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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-249

Filed: 21 January 2020

Union County, No. 15 CRS 53521

STATE OF NORTH CAROLINA

v.

TAMIKA LATONYA HORNE

Appeal by Defendant from Judgment entered 6 June 2018 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 17 October 2019.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Brian Rabinovitz, for the State.*

*Mark Montgomery for defendant-appellant.*

HAMPSON, Judge.

**Factual and Procedural Background**

Tamika Latonya Horne (Defendant) appeals from Judgment entered on 6 June 2018 upon her conviction for Intentional Child Abuse Inflicting Serious Bodily Injury Resulting in Permanent Loss of Mental or Emotional Function. The Record before us and evidence presented at trial tend to show the following:

On 12 August 2015, Defendant's eleven-month-old son, Isaac,<sup>1</sup> became unresponsive at Defendant's home. Defendant's mother, who was home with Defendant and Defendant's sister at the time, called 911, and Defendant testified that she gave Isaac CPR until Emergency Management Services (EMS) arrived. Isaac was still unresponsive when EMS arrived, and EMS rushed Isaac to CMC Union Hospital. En route, EMS contacted CMC Union and notified them that due to his condition Isaac would need to be transported to another facility. Upon arrival at CMC Union, Isaac was airlifted to CMC Main Hospital in Charlotte, North Carolina.

At CMC Main, Isaac was seen by the neurosurgeon on call, Dr. Hunter Dyer (Dr. Dyer). Dr. Dyer performed an emergency craniotomy and diagnosed Isaac with a subdural hematoma. Isaac remained in the hospital for a total of four months, and upon his release he was transferred to an intermediate care facility where he currently resides. Due to the nature and severity of Isaac's injuries, the Union County Sheriff's Office opened an investigation into Defendant for suspected child abuse.

That evening, at CMC Main, Defendant gave two separate statements to law enforcement. In Defendant's first statement, she recalled "[Isaac] was jumping on the couch and he fell and bumped his head. I picked him up and held him. He dozed off. I then went, laid him down. When I went back to check on him . . . he was not

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<sup>1</sup> A pseudonym is used in accordance with Rule 42 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 42.

breathing.” In Defendant’s second statement, made about thirty minutes later, Defendant stated Isaac was jumping and fell back and hit his head, but that he played for three or four more minutes. Defendant did not mention grabbing Isaac’s leg after he fell in either of these two statements.

Brian Keziah (Sergeant Keziah), from the Union County Sheriff’s Office’s Criminal Investigations Division, was assigned to Defendant’s case. On 14 August 2015, Defendant met Sergeant Keziah at her residence and voluntarily reenacted the events of 12 August 2015, which Sergeant Keziah recorded, and which the State played for the jury at trial over Defendant’s objection. Sergeant Keziah also testified at Defendant’s trial to his observations of Defendant’s interview with the State Bureau of Investigation, and that “[a]fter the Defendant was asked about what happened to [Isaac], [the SBI Agent] ask[ed] her specifically what kind of person would do this?” and—“[t]o the best of [Sergeant Keziah’s] memory”—Defendant responded “someone who doesn’t care and can’t be bothered by a child.”

Defendant also met with David Linto (Lieutenant Linto) who at that time was employed by the Union County Sheriff’s Office as Supervisor of Investigations. In that interview, which was recorded and played for the jury during Defendant’s trial, Defendant stated she grabbed Isaac’s leg when he was jumping to pull him closer to her and he fell and hit his head. She then picked him up and rubbed the back of his head to calm him. Lieutenant Linto repeatedly told Defendant that she had to have

shaken Isaac. Defendant denied multiple times that she shook Isaac; however, Defendant ultimately conceded, in response to Lieutenant Linto's insistence, that she may have shaken Isaac just a little.

On 17 August 2015, Defendant was arrested for Intentional Child Abuse Inflicting Serious Bodily Injury. Defendant's trial came on for hearing on 29 May 2018. The State proffered three expert witnesses. First, the State tendered Dr. Dyer as an expert in the fields of neurology and neurosurgery, and he was accepted without objection. Dr. Dyer testified that he was on call the evening of 12 August 2015. He testified to the results of CT scans performed on Isaac upon his arrival to the hospital.<sup>2</sup> Dr. Dyer stated Isaac's CT scans indicated he had a subdural hematoma, and as a result Dr. Dyer performed an emergency craniotomy. Dr. Dyer testified Isaac's subdural hematoma—bleeding between the skull and the brain—resulted from a torn bridging vein and such a tear is caused by trauma. He also stated it is “not impossible to have a subdural hematoma or tearing of a vein from a fall” but that it is most common in acceleration/deceleration injuries.

Next, the State called Dr. Valencia Jeffcoat (Dr. Jeffcoat). Dr. Jeffcoat is a family nurse practitioner and oversaw Isaac's admission to the hospital. Dr. Jeffcoat was accepted without objection as an expert in family medicine, pediatrics, child maltreatment, and child abuse. Dr. Jeffcoat testified about abusive head trauma in

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<sup>2</sup> Dr. Dyer testified “A CT scan is a multi-slice x-ray of the brain.”

general and what a diagnosis of abusive head trauma entails. She explained that prior to Isaac's incident on 12 August 2015, there was nothing in Isaac's records to indicate he had any health issues. She completed a SCAN consultation<sup>3</sup> on Isaac and ultimately concluded Isaac suffered from abusive head trauma and that his diagnosis could not come from any of the events described by Defendant. She testified instead such injuries were consistent with a "violent intentional act."

The State's third expert was Dr. Patricia Morgan (Dr. Morgan). Dr. Morgan is the medical director for child maltreatment at Levine Children's Hospital in Charlotte, North Carolina, and is a child-abuse pediatrician. Dr. Morgan was accepted, without Defendant's objection, as an expert in pediatrics, child maltreatment, and child-abuse pediatrics. Dr. Morgan testified the diagnosis of abusive head trauma does not include an accidental fall or other accidental trauma. She testified "[f]or the type of injuries that [Isaac] had, I would have expected a report that he had a fall from a significant height, so about 10 feet would be or higher [sic]" and agreed that Isaac's injuries were consistent with a "violent intentional act." Dr. Morgan conceded on cross-examination that there was no evidence of additional injuries, such as neck or back strains, corroborating the diagnosis of abusive head trauma but testified such additional injuries are not necessary for a diagnosis of

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<sup>3</sup> SCAN stands for "Suspected Child Abuse and Neglect." A SCAN consultation is a comprehensive evaluation conducted when a child is admitted with an injury and there is potential for abuse.

abusive head trauma. At the close of the State's evidence, Defense Counsel moved the trial court to enter a judgment of acquittal on the basis that "[t]he State has presented essentially a case built upon expert testimony and medical notes." The trial court denied the motion.

Defendant testified in her own defense. Defendant testified on 12 August 2015, she was at home with Isaac and his cousin, who was four years old. Defendant described sitting on the couch, with Isaac standing on the side of the couch and his cousin on the other side playing. She testified she grabbed Isaac's foot to stop him from falling but that he still fell back and hit his head on the arm of a chair "like a thump." She then picked him up and comforted him. Defendant testified Isaac was crying, so she changed his diaper and Isaac fell asleep. Defendant stated she put Isaac on the bed while she used the restroom. When she returned, Defendant noticed his heart was beating very fast but Isaac was not breathing. She called out to her mother in another room and for her sister to call 911. Defendant received instructions on CPR for the infant from the 911 operator, and Defendant and her mother administered CPR until EMS arrived. Defendant, her mother, and sister followed EMS to CMC Union.

Defense Counsel sought to introduce testimony from character witnesses in support of Defendant. The trial court prohibited Defendant from offering evidence that she watched other children, in addition to her own, and that she taught young

children in Sunday school. However, Defendant was permitted to introduce three witnesses, including Defendant's seventeen-year-old daughter, to testify about Defendant's character trait of peacefulness. All three witnesses' testimony echoed the other, reiterating that Defendant was known in her community to be a peaceful and calm person. At the close of all evidence, Defendant renewed her motion to dismiss the case. The trial court denied Defendant's motion.

The trial court instructed the jury that Defendant was charged with Felonious Child Abuse Inflicting Serious Bodily Injury Resulting in Permanent or Protracted Loss or Impairment of Mental or Emotional Function. The trial court instructed the jury that to find Defendant guilty of this charge, the State must prove beyond a reasonable doubt that "Defendant, without justification or excuse, intentionally assaulted the child which proximately resulted in permanent or protracted loss or impairment of any mental or emotional function of the child." The trial court included instructions on felonious child abuse, misdemeanor child abuse, and on Defendant's requested defense of accident. On 5 June 2018, the jury returned a verdict finding Defendant guilty of Intentional Child Abuse Inflicting Serious Bodily Injury Resulting in Permanent Loss of Mental or Emotional Function. The jury also found one aggravating factor—that the victim was very young.

Prior to sentencing, Defendant called four witnesses to offer evidence of mitigating circumstances. Defendant's pastor spoke of her continued involvement

and leadership roles within her church. Two other members of Defendant's church testified Defendant is "very loving" and an "awesome mother" who is a "good person." The third witness who testified on behalf of Defendant, Ms. Hubbard, was the executive director of a childcare facility where Defendant volunteered. Although Ms. Hubbard had not witnessed Defendant interact with her son Isaac, Ms. Hubbard testified that she witnessed Defendant serve the children in her facility and in the community. She described Defendant as a "woman that loves her children, who genuinely cares about people and their well-being." She never witnessed Defendant "snap" or "lose her cool" during her time volunteering with children at the facility.

The trial court, after hearing arguments from the State and Defendant, found the existence of all the mitigating factors proffered by Defendant and concluded they balanced out the State's sole aggravating factor. The trial court sentenced Defendant within the presumptive range to 141-182 months active sentence. Defendant gave oral notice of appeal.

### **Issues**

Defendant raises five issues before this Court on appeal: (I) whether the trial court committed plain error in admitting expert testimony that Defendant intentionally abused Isaac; (II) whether the trial court committed plain error when it allowed the State to argue during closing arguments that it did not need to show Defendant intended to injure Isaac; (III) whether the trial court committed plain



error when it failed to instruct the jury that the State had the burden of proving Defendant intended to injure Isaac; (IV) whether the trial court erred by denying Defendant's Motion for a Mistrial; and (V) whether the trial court erred in excluding portions of Defendant's character evidence.

### **Analysis**

#### **I. Expert Testimony**

We review the trial court's decision regarding the admissibility of expert testimony without objection for plain error. *See State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) ("Unpreserved error in criminal cases . . . is reviewed only for plain error."). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Defendant contends the trial court erred by admitting expert testimony that the victim's injuries were from a "violent intentional act." However, Defendant's contention that the trial court committed plain error relies upon the argument that felony child abuse inflicting serious bodily injury is a specific-intent crime. Accordingly, we must first address Defendant's argument that a violation of N.C. Gen. Stat. § 14-318.4(a3) requires proof of specific intent before addressing whether the trial court committed plain error. N.C. Gen. Stat. § 14-318.4(a3) (2017).

Under Section 14-318.4(a3),

[a] parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class B2 felony.

*Id.* In support of her argument that Section 14-318.4(a3) is a specific-intent crime, Defendant cites to the legislative history of the statute. We disagree.

In 1999, the North Carolina General Assembly amended Section 14-318.4, titled “Child abuse a felony[,]” to increase the punishment levels for those convicted under the statute. It added Subsection (a3) and designated it a Class C felony. 1999 N.C. Sess. Laws 451, § 1 (N.C. 1999). In 2008, this Court held “culpable or criminal negligence may satisfy the intent requirement of felonious child abuse[ ]” and therefore that Section 14-318.4 does not require proof of specific intent of the Defendant. *State v. Oakman*, 191 N.C. App. 796, 801, 663 S.E.2d 453, 457 (2008); *see also State v. Chapman*, 154 N.C. App. 441, 445, 572 S.E.2d 243, 246 (2002) (“[F]elonious child abuse does not require the State to prove any specific intent on the part of the accused.” (citations and quotation marks omitted)).

In 2013, the General Assembly amended Section 14-318.4 and increased the penalty in Subsection (a3) from a Class C to a Class B2 felony. *See* 2013 N.C. Sess. Laws 35, § 1 (N.C. 2013). We do not agree, as Defendant argues, that based on the

2013 Amendments, the legislature intended to make a violation of Section 14-318.4(a3) a specific-intent crime by elevating the class of felony. As such, we conclude, in line with our precedent, the State did not need to prove Defendant's specific intent to injure under Section 14-318.4(a3). *See Oakman*, 191 N.C. App. at 800, 663 S.E.2d at 457 ("Our Supreme Court has stated that in proving felonious child abuse the State is not required to prove that the defendant specifically intended that the injury be serious." (alterations, citations, and quotation marks omitted)); *see also State v. Frazier*, 248 N.C. App. 252, 261, 790 S.E.2d 312, 319 (2016) ("[Felonious child abuse] does not require the State to prove any specific intent on the part of the accused." (citation and quotation marks omitted)).

Defendant nevertheless contends the trial court committed plain error because the State's experts testified at trial that Isaac's injuries were consistent with a "violent intentional act[.]" effectively communicating to the jury that Defendant intended to injure Isaac and thereby satisfying the intent requirement for felonious child abuse. The State contends the testimony was proper under North Carolina Rules of Evidence 702 and 704 and considering this Court's opinion in *State v. McAbee*. 120 N.C. App. 674, 688, 463 S.E.2d 281, 289 (1995).

Rule 702 of the North Carolina Rules of Evidence provides "a witness qualified as an expert . . . may testify thereto in the form of an *opinion*," provided "all of the following apply: (1) The testimony is based upon sufficient facts or data. (2) The

testimony is the product of reliable principles and methods. (3) The witness has applied the principles and methods reliably to the facts of the case.” N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017) (emphasis added). Furthermore, Rule 704 continues “[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” *Id.* § 8C-1, Rule 704. Assuming *arguendo* that the State’s experts’ testimony that Isaac’s injuries were the result of a “violent *intentional* act” was an ultimate issue to be decided by the trier of fact, the North Carolina Rules of Evidence expressly do not bar such expert testimony.

Moreover, in *McAbee*, this Court considered the expert testimony of two medical experts that testified—like in the case *sub judice*—the injuries sustained by the child were intentional. 120 N.C. App. at 687-88, 463 S.E.2d at 289. “In discussing the specific injuries sustained by [the child], each physician offered his opinion as to whether the injuries were consistent with intentionally, as opposed to accidentally, inflicted injuries.” *Id.* at 688, 463 S.E.2d at 289. This Court held the “trial court did not abuse its discretion in allowing the testimony since it was within each physician’s area of expertise, was helpful to the factfinder and did not embrace a legal term of art or conclusion of law.” *Id.*

Based on the language of Rules 702 and 704 and this Court’s holding in *McAbee*, we conclude the trial court did not abuse its discretion in allowing the State’s

experts to testify Isaac's injuries were the result of a "violent intentional act" and therefore not the result of an accident. We acknowledge Defendant's argument that witnesses may not testify to a "legal term of art," see *State v. Elkins*, 210 N.C. App. 110, 124, 707 S.E.2d 744, 755 (2011) (citation and quotation marks omitted); however, the expert testimony that Isaac's injuries were the result of some "intentional act" does not run afoul of that precedent. In the case *sub judice*, the State's three expert witnesses were all qualified as medical experts and accepted without objection. They testified about the diagnosis of abusive head trauma, the process by which a diagnosis is made, and then to the nature of Isaac's injuries. The opinions, all from qualified medical experts, that the severity of Isaac's injuries would not be from an accident and was the result of an intentional act fall squarely into what is admissible under Rules 702 and 704 and is addressed by this Court in *McAbee*. Accordingly, Defendant failed to prove that "absent the error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. Therefore, the trial court did not abuse its discretion when it allowed the State's experts to testify that Isaac's injuries were the result of a "violent intentional act."

## II. The State's Closing Argument

"Absent an objection at trial, our appellate review is limited to whether the prosecutor's argument was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error." *State v. Paog*,

159 N.C. App. 312, 319, 583 S.E.2d 661, 667 (2003) (citations omitted). “[I]n order for an improper closing argument to constitute reversible error, the prosecutor’s remarks must be both improper and prejudicial.” *State v. Marino*, 229 N.C. App. 130, 134, 747 S.E.2d 633, 637 (2013) (citations and quotation marks omitted).

Defendant contends the State improperly argued to the jury about the requisite intent the State was required to prove on behalf of Defendant. However, in making this assertion, Defendant relies upon her argument that N.C. Gen. Stat. § 14-318.4(a3) articulates a specific-intent crime. In light of our conclusion that Section 14-318.4(a3) only requires the State prove general intent, see *Oakman*, 191 N.C. App. at 800, 663 S.E.2d at 457, we do not conclude the State’s closing argument regarding Defendant’s intent was “so grossly improper” to constitute reversible error. *Marino*, 229 N.C. App. at 134, 747 S.E.2d at 637. The trial court instructed the jury according to the pattern jury instructions for a general-intent crime. In light of this Court’s prior holding that Section 14-318.4(a3) is satisfied by general intent, we conclude the trial court did not abuse its discretion.

In the alternative, Defendant requests we “review the issue to determine if counsel was ineffective for not specifically objecting to the challenged argument.” Because, we conclude the State’s closing arguments did not improperly argue to the jury on Defendant’s requisite intent under Section 14-318.4(a3), we reject Defendant’s ineffective assistance of counsel claim on this issue.

III. Jury Instructions

In Defendant's reply brief, Defendant concedes that if N.C. Gen. Stat. § 14-318.4(a3) is a general-intent crime, the trial court's instruction regarding intent was sufficient. In light of our foregoing conclusion, we agree.

IV. Mistrial

"The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2017). "It is within the trial court's discretion to determine whether to grant a mistrial, and the trial court's decision is to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable." *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997). As such, "[o]ur standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." *State v. Dye*, 207 N.C. App. 473, 482, 700 S.E.2d 135, 140 (2010) (citation and quotation marks omitted).

Here, Defendant argues the trial court abused its discretion in denying her motion for a mistrial on the basis the State's opening statements were improperly argumentative. Prior to opening statements, Defendant objected to the State's proposed use of photographs of Isaac, which the trial court overruled. After the State concluded its opening, and during a break in the testimony of the State's first witness,

Defendant renewed her objection to the photographs and moved for a mistrial on the basis the State's opening was improperly argumentative and that it put Defendant's character at issue. Defendant argues the State's use of a line of rhetorical questions improperly characterized statements Defendant made during questioning by police.

Defendant challenges the following portion of the State's opening:

What kind of person would do this? What kind of person would so violently shake their 11 month old son so that his brain hemorrhages, so that his brain swells and shifts in its skull, so that his eyes bleed, so that he has to have multiple life saving surgeries where doctors have to cut open his skull to drain the fluid and to prevent his brain from pressing up against his skull too hard? What kind of person would assault their child in such a way to leave them permanently neurologically devastated? What kind of person would do this? What kind of person would violate the ultimate relationship of trust and of love, that between a mother and a child? In the words of the Defendant, that person is someone who doesn't care, someone who can't be bothered by a child. That person is the Defendant[.]

"The purpose of an opening statement is to permit the parties to present to the judge and jury the issues involved in the case and to allow them to give a general forecast of what the evidence will be." *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685 (1986). "The control of opening statements rests in the discretion of the trial court[.]" *State v. Waring*, 364 N.C. 443, 505, 701 S.E.2d 615, 653 (2010); however, "[opening statements] should *not* be permitted to become an argument on the case . . . ." *State v. Paige*, 316 N.C. 630, 648, 343 S.E.2d 848, 859 (1986) (emphasis added) (citation and quotation marks omitted).



In examining the facts of the case *sub judice* and the State's opening, we conclude the trial court did not abuse its discretion in denying Defendant's requested mistrial. The transcript and Record on Appeal indicate the State's opening forecasted evidence later presented to the jury. Specifically, three medical experts testified at trial—without objection—to the extent of Isaac's injuries, including his retinal bleeding, the shifting and swelling of his brain, his multiple surgeries, and the fact that he suffered permanent neurological damage. Isaac's occupational therapist testified to his current condition. And, in addition, Detective Keziah testified to an interrogation with Defendant where she was asked "what kind of person would do this?" and she responded—to the best of his memory—"someone who doesn't care and can't be bothered by a child."

Thus, the basic elements of the State's opening forecasted evidence that was properly admitted before the jury at Defendant's trial. Even assuming *arguendo* that the State's opening was improperly argumentative, we conclude Defendant has not demonstrated "substantial and irreparable prejudice" to her case. See N.C. Gen. Stat. § 15A-1061. "[T]he trial court's decision [to grant or deny a mistrial] is to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable." *Hill*, 347 N.C. at 297, 493 S.E.2d

at 276. Accordingly, we conclude the trial court did not abuse its discretion when it denied Defendant's motion for mistrial.<sup>4</sup>

#### V. Character Evidence

Lastly, Defendant contends the trial court erred in excluding evidence of her good character for interacting with children. The admissibility of character evidence under North Carolina Rule of Evidence 404 is a question of law reviewed de novo. *See State v. Tatum-Wade*, 229 N.C. App. 83, 87, 747 S.E.2d 382, 385 (2013). Here, the trial court excluded certain testimony of Defendant's character, specifically that she was "good with children in general." However, the trial court permitted Defendant to introduce evidence of her character trait of peacefulness. Accordingly, three witnesses testified before the jury on behalf of Defendant's character trait of peacefulness.

Rule 404(a) of the North Carolina Rules of Evidence provides "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a). Rule 404(a)(1) provides an exception to the general prohibition; however, "to have evidence of [her] good character admitted at trial under Rule 404(a)(1), the accused must tailor the evidence to a *particular trait* that is

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<sup>4</sup> Additionally, the trial court instructed the jury prior to opening statements that such statements have a "narrow and limited" purpose and are "not evidence and must not be considered by you as evidence."

*relevant* to an issue in the case.” *State v. Walston*, 367 N.C. 721, 726, 766 S.E.2d 312, 316 (2014) (emphasis added) (citation and quotation marks omitted). When an element of a crime includes violence, North Carolina courts have permitted evidence of the defendant’s character trait for peacefulness. *See id.* at 728, 766 S.E.2d at 317 (“[O]ur case law has repeatedly held that peacefulness is a pertinent trait with regards to alleged acts of violence[.]”).

As Defendant concedes, the trial court correctly permitted Defendant to offer testimony related to her character trait for peacefulness. The Defendant’s attempt to introduce evidence that she previously cared for other children is not a “particular trait that is relevant to the issue in the case.” *Id.* at 726, 766 S.E.2d at 316. As such, the trial court did not err by limiting Defendant’s character evidence to testimony about her trait of peacefulness.

### **Conclusion**

Accordingly, for the foregoing reasons, we conclude there was no prejudicial error in Defendant’s trial.

NO ERROR.

Judge ARROWOOD and Judge COLLINS concur.

Report per Rule 30(e).