An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2022-NCCOA-820

No. COA22-356

Filed 6 December 2022

Cleveland County, Nos. 19CRS000623-25, 19CRS052419-20, 19CRS052463

STATE OF NORTH CAROLINA

v.

PATRICK RYAN HUMPHRIES

Appeal by Defendant from judgments entered 20 August 2021 by Judge David A. Phillips in Cleveland County Superior Court. Heard in the Court of Appeals 4 October 2022.

*Attorney General Joshua H. Stein, by Assistant Attorney General Zach Padget, for the State-Appellee.*

*Drew Nelson for Defendant-Appellant.*

COLLINS, Judge.

¶ 1 Defendant Patrick Ryan Humphries appeals from judgments entered upon a jury's guilty verdicts of various sexual offenses and first-degree kidnapping. Defendant argues that the trial court committed plain error by admitting into evidence a DNA assessment of a penile swab. Because the admission of the challenged evidence did not have a probable impact on the jury's finding of Defendant's guilt, we conclude there was no plain error.

## I. Procedural History and Factual Background

¶ 2 HB[1] was born on 24 June 2010. Defendant, the boyfriend of HB's mother, lived at HB and her mother's house when HB was eight years old. On the night of 10 May 2019, HB was asleep in her pajamas on the living room floor next to her brother when Defendant woke her up and told her to go outside to the car. Defendant took her to the car and told her that he would hurt her if she did not come with him. They both got in the front seat. He told her to take her clothes off, and he took off his shorts. He told her to get into the driver's seat with him. While she was face-to-face with him, he "put his private part in [her] front private part." It was "[s]omething [she] didn't like" and it was "[s]omething that hurt [her]." HB began screaming, and when she was screaming, she could hear loud music coming from the garage.

¶ 3 This was not the first time Defendant had sexually assaulted HB. He had previously assaulted her in the house and in their camper; it had happened more than five times. In the past, Defendant had touched her "bottom" with "[h]is hand and his private part." He had also asked her to touch his "private part" in the front, which she described as something that only boys have, is used to go pee, and starts with the letter p. It was also the same part that he put inside of her. On other occasions, both in their camper and while she was in the shower, he told her to touch his "private

[1] We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42(b).

part" with her hands and then put it in her mouth.

¶ 4 A little before 5 a.m. on 10 May 2019, Deputy Jordan Perkins and Sergeant Jordan Bowen of the Cleveland County Sheriff's Office responded to a noise complaint at an address in Shelby, North Carolina. Upon arriving, they heard a very loud noise coming from somewhere up the driveway. As they proceeded up the driveway, they noticed Defendant exiting out of the rear of a white, two-door vehicle parked in the driveway. He agreed to turn down the music, and they started to accompany Defendant to the garage. Bowen saw what he thought was a mannequin in the back of the white car, and he asked Perkins to check the car. Bowen went to the garage with Defendant, and Perkins went to the car to investigate.

¶ 5 Perkins found a small, naked child crouched on the floor of the backseat of the car. The officers learned that her name was HB, she was eight years old, and she lived with her mother and Defendant at the house. HB said that something happened to her in the car that she did not want to happen, and that it had happened before.

¶ 6 Soon thereafter, Detective Matthew Sadler interviewed HB at his office. During the interview, HB was able to differentiate between male and female anatomy, and in describing what happened to her in the car, she pointed to the male and female genitalia.

¶ 7 HB was taken to Levine Children's Hospital, where a doctor and a nurse examined her. Both found that HB had injuries consistent with recent penetration.

Police obtained a search warrant for, among other things, a DNA sample from Defendant. The search warrant was executed by sheriff's officers, and a nurse performed a DNA swab of the inside of Defendant's cheek and of his penis. HB's DNA was found on Defendant's penis. Defendant was arrested.

¶ 8 Defendant was indicted on 10 June 2019 for two counts of indecent liberties with a child, one count of first-degree kidnapping, two counts of statutory rape of a child by an adult, and two counts of statutory sex offense with a child by an adult. Defendant filed a motion to suppress on or about 15 August 2021; the motion was heard the following day. By order entered 20 August 2021, the trial court denied Defendant's motion.

¶ 9 The case came on for trial by jury on 16 August 2021. The jury found Defendant guilty on all counts. Defendant was sentenced to four consecutive terms of 300 to 420 months in prison. Defendant noticed appeal in open court.

## II. Discussion

¶ 10 Defendant argues that the trial court committed plain error by admitting the DNA evidence from the penile swab because the search exceeded the scope of the warrant and the warrant was "unconstitutionally ambiguous," and the admission of the evidence was prejudicial because it "provided a direct connection between his penis and HB."

### A. Jurisdiction and Standard of Review

¶ 11 As an initial matter, we must determine whether these issues are properly preserved for appeal. Our Supreme Court has explained that

> [t]o preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial. [Defendant's] failure to object at trial waived his right to have this issue reviewed on appeal.

*State v. Golphin*, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (internal citations omitted). Furthermore, constitutional issues not raised and passed on by the trial court will not be considered for the first time on appeal. *State v. Global*, 186 N.C. App. 308, 320, 651 S.E.2d. 279, 287 (2007), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008).

¶ 12 Defendant neither raised in his motion to suppress nor argued during the hearing on the motion that the search warrant was "unconstitutionally ambiguous." As this constitutional issue was neither raised nor ruled upon below, this issue is not preserved for appellate review. *See id.* at 320, 651 S.E.2d at 287.

¶ 13 Furthermore, Defendant acknowledges that although he filed a motion to suppress the DNA evidence, he failed to renew his objection when the State sought to admit the evidence at trial. Accordingly, Defendant failed to properly preserve this issue for appellate review.

¶ 14 However, "to the extent [a] defendant fail[s] to preserve issues relating to [his]

motion to suppress, we review for plain error" if the defendant "specifically and distinctly" argues plain error on appeal. *State v. Waring*, 364 N.C. 443, 468, 508, 701 S.E.2d 615, 632, 656 (2010); *see* N.C. R. App. P. 10(a)(4). Because Defendant specifically and distinctly argues plain error in his appellate brief, we review his argument under this standard.

¶ 15 Under plain error review, a defendant must show that a "fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). An error is deemed fundamental upon a showing of prejudice; in other words, a defendant must show that, "after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.'" *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). Plain error should be used sparingly and only in exceptional cases where the error affects a substantial right that seriously affects the fairness, integrity, and reputation of judicial proceedings. *State v. Thompson,* 254 N.C. App. 220, 224, 801 S.E.2d 689, 693 (2017).

**B. Analysis**

¶ 16 We need not determine whether the trial court erred by denying Defendant's motion to suppress because even if the DNA evidence from the penile swab was erroneously admitted, Defendant has failed to show that the error had a probable impact on the jury's finding of Defendant's guilt.

¶ 17 HB testified in detail about the number of times and various ways Defendant

has sexually assaulted and physically abused her. She specifically testified that: on the night the police found her naked in the back of a car, she was eight years old; Defendant had awakened her, forced her to go to the car and get in, and forced her to take her clothes off; Defendant took off his shorts; Defendant then "put his private part in [her] front private part"; and it hurt so badly that she began screaming, but it was drowned out by loud music.

¶ 18 Additionally, Bowen and Perkins testified that they witnessed Defendant exit the car whereafter they immediately found HB, who was crouching naked on the floor in the back of the car. HB told the officers that something had happened in the car that she did not want to happen, and that it had happened before. HB was interviewed by various individuals; each time she confirmed that she had been assaulted. A doctor and a nurse both examined HB soon after she was discovered by Bowen and Perkins; both found that HB had injuries consistent with recent penetration.

¶ 19 Without making any specific argument as to any of the charges against him—first-degree kidnapping, statutory rape of a child by an adult, and statutory sex offense with a child by an adult—Defendant argues generally that admission of the challenged evidence had a probable impact on the jury's verdicts because "the [DNA] sample taken from [his] penis provided powerful evidence in support of the allegations against [Defendant] – direct, physical evidence that supported the

charges against him." We reject Defendant's argument. Given the overwhelming evidence in the record of Defendant's guilt of each of the offenses charged, Defendant has failed to show that any error in admitting the challenged DNA evidence had a probable impact on the jury's finding of Defendant's guilt. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

## III. Conclusion

¶ 20 In light of the overwhelming evidence in the record of Defendant's guilt, the admission of the challenged evidence did not have a probable impact on the jury's finding of Defendant's guilt. We thus conclude there was no plain error.

NO PLAIN ERROR.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).