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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-883

Filed: 19 June 2018

Mecklenburg County, No. 14 CRS 204260

STATE OF NORTH CAROLINA

v.

DAMIEN MARKESE PRUITT

Appeal by defendant from judgment entered 21 November 2016 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Ashish K. Sharda, for the State.

Dylan J.C. Buffum, Attorney at Law, PLLC, by Dylan J.C. Buffum, for defendant.

ELMORE, Judge.

Defendant Damien Markese Pruitt appeals judgments and orders entered after a jury convicted him of two counts of second-degree sexual offense. The trial court sentenced him to 75 to 150 months in prison, ordered he register as a sex

offender for thirty years, and imposed a civil judgment ordering him to pay $11,900 in attorneys' fees.

On appeal, defendant argues the trial court erred by (1) denying his motions to dismiss both charges for insufficient evidence; (2) providing inadequate jury instructions; (3) admitting allegedly unreliable expert opinion testimony in violation of Rule 702(a); (4) imposing attorneys' fees without providing him an opportunity to be heard; and (5) making a clerical error in its sex offender registration order.

As to the first three alleged errors, we hold that defendant received a fair trial, free of error. As to the fourth, we agree defendant was not afforded an adequate opportunity to be heard on the issue of attorneys' fees, vacate that part of the judgment imposing the fees, and remand for further proceedings on that issue. As to the fifth, we remand the sex offender registration order to the trial court with instructions to correct the clerical error.

I. Background

In late January 2014, twenty-year-old C.W.[1] was a college sophomore at UNC-Charlotte, living in a four-bedroom dorm suite at Pine Hall with two roommates, Brittany and Amy. About one month prior, Amy met defendant at a club and, soon after, the two became romantically involved.

[1] Pseudonym initials are used to protect the victim's identity.

Around 3:00 a.m. on 31 January 2014, defendant and Amy were sitting in the living room of the dorm when C.W. returned from a party and started cooking ramen noodles in the kitchen. C.W. and defendant had not met before and, after Amy introduced them, the three spoke for a few minutes before Amy and defendant retired to Amy's bedroom to sleep. After C.W. finished eating, she also retired to her bedroom, closed her door, and got into her bed. C.W.'s bed was positioned directly against one wall, and she fell asleep lying on her side facing that wall, wearing leggings and a tank top.

Virginia Booher, Amy's hometown friend, was visiting Amy that weekend, and met defendant for the first time that night with Amy at a club. After she and Amy left the club, Virginia visited another friend, and defendant went to Amy's dorm to stay the night. Virginia eventually returned to the dorm after 3:00 a.m. and fell asleep on the living room couch. Around 5:00 a.m., Virginia awoke to defendant "laying next to [her]" "face forward" on the couch "kissing [her] and touching [her]" vagina. Virginia "kept telling him no and moved his hands away," but defendant "kept shushing [her]" and "forcefully pushing [her] hands back. . . ." Defendant eventually left to use the restroom but returned and yanked Virginia's blanket off her and "tried to grab [her] legs" but Virginia "kicked at him." At that point, defendant "stopped and turned and walked away," and Virginia fell back asleep. What

happened next was the main dispute at trial. Both C.W. and defendant testified, and their accounts materially differed.

According to C.W., a little after 5:00 a.m., she thought she was experiencing a "vivid dream" that her boyfriend was kissing her, fondling her breasts, and digitally penetrating her vagina. When she eventually awoke, C.W. felt an erect penis pressed against her backside and realized that it had not been a dream. C.W. was still lying on her side and facing the wall, and a man was lying in bed behind her. C.W. "said 'no' repeatedly" and tried to push him away, but she was trapped between him and the wall, and the man had his hands on her hips, "holding her in place," while attempting to penetrate her anus with his penis. Despite C.W.'s resistance, the man continued "attempt[ing] to push" "four or five times" before C.W. eventually stopped resisting because she believed "fighting it harder would make it worse." After "forcibly penetrating [C.W.'s] anus with his penis," the man eventually "pulled out and left." C.W. never got a good look at the man, and thought a stranger broke into the dorm, sexually assaulted her, and left.

According to defendant, after falling asleep in Amy's bed, he awoke around 5:00 a.m., used the restroom, and grabbed a glass of water from the kitchen. Defendant admitted he laid down next to Virginia and attempted to engage in sexual activities with her, but after Virginia repeatedly refused his advances, he stopped and left her. Defendant attempted to return to what he thought was Amy's bedroom, where he saw

a sleeping female lying on her side facing the wall. Defendant, thinking she was Amy, got into bed next to her. But after defendant realized he was not lying next to Amy, he "went to get up off the bed" but the female "grabbed [his] left arm and pulled it back down." Then, she "put [his hand] inside of her shirt on her breast and started messing with her breasts, and took [his] hand and put it under her pants, on to her vagina." After the female pulled down her pants, defendant pulled down his pants, and the female started "rubbing her behind against [him]." Eventually, defendant "started having sex with her." According to defendant, the female never told him "no" nor "pushed [his] arm . . . or [his] body away," and they engaged only in consensual vaginal intercourse, not anal intercourse. After he ejaculated, he left C.W.'s bedroom and returned to Amy's bedroom, where he fell back asleep.

Minutes after the incident, C.W. called campus police and reported that she had been sexually assaulted by someone she believed was a stranger that had broken into the dorm room. The responding officers interviewed C.W. and Virginia, who had been sleeping on the couch. At that time, Virginia did not disclose that defendant had attempted to engage in sexual activities with her, and she reported to police that she did not see anyone enter or leave the dorm that night. C.W. was taken to a hospital and underwent a sexual assault examination. Her anal examination revealed no physical injury except an abrasion on her posterior fourchette. Her vaginal swabs later tested negative for pre-ejaculate and revealed one sperm, while

her anal swabs tested positive for pre-ejaculate at "the highest number" registered by the test and revealed twenty-five sperm.

While C.W. was at the hospital, Virginia told Amy about defendant attempting to engage in sexual activities with her. They both confronted defendant about the incident with Virginia, and told defendant C.W. had reported to police she had been sexually assaulted. Defendant denied his involvement in both incidents. After defendant left, Virginia and Amy called campus police, and Virginia gave a second statement that defendant attempted to engage in sexual activities with her that night. Police later arrested defendant for the incident with C.W. During his interview, defendant initially denied having sex with anyone that night, but he eventually admitted to engaging in consensual vaginal intercourse with one of Amy's suitemates. The State later charged defendant with two counts of second-degree sexual offense as to the incident with C.W. based on digital penetration and anal intercourse.

At trial, Taneika Torres, the sexual assault nurse examiner (SANE) who examined C.W. after the incident, was tendered as an expert in emergency and forensic nursing. During her *voir dire* examination, Nurse Torres testified she performed over 400 sexual assault examinations in the last six years that she had been employed as a full-time SANE. In her expert report, Nurse Torres opined that, based on her experience and her review of the medical literature, 85-90% of sexual

assault cases revealed no physical injury. However, Nurse Torres' proposed testimony never referenced this conclusion from her report. Rather, her proposed testimony was merely that, based on her experience, "personally, for [her], it's been less common to see [anal] injuries" when performing anal examinations. On cross-examination, Nurse Torres conceded she was unaware how many examinations involved adult females or claims of forced anal intercourse. Defendant therefore objected to Nurse Torres' proposed testimony on the basis that her conclusion—that the majority of anal examinations she performed showed no physical injury—was unreliable because it was based merely on approximations and insufficient data. The trial court overruled defendant's *voir dire* objection and admitted Nurse Torres' challenged testimony at trial over defendant's renewed objection.

After the presentation of evidence, the jury found defendant guilty of two counts of second-degree sexual offense based upon digital penetration and anal intercourse. At sentencing, the trial court consolidated the two convictions, imposing a sentence of 75 to 150 months in prison, and ordered defendant to register as a sex offender for thirty years. The trial court also ordered defendant to pay $11,900.00 in attorneys' fees in the form of a civil judgment without having personally asked defendant if he wished to be heard on the matter. In its sex offender registration order, the trial court checked a box indicating the victim was a minor. Defendant appeals.

II. Alleged Errors

On appeal, defendant asserts the trial court erred by (1) denying his motions to dismiss both charges for insufficient evidence of the element of force; (2) improperly instructing the jury on the element of force required to convict for second-degree sexual offense; (3) admitting Nurse Torres' expert opinion testimony that, based on her experience, it has been less common to observe physical injury during anal sexual assault examinations; (4) imposing attorneys' fees without providing defendant an opportunity to be heard; and (5) making a clerical error in its sex offender registration order by indicating the victim was a minor, since C.W. was an adult.

III. Motions to Dismiss

Defendant first asserts the trial court erred by denying his motions to dismiss both charges because the State failed to present substantial evidence he engaged in the sexual acts "by force," an essential element of second-degree sexual offense. He argues the State's showing of force was insufficient because it did not surpass "the physical touching[ ] that constitute[d] the 'sexual act' itself." Defendant cites to *State v. Raines*, 72 N.C. App. 300, 303, 324 S.E.2d 279, 281 (1985) ("[W]e decline to . . . expand the 'physical force' doctrine and bring within its ambit the conduct—the physical touching—that constitutes the 'sexual act' itself in this case.").

We review *de novo* a trial court's denial of a motion to dismiss for insufficient evidence. *See, e.g.*, *State v. China*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, slip. op at

8–9 (Apr. 6, 2018) (No. 95A17) (citations omitted). Such a motion is properly denied if the State presents substantial evidence of each element of the crime charged. *Id.* (citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008) (citation and quotation marks omitted). "[T]he trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citation omitted).

Here, the State charged defendant with two counts of second-degree sexual offense under N.C. Gen. Stat. § 14-27.5 (2013).[2] One essential element of that crime is that a "person engages in a sexual act with another person . . . *[b]y force* and against the will of the other person[.]" *Id.* § 14-27.5(a)(1) (emphasis added). The force requirement may be satisfied by either "actual, physical force or by constructive force in the form of fear, fright, or coercion." *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987) (citation omitted). " 'Physical force' means force applied to the body." *State v. Scott*, 323 N.C. 350, 354, 372 S.E.2d 572, 575 (1988) (citation omitted). Actual physical force "is present if the defendant uses force sufficient to overcome any resistance the victim might make." *State v. Brown*, 332 N.C. 262, 267, 420 S.E.2d 147, 150 (1992) (citations omitted). We address each charge in turn.

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[2] Effective 1 December 2015, N.C. Gen. Stat. § 14-27.5 was recodified as N.C. Gen. Stat. § 14-27.27. *See* Act of July 29, 2015, ch. 181, sec. 9(a), 2015 N.C. Sess. Laws 462, 462.

A. Second-Degree Sexual Offense by Anal Intercourse

Defendant asserts the State's showing of physical force as to the second-degree sexual offense by anal intercourse charge was insufficient. He argues that although C.W. testified defendant held her hips during the act, "no physical force was used in [that] sexual act that would have been absent if the sexual encounter was consensual." Defendant relies on *Raines*, to support his assertion the State's showing of physical force was insufficient because it did not surpass "the physical touching[ ] that constitute[d] the 'sexual act' itself." 72 N.C. App. at 303, 324 S.E.2d at 281.

In *Raines*, the defendant was convicted by a jury of second-degree sexual offense under the theory that he engaged in a sexual act with an alleged victim by force and against her will. *Id.* at 300, 324 S.E.2d at 280. At trial, the alleged victim testified she was ill and hospitalized when "twice during the night the defendant[, a nurse,] put something in her I.V. which caused a burning sensation" and "twice [the defendant] placed his hand in her vagina and attempted to rape her, succeeding the second time." *Id.* at 301, 324 S.E.2d at 280. However, the victim "did not allege any physical force, nor did she resist his advances in anyway." *Id.*

On appeal, we addressed whether the victim's testimony supplied substantial evidence of actual physical force, and "decline[d] to accept the State's invitation to expand the 'physical force' doctrine and bring within its ambit the conduct—the physical touching—that constitutes the 'sexual act' itself in this case." *Id.* at 303, 324

S.E.2d at 281. Therefore, we held, based on the victim's testimony, the State presented insufficient evidence of actual physical force to sustain the second-degree sexual offense charge. *Id.* at 305, 324 S.E.2d at 283.

Here, contrarily, C.W. testified she repeatedly told defendant "no" and tried pushing him away with her hand, but defendant continued "holding [her] in place" with his hands on her hips, ignored her verbal and physical resistance, and continued "attempt[ing] to push" while "[f]orcibly penetrating [her] anus with his penis." Because C.W. alleged defendant used physical force to constrain her movement and repeatedly resisted his advances, and her testimony necessarily establishes that defendant used physical force in resisting her attempts to push him away, defendant's reliance on *Raines* is misplaced. *Brown* controls here.

In *Brown*, the defendant was convicted by a jury of second-degree sexual offense under the theory of by force and against the alleged victim's will. 332 N.C. at 265, 420 S.E.2d at 149. The State's evidence showed the defendant had entered a sleeping patient's closed hospital room at night, pulled up her gown, and pulled aside her panties. *Id.* at 266, 420 S.E.2d at 149. The alleged victim awoke when the defendant, a stranger, "placed his fingers in her pubic hair" and then "pushed his finger into her vagina." *Id.* On appeal, this Court held there was insufficient evidence of force to sustain the charge and reversed the judgment. *Id.* at 265, 420 S.E.2d at 149. On discretionary review, our Supreme Court reversed. *Id.*

Our Supreme Court in *Brown* recognized our decision in *Raines* not to define "physical force" so broadly as to require no further showing of physical force beyond that which was inherent in the sexual act itself. *Id.* at 269, 420 S.E.2d at 151 (citing *Raines*, 72 N.C. App. at 303, 324 S.E.2d at 281). But it "expressly defer[red] any decision on th[e] question" of "whether the actual physical force which will establish the force element of a sexual offense may be shown simply through evidence of the force inherent in the sexual act at issue." *Id.* Instead, the *Brown* Court defined the requisite force element as "actual physical force sufficient to overcome any resistance the particular victim [the defendant] had chosen might have offered." *Id.* at 269, 420 S.E.2d at 151. Applying that definition to the facts of the case, our Supreme Court acknowledged the defendant had "entered a hospital in the middle of the night and went into the room of a patient whom he had never seen before" and concluded his actions of "pulling back the bedclothing, pulling up the victim's gown, and pulling her panties aside amounted to actual physical 'force' as that term is to be applied in sexual offense cases." *Id.* at 270, 420 S.E.2d at 152. Accordingly, the *Brown* Court held the State presented substantial evidence "the defendant used actual physical force surpassing that inherent in the sexual act he committed upon the victim" and reinstated the judgment. *Id.* at 269, 420 S.E.2d at 151.

Here, as in *Brown*, the State's evidence that defendant entered a sleeping stranger's closed room at night, someone with whom he had no prior consensual

relationship, pulled back the bedsheets, and pulled down the clothing covering her genitals to engage in the sexual activity, provided substantial evidence of actual, physical force beyond that of the sexual act itself. C.W.'s testimony that she repeatedly attempted to "push[ ]" defendant away with her hand but was not "strong" enough, that defendant constrained her movement by "holding [her hips] in place" and positioning himself behind her in the bed such that C.W. was "trapped" between him and the wall, and that C.W. eventually submitted because the encounter was "painful" and she did not "want to get hurt worse," provides further substantial evidence defendant "used actual physical force sufficient to overcome *any* resistance [C.W.] *might* have offered." *Brown*, 332 N.C. at 269, 420 S.E.2d at 151 (emphasis added).

When viewed in the light most favorable to the State, C.W.'s testimony provided substantial evidence of force necessary to sustain the second-degree sexual offense by anal intercourse charge. Accordingly, the trial court properly denied defendant's motion to dismiss this charge for insufficient evidence.

B. Second-Degree Sexual Offense by Digital Penetration

As to the second-degree sexual offense by digital penetration charge, defendant's reliance on *Raines* is misguided because unlike the alleged victim in that case, C.W. testified she was asleep during this sexual act. Where, as here, the State presents substantial evidence that a defendant engaged in a sexual act with a

sleeping victim, "force . . . [is] implied in law." *State v. Moorman*, 320 N.C. 387, 392, 358 S.E.2d 502, 506 (1987) ("In the case of a sleeping[ ] . . . victim[ ] . . . . sexual intercourse with the victim is *ipso facto* rape because the force and lack of consent are implied in law."); *see also State v. Dillard*, 90 N.C. App. 318, 322, 368 S.E.2d 442, 445 (1988) (holding the State presented substantial evidence that "a sexual act was by force and against the victim's will" under N.C. Gen. Stat. § 14-27.5(a)(1) when "[t]he victim testified that she was asleep in the same bed with . . . defendant[ ] and was awakened by [him] committing the sexual act charged").

Here, C.W. testified she was asleep and believed she was experiencing a "vivid dream" about her boyfriend kissing her, fondling her breasts, and digitally penetrating her vagina, but she eventually awoke and realized that it had not been a dream. Viewing this evidence in the light most favorable to the State, C.W.'s testimony provided substantial evidence of force to sustain the second-degree sexual offense by digital penetration charge. Accordingly, the trial court properly denied defendant's motion to dismiss this charge for insufficient evidence.

Defendant also argues that, although it "may have been appropriate" to charge him under subdivision (a)(2) of section 14-27.5 (criminalizing a sexual act with a "mentally disabled, mentally incapacitated, or physically helpless" person) because C.W. testified she was asleep during the act of digital penetration, there was insufficient evidence of force to support the State's charge under subdivision (a)(1)

(criminalizing a sexual act with another person "by force and against the victim's will"). This argument is foreclosed by *Moorman*, 320 N.C. at 390–92, 358 S.E.2d at 505–06 (rejecting this argument in a second-degree rape case with similar subdivisions, explaining that "[w]hile the state might have elected to proceed under N.C.G.S. § 14-27.3(a)(2), it was not required to do so," since "[i]n the case of a sleeping[ ] . . . victim, it makes no difference whether the indictment alleges that the vaginal intercourse was by force and against the victim's will or whether it alleges merely the vaginal intercourse with an incapacitated victim").

IV. Jury Instructions

Defendant next asserts the trial court plainly erred when instructing the jury on the element of force necessary to convict for second-degree sexual offense. The trial court instructed that the State must prove "[d]efendant used or threatened to use force sufficient to overcome any resistance [C.W.] might make." Defendant argues that, particularly in light of the prosecutor allegedly misrepresenting the law on force during its closing argument to the jury, the trial court should have instructed that the State must prove physical force beyond "the physical touching [ ] that constitutes the 'sexual act' itself" and should have provided a more detailed constructive-force instruction. Defendant concedes his failure to object to the jury instruction entitles him only to plain-error review.

A. Closing Argument

"The standard of review for assessing allegedly improper closing arguments to which opposing counsel failed to object is whether the remarks were so grossly improper that the trial court erred by not intervening *ex mero motu*." *State v. Taylor*, 362 N.C. 514, 545, 669 S.E.2d 239, 265 (2008) (quoting *State v. McNeill*, 360 N.C. 231, 244, 624 S.E.2d 329, 338 (2006)). "Under this standard, 'only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.' " *Id.* (quoting *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001)). " 'A trial court is not required to intervene *ex mero motu* where a prosecutor makes comments during closing argument which are substantially correct shorthand summaries of the law, even if slightly slanted toward the State's perspective.' " *Id.* at 546, 669 S.E.2d at 265 (quoting *State v. Barden*, 356 N.C. 316, 366, 572 S.E.2d 108, 140 (2002)).

As to physical force, the State argued during its closing argument to the jury that "the physical force was that [defendant] held [C.W.] in place. And when she tried to push him away, he wouldn't let her." Considering the lesser showing of physical force held sufficient in *Brown*, this was an accurate statement of the law and was therefore not so "grossly improper" that the trial court abused its discretion in failing to *ex mero motu* provide a different instruction on physical force.

As to constructive force, the State argued that "[i]f [a victim] compl[ies] because they're afraid of you that's enough" and "if a person doesn't resist because they're afraid, that's enough." Even had this been a misstatement of law on constructive force, *see Etheridge*, 319 N.C. at 45, 352 S.E.2d at 680 (requiring a greater showing than subjective fear if that fear was objectively unreasonable: "Constructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim's submission to sexual acts. Threats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat." (citations omitted)), this argument was not so "grossly improper" that the trial court abused its discretion in failing to *ex mero motu* provide a more detailed instruction on constructive force. Further, the trial court's instruction encompassed both actual force ("use[d] . . . force") and constructive force ("threatened to use force"), and the impact of any misstatement by the State on constructive force, if it occurred at all, was overwhelmed by the substantial evidence of physical force, and the strength of evidence against defendant. Thus, defendant cannot establish plain-error prejudice with respect to this issue.

Accordingly, we hold that defendant has failed to demonstrate the trial court abused its discretion in failing to *ex mero motu* instruct the jury differently on the element of force in response to the State's closing argument.

B. Jury Instruction

"[T]he preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *State v. Tyson*, 195 N.C. App. 327, 335, 672 S.E.2d 700, 706 (2009) (citation and quotation marks omitted); *see also State v. Ballard*, 193 N.C. App. 551, 555, 668 S.E.2d 78, 81 (2008) ("Jury instructions in accord with a previously approved pattern jury instruction provide the jury with an understandable explanation of the law." (citation and quotation marks omitted)). Here, the trial court's instruction on force mirrored the pattern jury instruction as follows: "For you to find the Defendant guilty of second-degree sexual offense, the State must prove . . . . [d]efendant used or threatened to use force sufficient to overcome any resistance [C.W.] might make." *See* N.C.P.I—Crim. 207.60. Because the trial court's instruction mirrored the pattern instruction, which accurately described the law on the element of force required to convict for second-degree sexual offense, *see Brown*, 332 N.C. at 267, 420 S.E.2d at 150 (citations omitted), defendant has failed to demonstrate jury-instruction error—much less plain error. We overrule this argument.

V. Expert Testimony

Defendant next asserts the trial court erred by admitting Nurse Torres' proposed expert opinion testimony that, in her experience having performed hundreds of sexual assault examinations, "personally, for [her], it's been less common to see [anal] injuries" when performing anal examinations. He argues this testimony

should have been excluded as unreliable under Rule 702(a)(1) of our Rules of Evidence since it was not "based upon sufficient facts or data." *See* N.C. Gen. Stat. § 8C-1, Rule 702(a)(1) (2017).

A. Issue Preservation

As an initial matter, the State argues this issue is unpreserved because (1) defendant's argument on appeal is grounded in the basis of his *voir dire* objection, which he waived because his later trial objection differed in substance from his *voir dire* objection; and (2) the same or substantially similar expert testimony from Nurse Torres was later admitted without objection.

At Nurse Torre's *voir dire* examination, defendant objected to her proposed testimony that "it's common that there's no injury in sexual assault cases" on *Daubert* grounds of reliability. He argued Nurse Torres' opinion, which was primarily based on her experience having conducted 400 sexual assault examinations, was unreliable because she could not identify how many of those examinations were performed on males, females, or children, nor could she identify how many involved claims of forced vaginal intercourse, anal intercourse, or digital penetration. At trial, the State elicited, over defendant's objection, Nurse Torres' testimony that "personally, for [her], it's less common to see injuries" where "individuals had claimed forced anal intercourse." Because we conclude it was apparent from the context that defendant's

general trial objection was grounded in the same *Daubert* unreliability theory as his prior *voir dire* objection, we overrule this waiver argument.

Additionally, while "later admission of similar evidence waive[s] any benefit of [a] prior objection," *State v. Simpson*, 327 N.C. 178, 184, 393 S.E.2d 771, 775 (1990), defendant's trial objection targeted materially different testimony than the testimony later admitted without objection. The State points to Nurse Torres' testimony, admitted absent objection, that it is common for her not to observe physical injury when examining an alleged sexual assault victim, that she often observes no injury during exams, that forced intercourse may occur without physical injury, and that she has performed anal exams on alleged victims claiming forced anal intercourse and found no physical injury. However, Nurse Torres' testimony that it is less common for her to observe physical injury when examining alleged sexual assault victims generally, or that she has examined alleged victims claiming forced anal intercourse that showed no physical injury, materially differs from testimony that it has been less common for Nurse Torres to have observed physical injury when examining alleged victims claiming forced anal intercourse specifically. Accordingly, this waiver argument is overruled. This issue was properly preserved.

B. Merits

"We review a trial court's admission of expert testimony for abuse of discretion." *State v. Babich*, ___ N.C. App. ___, ___, 797 S.E.2d 359, 361 (2017). "A

trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

For expert opinion testimony to satisfy the first prong of amended Rule 702(a)'s three-pronged reliability test, it must, *inter alia*, be "based upon sufficient facts or data[.] . . ." N.C. Gen. Stat. § 8C-1, Rule 702(a)(1) (2017). However, "the trial court has discretion in determining how to address the three prongs of the reliability test," and "[t]he precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony." *State v. McGrady*, 368 N.C. 880, 890, 787 S.E.2d 1, 9 (2016) (citation omitted).

During *voir dire*, Nurse Torres was tendered without objection as an expert in forensic and emergency nursing. Nurse Torres testified she had been employed as a full-time SANE for the past six years, and was trained to identify injury after an assault, having completed forty hours of didactic training, forty to eighty hours of clinical training, and six sexual assault kits under the supervision of an experienced SANE. Nurse Torres estimated she had performed "well over 400" sexual assault examinations but conceded she did not know how many of those exams involved claims of forced anal intercourse, adult women, or penile penetration. The nature of Nurse Torres' proposed testimony was merely that, based on her training and

experience, "personally, for [her], it's [been] less common to see [anal] injuries" during anal examinations.

Defendant argues this testimony should have been excluded as unreliable under Rule 702(a)(1) because it was founded upon Nurse Torres' "subjective reflection and memory, with no actual data to support it." We conclude defendant has failed to show the trial court abused its discretion in failing to exclude this testimony.

Nurse Torres was undisputedly qualified as an expert in emergency and forensic nursing, having extensive professional training and experience performing hundreds of sexual assault examinations. The nature of the issue at trial was whether the sexual encounter was consensual, and specifically whether someone can engage in forced anal intercourse without anal injury. The subject of Nurse Torres' opinion was that, more often than not, the anal examinations she performed revealed no anal injury. While more precise data on those examinations would have strengthened the weight of Nurse Torres' opinion, the probability advanced in her opinion was similarly imprecise, and the issue was its admissibility, not its weight.

Nurse Torres explicitly qualified this part of her opinion at trial as being based solely on "[her] personal experience," not on medical literature or any other basis, and she further explained anal injury may be less common because the anus "is designed for expansion . . . ." Further, Nurse Torres previously testified that a person "can have forced sexual intercourse . . . and not have injury" or, contrarily, can "have

consensual sexual intercourse and have an injury." Thus, Nurse Torres confirmed, physical injury, by itself, would provide her "no way to know" whether it derived from "consensual or non-consensual contact." Based on the nature of Nurse Torres' testimony as it relates to the issues in this case, we conclude defendant has failed to show the trial court abused its discretion in failing to exclude this testimony as unreliable under Rule 702(a)(1).

VI. Attorneys' Fees

Defendant next asserts the trial court erred by imposing attorneys' fees without allowing him an opportunity to be heard on the matter. The State argues we lack jurisdiction over the judgment because defendant failed to file a written notice of appeal from the civil judgment. *See* N.C. R. App. P. 3(a).

A. Appellate Jurisdiction

A criminal defendant must comply with the appellate rules governing civil appeals to perfect an appeal from a judgment imposing attorneys' fees. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 697 (2008) (holding that because judgments imposing attorneys' fees "constitute[ ] 'civil judgment[s],' " a criminal defendant is "required to comply with Rule 3(a) of the Rules of Appellate Procedure when appealing from those judgments" (citation omitted)). Because defendant here failed to comply with Appellate Rule 3(a)'s jurisdictional requirement of filing written notice of appeal from the civil judgment imposing attorneys' fees, we must dismiss

his appeal for lack of jurisdiction. *Young v. Young*, 224 N.C. App. 388, 393, 736 S.E.2d 538, 543 (2012) ("The provisions of Rule 3 are jurisdictional, and failure to follow [its] requirements . . . requires dismissal of an appeal.").

However, because defendant gave timely notice of appeal in open court and his argument on the issue of attorneys' fees has merit, we exercise our discretionary authority under Appellate Rule 21 to treat his brief as a petition for a writ of *certiorari*, which we issue to review the civil judgment and the merits of his argument. *See, e.g.*, *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) ("This Court does have the authority pursuant to [Appellate Rule] 21(a)(1) to 'treat the purported appeal as a petition for writ of certiorari' and grant it in our discretion." (citations omitted)); *see also State v. Oxendine*, 206 N.C. App. 205, 209, 696 S.E.2d 850, 853 (2010) ("[I]n the interest of justice, and to expedite the decision in the public interest, we *ex mero motu* treat defendant's brief as a petition for certiorari and grant said petition to address the merits of defendant's appeal.").

B. Merits

Under N.C. Gen. Stat. § 7A-455, a trial court "may enter a civil judgment against a convicted indigent defendant for the amount of fees incurred by the defendant's court-appointed attorney." *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005) (citing N.C. Gen. Stat. § 7A-455 (2003)). But where "there is no indication in the record that defendant was notified of and given an opportunity

to be heard regarding the appointed attorney's total hours or the total amount of fees imposed," the civil judgment will be vacated and the case remanded without prejudice for the State to "apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that [the] defendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Id.* at 236, 616 S.E.2d at 317.

In *State v. Friend*, ___ N.C. App. ___, ___, 809 S.E.2d 902 (2018), we reiterated that to protect a defendant's right to be heard in this context, the trial court must personally ask the defendant, not just his court-appointed attorney requesting fees, whether he wants to be heard on the issue. *Id.* at ___, 809 S.E.2d at 907. We instructed that, "before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue," and held that

> [a]bsent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

Id.

Thus, because "[t]he State concede[d] that the trial court did not inform [the defendant] of his right to be heard on the issue of attorneys' fees, and nothing in the

record indicate[d] . . . [he] understood he had that right," we vacated the judgment imposing attorneys' fees and remanded for further proceedings on that issue. *Id.* at ___, 809 S.E.2d at 906.

Here, as in *Friend*, the transcript reveals the trial court did not inform defendant of his right to be heard on the issue of attorneys' fees, and nothing in the record indicates he understood he had that right. We therefore vacate the judgment imposing attorneys' fees and remand without prejudice to the State's right to reapply for those fees after defendant receives a proper opportunity to be heard on the issue.

VII. Clerical Error

Both parties agree the sex offender registration order contains a clerical error. Box 5(a) is checked, indicating the victim was a minor, when it should have remained unchecked, since C.W. was an adult. We remand this order to the trial court with instructions to correct this clerical error. *See, e.g.*, *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999) ("When, on appeal, a clerical error is discovered in the trial court's judgment . . . , it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " (quoting *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956))).

VIII. Conclusion

Because the State presented substantial evidence of force necessary to sustain both second-degree sexual offense charges, the trial court properly denied defendant's

motions to dismiss these charges. Because the trial court instructed the jury verbatim with the pattern jury instructions, defendant failed to demonstrate jury-instruction error—much less plain error—in the instruction. Based on the general nature of Nurse Torres' challenged expert opinion testimony, we conclude it was sufficiently reliable under Rule 702(a)(1) and hold defendant failed to demonstrate the trial court abused its discretion in admitting that testimony.

Although defendant failed to properly appeal the civil judgment imposing attorneys' fees, in our discretion we treat his brief as a petition for *certiorari* review, issue the writ, and review his argument. Because the record reveals defendant was not afforded an adequate opportunity to be heard on the issue of attorneys' fees, we vacate the part of the judgment imposing attorneys' fees and remand the matter without prejudice to the State's right to refile its request for attorneys' fees and instruct the trial court to afford defendant adequate notice and an opportunity to be heard on the matter. Finally, as both parties concede, there was a clerical error in the trial court's sex offender registration order. We remand that order to the trial court with instructions to uncheck the box indicating the victim was a minor.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges INMAN and BERGER concur.

Report per Rule 30(e).