan. 2014).

In light of our rulings in this opinion that the admission of the Rule 404(b) evidence was not only erroneous but also that its admission did, in fact, constitute plain error, we believe that granting Defendant a new appeal would be a waste of judicial resources as there are no remaining unresolved appellate issues to be decided. Thus, we conclude that based upon considerations of judicial economy and the expeditious administration of justice the proper remedy is for us to remand this matter to the trial court with instructions to grant Defendant a new trial.

Conclusion

For the reasons stated above, we reverse the trial court's 13 September 2016 order and remand for a new trial.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Judge CALABRIA concurs.

Judge TYSON dissents in a separate opinion.

Report per Rule 30(e).

TYSON, Judge, dissenting.

Judge Pope entered an order ("MAR Order") after a hearing mandated upon this Court's remand and correctly denied Defendant's motion for appropriate relief ("MAR"). Judge Pope made unchallenged findings and properly concluded that appellate counsel Casterline's performance did not prejudice Defendant, because "even had appellate counsel argued plain error there is no reasonable probability that the Court of Appeals would have found plain error and reversed the conviction."

Rule 403 determinations are reviewed for an abuse of discretion, and discretionary determinations by the trial court cannot be reviewed for plain error. *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000) (refusing to apply the plain error standard of review "to issues which fall within the realm of the trial court's discretion"); *State v. Fink*, __ N.C. App. __, __,798 S.E.2d 537, 544 (2017) ("We [] review the trial court's Rule 403 determination for abuse of discretion.").

Defendant failed to preserve arguments concerning the proximity in time elapsed between the challenged 404(b) evidence and the charged offenses by failing to object at trial. The majority's opinion does not dispute that the 404(b) evidence of prior sexual abuse at issue is otherwise relevant, admissible, and probative evidence for purposes of Rules 401 and 402 of the Rules of Evidence. *See* N.C. Gen. Stat. § 8C-1, Rules 401, 402 (2017). The majority's opinion also does not dispute the 404(b)

evidence at issue was proffered by the State to show motive and common scheme or plan, two of the proper purposes expressly listed by Rule 404(b) for admitting relevant and probative evidence of Defendant's prior bad acts. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017).

We all agree that in analyzing the admissibility of 404(b) evidence of prior sexual acts, the court must "look for the similarities between a prior sexual act and the act giving rise to the charged offense rather than focus on the differences." The majority's opinion presumes "*arguendo*" that even if the 404(b) evidence Defendant challenges is sufficiently similar to the sexual offense for which Defendant is charged to be relevant, probative, and admissible, the proximity in time, which lapsed between the 404(b) evidence and the charged offenses, renders the 404(b) evidence *per se* inadmissible to award a new trial under plain error review.

Another erroneous conclusion in the majority's opinion asserts the trial court's ruling on proximity in time under Rules 404(b) and 403 is analyzed on appeal *de novo*, despite numerous binding precedents explicitly stating that proximity in time is analyzed under whether the prejudice to Defendant substantially outweighs the probative value balancing test of Rule 403. This Court's opinion in *State v. Faircloth,* stating that remoteness in time is analyzed under Rule 403 is cited and quoted in the majority's opinion. *See State v. Faircloth*, 99 N.C. App. 685, 689-90, 394 S.E.2d 198, 201 (1990) ("evidence of prior sexual abuse must relate to incidents sufficiently

similar and not so remote in time that they are more probative than prejudicial under the balancing test of [Rule] 403." (citation omitted)).

The majority's opinion properly acknowledges that Rule 403 determinations are reviewed on appeal under an abuse of discretion standard. Despite these well-established precedents, the majority's opinion purports to review the remoteness or proximity in time issue for plain error, *de novo* under Rule 404(b), and not for abuse of discretion under Rule 403. Their conclusion holds, upon reviewing an appellate MAR and under plain error review, the trial court's admission of the relevant, similar, and probative evidence was inadmissible, as a matter of law, and awards the non-objecting Defendant a new trial. The findings and conclusions contained in the order appealed from to deny Defendant's MAR are correct. I respectfully dissent.

I. Standard of Review

This Court has recited a three-part test to determine whether relevant evidence is properly admitted under Rules of Evidence 404(b) and 403:

> First, is the evidence relevant for some purpose other than to show that defendant has the propensity to commit the type of offense for which he is being tried? Second, is that purpose relevant to an issue material to the pending case? Third, is the probative value of the evidence substantially outweighed by danger of unfair prejudice pursuant to N.C.R. Evid. 403?

State v. Houseright, 220 N.C. App. 495, 499, 725 S.E.2d 445, 448 (2012) (internal citations omitted).

"We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). "We [] review the trial court's Rule 403 determination for abuse of discretion." *Fink*, __ N.C. App. at __,798 S.E.2d at 544 (citation omitted).

II. Analysis

A. Defendant's Burden on MAR

This Court has stated a defendant's burden on appeal and held that "[t]o show ineffective assistance of appellate counsel, [d]efendant must meet the same standard for proving ineffective assistance of trial counsel." *State v. Simpson*, 176 N.C. App. 719, 722, 627 S.E.2d 271, 275 (citation omitted), *appeal dismissed*, 360 N.C. 653, 637 S.E.2d 191 (2006). Under the *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), two-factor test, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense," in order to prevail upon an ineffective assistance of counsel claim. *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012).

"To show prejudice in the context of appellate representation, a petitioner must establish a reasonable probability he would have prevailed on his appeal but for his counsel's unreasonable failure to raise an issue." *State v. Spruiell*, __ N.C. App. __, __, 798 S.E.2d 802, 805 (2017) (citation and internal quotation marks omitted). Judge Pope properly concluded Defendant cannot and had failed to show any prejudice

under *Strickland* from the admission of un-objected to Rule 404(b) evidence at trial to warrant relief under abuse of discretion and plain error reviews.

For Defendant to show prejudice in his appellate counsel's failure to assert plain error, he must show a reasonable probability this Court would have found plain error in his first appeal to this Court. Defendant's review is limited under plain error, because he failed to preserve the admission of the Rule 404(b) evidence by a timely objection at trial.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4).

"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, 334 (2012) (citation omitted). A fundamental error is one where "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citation and internal quotation marks omitted).

The burden of demonstrating prejudice rests upon the defendant. *Id.* Plain error is fundamental error and is to be "applied cautiously and only in the exceptional case," where "the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (citations and internal quotation

marks omitted). Defendant has failed to and cannot meet this high plain error burden to warrant a new trial.

The trial court allowed the Rule 404(b) evidence of sexual abuse of minors to be introduced to the jury "as proof of motive in these cases, opportunity, plan, and/or scheme." The State contends that the Rule 404(b) evidence was properly admitted to establish: (1) Defendant's actions depicted a common plan or scheme of sexual abuses of minor family members; and, (2) Defendant had a motive to engage in sexual acts with Nora.

Otherwise relevant, probative, and admissible Rule 404(b) evidence is to be excluded *solely,* if its probative value is *only* to show a defendant's propensity to commit the charged crimes. *State v. White,* 340 N.C. 264, 284, 457 S.E.2d 841, 852 (1995) (stating that 404(b) evidence is excluded "if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." (emphasis original) (citation omitted)).

Defendant argues without controlling authority, and the majority's opinion agrees, that the proximity of time elapsed between the 404(b) testimony and the charged offenses renders the 404(b) testimony too dissimilar and irrelevant to be admissible. However, North Carolina's appellate courts and those in sister states reviewing our Supreme Court's decisions have consistently held the passage of or proximity in time issue is reviewed under the Rule 403 balancing test of whether the prejudicial effect of the otherwise admissible 404(b) evidence substantially outweighs

its probative value, and not whether the 404(b) evidence is similar or relevant to the sexual abuse for which Defendant was charged for purposes of Rule 404. *See* N.C. Gen. Stat. § 8C-1, 404, 403 (2017).

B. Rule 404(b) Evidence was Admissible

In his MAR Order, Judge Pope compared the facts of the present case to those contained in both *State v. Shamsid-Deen* and *State v. Frazier* to show that Defendant's prior sexual acts with other minor family members occurring up to 20 years earlier is relevant and properly admissible under Rule 404(b), and not more substantially prejudicial than probative under Rule 403. *See State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) (defendant forcibly raped three daughters over 20-year period except for a five-month period in 1983); *State v. Frazier*, 344 N.C. 611, 616, 476 S.E.2d 297, 300 (1996) (defendant fondled and raped two step-daughters, two step-granddaughters, and a daughter-in-law over a period of 26 years).

The Supreme Court of North Carolina has held that "evidence that the defendant committed similar offenses is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *State v. Frazier*, 319 N.C. 388, 390, 354 S.E.2d 475, 477 (1987) (citations and internal quotation marks omitted).

"Rule 404(b) is 'a clear general rule of *inclusion*.'" *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (quoting *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990)) (emphasis original). "With respect to prior sexual offenses, *we have been very liberal in permitting* the State to present such evidence to prove *any relevant fact* not prohibited by Rule 404(b)." *State v. White*, 331 N.C. 604, 612, 419 S.E.2d 557, 561 (1992) (emphasis supplied). In such cases, evidence of prior bad acts "is often viewed as showing a common scheme or plan by the defendant to sexually abuse the victim." *Faircloth*, 99 N.C. App. at 689, 394 S.E.2d at 201 (citation and internal quotation marks omitted).

Rule 402 provides, in part: "All relevant evidence is admissible except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules." N.C. Gen. Stat. § 8C-1, 402. "Relevant evidence" is defined in the statutes as "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, 401.

Under Rule 404(b), evidence of other similar child sexual offenses is relevant, and consequently admissible, to show a defendant's common plan or scheme, or motive, to sexually abuse children. *See State v. Jacob,* 113 N.C. App. 605, 608, 439 S.E.2d 812, 813 (1994) ("Evidence of other similar sexual offenses may be admitted to show a common scheme or plan to molest children." (citations omitted)).

This Court has also reiterated the standards for admitting Rule 404(b) evidence:

> When the evidence is offered for a proper purpose, the ultimate test of admissibility is whether the incidents are sufficiently similar to those in the case at bar *and not so remote in time as to be more prejudicial than probative under the Rule 403 test*. The similarities between the acts do not have to be unique or bizarre; rather, they must tend to support a reasonable inference that the same person committed both acts.

State v. Love, 152 N.C. App. 608, 612, 568 S.E.2d 320, 323 (2002) (emphasis supplied). Thus, a trial court's ruling to admit acts "remote in time" under Rule 403 is reviewed under an abuse of discretion standard. *Id.* at 614-15, 568 S.E.2d at 325; *see Fink*, __ N.C. App. at __,798 S.E.2d at 544 ("We [] review the trial court's Rule 403 determination for abuse of discretion.") (citation omitted).

In *State v. Love*, this Court held that Rule 404(b) testimony concerning uncharged sexual abuse, which had occurred twenty years prior was admissible "to show proof of identity, *a common scheme or plan* or modus operandi, and intent." 152 N.C. App. at 613, 568 S.E.2d at 324 (citations omitted) (emphasis supplied). The defendant in *Love* was indicted and tried for first-degree sexual offense and first-degree kidnapping of a female minor, after he was charged with performing oral sex upon a 6-year old child. *Id.* at 611, 568 S.E.2d at 323. At trial, the State offered Rule 404(b) testimony of the victim's mother, asserting the defendant had performed

similar acts upon her as a minor twenty years before the charged offenses. *Id.* at 612-13, 568 S.E.2d at 324.

On appeal, this Court held it was not error to admit the challenged Rule 404(b) testimony, despite the twenty-year lapse or proximity in time, because the acts the defendant was charged with were similar to the sexual assaults the victim's mother testified the defendant had performed on her. *Id.* at 613-14, 568 S.E.2d at 324. This Court stated:

> [T]he testimony of the minor female's mother also indicated a strikingly similar pattern of sexual abuse acts by defendant. Both mother and daughter were young children, in each instance, defendant made the victim sit on his face and licked the child's genitalia, and both victims were related to defendant. Moreover, the trial court made the findings in its order that this was similar to the incident involving the child.

Id. at 614, 568 S.E.2d at 324. Like the Rule 404(b) testimony admitted without error in *Love*, the 404(b) testimony at issue here was offered and admitted, in part, for the proper purpose of showing common scheme or plan without any objection from Defendant on any basis. *See id.* at 613, 568 S.E.2d at 324.

The trial court properly found the incidences described in the Rule 404(b) testimony of Melissa and Tony were sufficiently similar to Defendant's alleged sexual assaults against Nora to be admissible under Rule 404(b). Melissa and Tony's testimonies detailed Defendant performing sexual acts upon them when they were minors, at ages close to Nora's age at the time the charged offenses occurred. All

assaults occurred inside family dwellings. Most "strikingly similar," Melissa and Tony were both younger family members of Defendant, as was Nora at the time the incidents occurred. Defendant did not challenge or deny that the events described by Melissa occurred, he only disputed the occurrence of the events described by Tony.

Although the sexual acts with twelve-year-old Melissa occurred at least twenty years before the 2008 sexual assault reported by Nora, and the sexual assault of Tony occurred at least twenty-three years before the 2008 incident, the "striking similarity" between the Rule 404(b) evidence and Defendant's sexual assaults of Nora overcomes any attenuation. The lapse of time does not diminish the relevancy, similarity, or admissibility of the Rule 404(b) evidence under either Rules 401 and 402 and any prejudicial "remote in time" analysis must be reviewed for abuse of discretion under the substantially more prejudicial than probative test of Rule 403. *Love*, 152 N.C. App. at 613-14, 568 S.E.2d at 324.

Our Supreme Court has indicated that we should focus on the similarities between 404(b) evidence and the offenses for which a defendant was tried in determining whether the 404(b) evidence was admissible. *See Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (reversing the Court of Appeals and noting: "Instead of reviewing these similarities noted by the trial court, the Court of Appeals focused on the differences between the incidents[.]") The proper focus of inclusion must review the similarities between the 404(b) evidence and the offenses for which Defendant was charged, as the trial court correctly ruled. *Id*.

The similarity between the acts described by Melissa and Tony and the sexual acts with Nora for which Defendant was charged readily meet the low threshold for similarity for purposes of Rule 404(b). *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 ("Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them." (citation and quotation marks omitted)).

As in *Love*, the Rule 404(b) evidence at issue here was relevant, similar, probative, and properly admitted by the trial court to show common scheme or plan. *Love,* 152 N.C. App. at 613-14, 568 S.E.2d at 324. Defendant has failed to demonstrate the trial court abused its discretion and erred in admitting this factually relevant and admissible Rule 404(b) evidence. Defendant has further failed to show the required prejudice under plain error to warrant a new trial as a matter of law.

The majority's opinion cites our Supreme Court's opinion in *State v. Jones*, where Rule 404(b) evidence consisting of remote-in-time sexual acts were held inadmissible to show common scheme or plan. In *Jones*, our Supreme Court held that a seven-year gap between prior acts of sexual abuse and charged acts of sexual offenses rendered 404(b) evidence inadmissible. 322 N.C. 585, 587, 590-91, 369 S.E.2d 822, 823, 824-25 (1988). In the more recent case of *Beckelheimer*, our Supreme Court determined that 404(b) evidence of the defendant's sexual abuse of a minor was admissible in the defendant's trial for sexual offense and indecent liberties with another minor, when the 404(b) evidence involved abuse that had occurred twelve

years prior to the conduct for which the defendant was charged. 366 N.C. at 128, 132, 726 S.E.2d at 157, 160.

Our Supreme Court in *Beckelheimer* clearly distinguished its prior holding in *Jones*, stating:

> On the issue of temporal proximity, defendant contends that the earlier incident, which he denies ever occurred, is too remote in time to be relevant to these charges. He cites to cases such as *State v. Jones*, in which this Court held that a seven year gap between prior acts and the charged acts rendered 404(b) evidence inadmissible. 322 N.C. 585, 587, 590-91, 369 S.E.2d 822, 823, 824-25 (1988). *There are cases, however, with a similarly long lapse of years between incidents in which this Court has allowed the evidence*. E.g., *State v. Carter*, 338 N.C. 569, 588-89, 451 S.E.2d 157, 167-68 (1994) (affirming admissibility of 404(b) evidence of prior assault despite eight-year lapse between assaults), *cert. denied*, 515 U.S. 1107, 132 L.Ed.2d 263 (1995). *These varied results simply affirm the point that "[r]emoteness for purposes of 404(b) must be considered in light of the specific facts of each case*." *State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998), *cert. denied*, 525 U.S. 1180, 143 L.Ed.2d 114 (1999).

Id. at 132, 726 S.E.2d at 160 (emphasis supplied).

The majority's opinion contends that the issue of remoteness of time between prior bad acts and the offenses for which a defendant is charged are analyzed on appeal *de novo* under Rule 404(b). The trial court's conclusion of balancing proximity or remoteness in time for admitting similar prior bad acts is reviewed under Rule 403, not Rule 404. *Love*, 152 N.C. App. at 612, 568 S.E.2d at 323. In "light of the specific facts of [the] case" at hand, the remoteness in time between the sexual

assaults on minors described in the 404(b) testimony and the charged conduct does not render the 404(b) testimony irrelevant, dissimilar, or inadmissible. In light of our Supreme Court's ruling in *Beckelheimer*, the majority opinion's reliance on *Jones* to review *de novo,* and conclude that the 404(b) evidence was *per se* inadmissible due to passage of time between the acts as a matter of law is misplaced and erroneous.

C. Rule 403 Analysis

Our Supreme Court has repeatedly held that "[prior bad act] evidence is relevant and admissible under Rule 404(b) against a defendant 'if the incidents are sufficiently similar and not too remote in time *so as to be more probative than prejudicial under the Rule 403 balancing test*.'" *State v. Cotton*, 318 N.C. 663, 665, 351 S.E.2d 277, 278-79 (1987) (emphasis supplied) (quoting *State v. Scott*, 318 N.C. 237, 248, 347 S.E.2d 414, 420 (1986)).

"The test for determining whether [Rule 404(b)] evidence is admissible is whether the incidents establishing the common plan or scheme are sufficiently similar and *not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403*." *Frazier*, 344 N.C. at 615, 476 S.E.2d at 299 (emphasis supplied) (citing *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)). Neither *Cotton*, *Scott*, *Frazier*, nor *Boyd* have been overturned by our Supreme Court. Contrary to the majority opinion's assertion, our Supreme Court in *Beckelheimer* did not purport to overturn, and clearly reiterated, the rule that the trial court's Rule 403 determinations are reviewed for abuse of discretion. *See*

Beckelheimer, 366 N.C. at 130, 726 S.E.2d at 159. Contrary to long-established precedents, the majority's opinion incorrectly analyzes the remoteness in time issue under Rule 404(b), rather than Rule 403, of the North Carolina Rules of Evidence.

Courts of other jurisdictions have analyzed the remoteness in time element under versions of Rule 403 equivalent to ours. In *Commonwealth v. English*, the Supreme Court of Kentucky held that Kentucky Rule 404(b) evidence of the defendant's prior uncharged sexual abuse of two of his nieces was admissible in his trial for sexual abuse of his grand-nieces. 993 S.W.2d 941, 941-42 (Ky. 1999). In overruling the Kentucky Court of Appeals, which had held the evidence was "too remote in time" to be admissible under Kentucky Rule 404(b), the Kentucky Supreme Court cited our Supreme Court's opinion in *State v. Hipps*, 348 N.C. 377, 501 S.E.2d 625 (1998). *Id.* at 944. In *Hipps*, our Supreme Court held that prior bad acts that occurred seventeen years before the charged offense were admissible. 348 N.C. at 405-06 , 501 S.E.2d at 642. The Kentucky Supreme Court stated:

> [The North Carolina Supreme Court] has further held that even with respect to evidence of a common scheme or plan, remoteness is a factor to be considered not in determining relevancy under Rule 404, but in determining probativeness for the purpose of conducting the balancing test required by Rule 403. *State v. Frazier*, 344 N.C. 611, 476 S.E.2d 297, 299 (1996); *State v. Howell*, 343 N.C. 229, 470 S.E.2d 38 (1996).

English, 993 S.W.2d at 944.

In addition to Kentucky, courts of other states admitted 404(b) evidence in child sexual abuse cases that is temporally remote from charged offenses, and analyzed the remoteness in time element under the balancing test of their versions of Rule 403. In *State v. Gary A.*, the Supreme Court of Appeals of West Virginia held that testimony detailing two instances of the defendant's prior sexual abuse of two of his relatives that occurred approximately twenty-three and thirty years before the charged sexual abuse of his seven-year old niece was not inadmissible because of remoteness in time. 237 W. Va. 762, 766, 791 S.E.2d 392, 395-96 (2016). The defendant argued the prior bad acts testimony was so temporally remote from the charged offenses as to render it *per se* inadmissible as a matter of law. *Id.* at 766, 791 S.E.2d at 296.

The West Virginia Supreme Court of Appeals rejected the defendant's arguments, stating:

> The Defendant's argument for automatically excluding [Rule 404(b) testimony] is flawed for two reasons: (1) it attempts to place a definite time-limit on how remote is "too old" for Rule 404(b) evidence; and (2) it assumes that remoteness in time of Rule 404(b) evidence, in itself, is sufficient to render it inadmissible. We have been clear that "no exact limitation of time can be fixed as to when prior acts are too remote to be admissible." Accordingly, we have found a circuit court did not abuse its discretion in admitting Rule 404(b) evidence which occurred twenty-one years before the incidents giving rise to a defendant's indictment. Other jurisdictions have found even greater time lapses insufficient to render Rule 404(b) evidence inadmissible.

> Moreover, we have stated: "While remoteness in time may weaken the probative value of evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence." *Rather, Rule 404(b) evidence is rendered inadmissible by remoteness in time only when it is so far removed from a defendant's present charges that it has lost its probative value, such that the probative value no longer outweighs its danger of undue prejudice.*

Id. at 766-67, 791 S.E.2d at 396-97 (emphasis supplied) (footnotes omitted).

The majority's opinion dismissively states that these cases from Kentucky and West Virginia are "obviously irrelevant." The Kentucky Supreme Court in *English* explicitly cites three of the Supreme Court of North Carolina's opinions in support of the rule that "remoteness [in time] is a factor to be considered not in determining relevancy under Rule 404, but in determining probativeness for the purpose of conducting the balancing test required by Rule 403." *English*, 993 S.W.2d at 941. In *State v. Gary A.*, the West Virginia Supreme Court of Appeals similarly analyzed remoteness in time under the balancing test of Rule 403, and not under Rule 404. 237 W. Va. at 766, 791 S.E.2d at 396. These cases are cited to illustrate the consistency with which other jurisdictions have analyzed the remoteness in time issue under similar versions of Rule 403. While these cases are not binding upon us, they are clearly persuasive and relevant to support the rule that remoteness in time is properly analyzed under Rule 403 and under an abuse of discretion standard upon appeal.

In the present case, Defendant has notably failed to preserve or assert any arguments under Rule 403 by failing to object at trial to either the trial court's relevancy and similarity findings or allowing the admission of the Rule 404(b) testimony. Defendant also does not challenge or make any argument to undermine the trial court's determination that the challenged testimony was not substantially more prejudicial than probative under the Rule 403 balancing test.

D. Standard of Review for Abuse of Discretion and Plain Error

Under the precedents reviewed above, even if Defendant had preserved or made any arguments under Rule 403, the trial court's determination whether to admit the testimony of Melissa and Tony would be reviewed under the abuse of discretion standard. *See State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995) ("Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion.").

Our Supreme Court has refused to allow plain error review "to issues which fall within the realm of the trial court's discretion[.]" *Steen*, 352 N.C. at 256, 536 S.E.2d at 18. Even though Defendant failed to object to the admission of the challenged 404(b) testimony, the issue of the trial court's exercise of discretion in the application of the Rule 403 balancing test is not reviewable on appeal for plain error. *Id.*

"Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 (citation omitted). This Court and our Supreme Court have liberally admitted 404(b) evidence after determining significant lapses in time between prior bad acts and charged offenses did not render the 404(b) evidence more prejudicial than probative. *See Hipps*, 348 N.C. at 405, 501 S.E.2d at 642 (holding prior bad acts occurring approximately seventeen years before charged offenses were admissible); *State v. Dyson*, 165 N.C. App. 648, 656, 599 S.E.2d 73, 78 (2004) (holding 404(b) evidence of defendant's prior sexual abuse on a child which occurred approximately eleven years earlier was admissible); *State v. Blackwell*, 133 N.C. App. 31, 36, 514 S.E.2d 116, 120 (1999) (holding evidence of prior sex offenses which occurred approximately ten and seven years earlier were not too remote in time to be inadmissible).

The trial court determined the probative value of the 404(b) evidence was not substantially outweighed by any prejudicial effect the admission of this evidence would have on Defendant under Rule 403. The trial court properly found and admitted the evidence for the express and listed purposes in Rule 404(b) of showing Defendant's common scheme or plan, and motive. The trial court gave the jury a limiting instruction to only consider the 404(b) evidence for these proper purposes. Defendant has not argued nor shown, and cannot show, any abuse of discretion to

admit this evidence under Rule 403. *See Love*, 152 N.C. App. at 613, 568 S.E.2d at 324.

As Judge Pope correctly found in his MAR order, Defendant has failed to show a reasonable probability this Court would have found any abuse of discretion or any plain error in *Mills I* had his appellate counsel asserted it. *See State v. Mills*, 230 N.C. App. 145, 752 S.E.2d 258, 2013 N.C. App. LEXIS 1071 (unpublished), *disc. review denied*, 367 N.C. 283, 752 S.E.2d 161 (2013).

E. No Probable Impact on Jury's Guilty Verdict

The majority's opinion asserts the challenged 404(b) testimony was improperly admitted. Even if true, Defendant cannot demonstrate the 404(b) evidence had a probable impact on the jury's verdict of Defendant's guilt for the 2008 incident under plain error review to warrant a new trial. *See Lawrence*, 365 N.C. at 516-17, 723 S.E.2d at 333-34.

As the trial court recognized in its MAR order, the Defendant's prior sexual acts with minors, as described by Melissa and Tony in their 404(b) testimony, were more similar to the 2009 incident with Nora, of which the jury acquitted Defendant of the related charges. Melissa and Tony, Defendant's family members, both came into court, testified under oath and described Defendant's engaging in sexual activity with them inside family dwellings, where other family members were close by. In the 2009 incident, of which the jury acquitted Defendant, Nora alleged Defendant had

engaged in anal intercourse with her inside the kitchen of a trailer while her half-sisters, Defendant's daughters, were present outside, in close proximity to the trailer.

Because the challenged 404(b) evidence was more similar to the events alleged in the charge Defendant was acquitted by the jury of committing, he has failed to demonstrate the 404(b) evidence had a probable impact on the jury's finding of guilt for the 2008 incident as a matter of law, to warrant a new trial under either plain error or abuse of discretion review. *See id.* at 516-17, 723 S.E.2d at 333-34. Defendants objections and arguments are properly overruled.

III. Conclusion

Defendant's prior and multiple sexual assaults on children, graphically chronicled in the 404(b) testimony by Melissa and Tony, were properly admitted for the purpose of showing both Defendant's common plan or scheme and his motive. Defendant has not shown the trial court abused its discretion or committed any error, much less plain error, in finding relevancy, probativeness, similarity, or in admitting the 404(b) evidence. Defendant is not entitled to plain error review on appeal of a ruling that is reviewed for abuse of discretion. *See Fink*, __ N.C. App. at __,798 S.E.2d at 544.

Even if the trial court improperly admitted the Rule 404(b) evidence under Rule 403, Defendant has failed to show a reasonable probability this Court would have properly reviewed it for abuse of discretion or would have found plain error in *Mills I*, had his appellate counsel asserted it. *Spruiell*, __ N.C. App. at __, 798 S.E.2d

at 805. Defendant has failed to demonstrate any prejudice under *Strickland* to support his MAR against his appellate counsel and to overturn his conviction or be awarded a new trial.

The trial court's order on remand contains unchallenged and sufficient findings of fact, binding upon appeal and supported by competent evidence, to support its conclusions of law to deny Defendant's MAR. Defendant's appellate counsel's failure to argue plain error of the admission at trial of Defendant's prior sexual acts with children did not prejudice Defendant. For these reasons, I vote to affirm the findings and conclusions contained in the order appealed from and to deny Defendant's MAR. I respectfully dissent.