

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-516

Filed: 5 May 2020

Wake County, No. 17 CRS 201843

STATE OF NORTH CAROLINA

v.

ANDRE LAMONT MURRAY

Appeal by defendant from judgment entered 11 June 2018 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 4 February 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Lauren M. Clemmons, for the State.*

*Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.*

BRYANT, Judge.

Where defendant has waived all review of the sole issue, he presents on appeal by failing to properly object at trial and failing to argue plain error, we dismiss defendant's appeal.

Defendant Andre Lamont Murray was indicted on one count of statutory rape of a child. Four additional counts of statutory rape and one count of sexual exploitation of a minor were added to the original charge. On 4 June 2018, the case

was tried before the Honorable Henry W. Hight, Jr., Judge presiding. At the close of the evidence, the trial court dismissed the sexual exploitation charge. A jury found defendant guilty of statutory rape that occurred on or about 30 July 2015. Defendant was acquitted on the remaining four charges of statutory rape.

The teenage victim, Ivy, was seventeen at the time of trial.<sup>1</sup> At trial, the State's evidence revealed that defendant had begun dating Ivy's mother in the fall of 2014. After a few weeks of dating, defendant moved into their house. Ivy was fourteen at the time and the second oldest of the seven children in the house. Upon defendant moving in, Ivy's mother told Ivy and her siblings to refer to defendant as "dad."

Defendant soon thereafter began physically disciplining all the children, including Ivy. While playing a game, Ivy observed defendant touching her siblings in their private parts. During a parent/child evaluation with Child Protective Services ("CPS") regarding an unrelated incident with Ivy that led to charges in juvenile court, Ivy did not disclose what she had observed.<sup>2</sup> Defendant continued his interactions with Ivy and her siblings by initiating games, which included pulling their pants down and slapping them from behind.

---

<sup>1</sup> A pseudonym is used to protect the identity of the minor child and for ease of reading.

<sup>2</sup> It was revealed during trial that Ivy's mother had an ongoing history with CPS as CPS had documented concerns regarding her ability to care for the children since 2006. At the request of CPS, a psychologist arrived at Ivy's house in response to reports of changed behavior with Ivy after she was sexually abused in 2014 by a family friend's nephew.

STATE V. MURRAY

*Opinion of the Court*

During the summer of 2015, Ivy was in her mother's room with defendant and had fallen asleep on the bed. When she woke up, defendant's hand was inside her pants, touching her "kitty cat." Defendant acted like he was asleep at the time, and said to Ivy, "Give me a hug if you're not mad at me." Ivy did so. Through time, defendant's digital penetration of Ivy continued.

On the night of 30 July 2015, Ivy's fifteenth birthday, defendant and Ivy watched TV in the living room. While everyone was sleeping, defendant grabbed Ivy by the arm and kissed her on the neck. Defendant then pulled down Ivy's pants and penetrated her vaginally with his penis. During the course of penetration, defendant said to Ivy, "You know I love you, right?" Ivy responded out of fear, "Yes." Ivy did not tell her mother about the incident on her birthday. The next day, defendant penetrated Ivy again. In the days that followed, defendant engaged in vaginal intercourse with her at least three more times inside different rooms of the house: in her room, in her brother's room, and in the living room.

In the fall of 2015, Ivy was removed from her mother's house and sent to live with a family friend for the school year. Defendant drove a van to pick up Ivy and took her to different locations to have sex, including parks, churches, and a school. By November 2015, defendant had moved out of the house. On or about 12 December 2015, defendant began texting Ivy to meet up. Defendant had asked for nude photographs of Ivy. In addition to texting, Ivy had exchanged voice messages with

defendant. Ivy planted a cellphone in a bag where her mother would find it. After reading the messages, Ivy's mother turned the cellphone over to the Apex Police Department and CPS to conduct an investigation.

The police extracted the text messages and voice messages from Ivy's Samsung phone and preserved them for trial as the State's Exhibits 12, 13, and 14 (hereinafter referred to collectively as "the exhibits"). At trial, the exhibits were introduced and admitted into evidence. The voice messages were played for the jury without objection from defendant. After the close of evidence, the State rested its case. Defendant presented no evidence.

Defendant was found guilty of one count of statutory rape. Following the jury verdict, the trial court sentenced defendant to 240 to 348 months imprisonment. Defendant appeals.

---

On appeal, defendant argues the trial court erred by admitting the State's Exhibits 12, 13, and 14—which contained text messages and voice messages—without proper foundation that they were sent or received by defendant. Defendant argues that the admission of this evidence was prejudicial and therefore, requires that his conviction for statutory rape be vacated. However, the State contends that defendant has failed to preserve his argument as to the admission of the challenged exhibits. We first consider whether this issue is properly preserved for appeal.

STATE V. MURRAY

*Opinion of the Court*

“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C.R. App. P. 10(a)(1). “Generally speaking, the appellate courts of this state will not review a trial court’s decision to admit evidence unless there has been a timely objection.” *State v. Brent*, 367 N.C. 73, 76, 743 S.E.2d 152, 154 (2013) (citation omitted). “To be timely, the objection must be contemporaneous with the time such testimony is offered into evidence.” *Id.* (citation and quotation marks omitted).

A general objection to the admission of evidence, “when overruled, is ordinarily not adequate [to preserve the issue for appellate review] unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence.” *State v. Patterson*, 249 N.C. App. 659, 664, 791 S.E.2d 517, 521 (2016). “Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence.” *Id.* at 664–65, 791 S.E.2d 517, 521 (citation omitted).

In the instant case, Detective Josh MacMonagle of the Apex Police Department was called to testify about the extraction of messages on Ivy’s phone from a phone number identified in the contacts as “Andre.” Detective MacMonagle had prepared a

four-page PDF report on a disc—Exhibit 12. The State sought to introduce Exhibit 12, and defendant objected. The trial court then asked if defendant wanted to be heard on his objection to the introduction of Exhibit 12, and defendant responded, “No.” The trial court overruled defendant’s general objection and allowed the exhibit to be admitted into evidence.

On this record, it is clear that defendant made only a general objection, having stated no basis before the trial court to argue for exclusion of the exhibit. Defendant did not raise any specific objection to whether a proper foundation had been laid for admission of the exhibit. A timely objection on that basis would have given the trial court an opportunity to rule on that specific objection and would have allowed the state the opportunity to put forth foundation evidence if required. *See State v. Jones*, 342 N.C. 523, 535–36, 467 S.E.2d 12, 20 (1996) (“[A defendant] claiming error has the duty of showing not only that the ruling was incorrect, but must also provide the trial court with a specific and timely opportunity to rule correctly.”). Further, defendant failed to establish that there was no proper purpose for which the evidence could have been admitted. Therefore, his argument regarding the admission of Exhibit 12 is not preserved for appeal.

Similarly, we note from the record that the State’s Exhibits 13 and 14—the printed extraction reports of Exhibit 12—were admitted into evidence without objection from defendant. *See State v. Gardner*, 315 N.C. 444, 447, 340 S.E.2d 701,

704 (1986) (“Failure to make timely objection or exception at trial waives the right to assert error on appeal[.]”). Thus, by failing to object, defendant has not preserved his argument as to Exhibits 13 and 14.<sup>3</sup>

Notwithstanding that defendant has not properly preserved his issues for appeal, we acknowledge that this Court may review defendant’s issue for plain error. *See* N.C.R. App. P. 10(a)(4) (“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.”). But failure to argue plain error waives plain error review. *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.” (quoting N.C.R. App. P. 10(a)(4))).

Here, defendant has not argued, in either his original brief or in his reply brief before this Court, that the error of which he complains amounts to plain error.

---

<sup>3</sup> We also note that before trial, defendant was on notice that “Detective Josh MacMonagle, who performed cell phone extractions in 2015,” would be one of five people expected to testify as an expert witness, per the State’s 21 May 2018 Notice of Intent to Introduce Expert Testimony. And, while not binding, these exhibits were not listed on defendant’s “List of Potential Issues” for appeal. The only exhibit listed as a potential issue was Exhibit 11 (victim’s letter). This is further indication to this Court that defendant’s objection to Exhibit 12, and by his strained contention, to Exhibits 13 and 14, was a mere general objection, and not subject to review on appeal.

STATE V. MURRAY

*Opinion of the Court*

Defendant has therefore waived all review of this issue. Accordingly, we do not address the merits of the issue defendant raises on appeal.<sup>4</sup>

Defendant's appeal is

DISMISSED.

Judges DILLON and INMAN concur.

Report per Rule 30(e).

---

<sup>4</sup> Although *dicta*, had defendant properly preserved this issue for appellate review, we would have found no error in the trial court's ruling to admit the exhibits. Defendant was convicted of one count of statutory rape that occurred on 30 July 2015. Defendant was acquitted of the count alleged to have occurred in August 2015, and the remaining three counts alleged to have occurred between 30 July 2015 and 29 February 2016. Defendant's challenge is to exhibits showing messages exchanged in December 2015, well after 30 July 2015. Further, unlike defendant argues, the content of the exhibits does not necessarily corroborate the victim's testimony as to the offense for which defendant was convicted. Thus, defendant would not have been able to establish any prejudice.