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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-658

Filed 19 December 2023

Pasquotank County, Nos. 18 CRS 317, 19 CRS 364-65

STATE OF NORTH CAROLINA

v.

JOHNNIE EUGENE JOHNSON, III, Defendant.

Appeal by Defendant from judgments entered 6 January 2022 by Judge Eula E. Reid in Pasquotank County Superior Court. Heard in the Court of Appeals 10 May 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Sarah N. Tackett, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for defendant-appellant.*

MURPHY, Judge.

On appeal, Defendant argues that the trial court erred by denying his attempt to strike an impaneled juror during trial because he had a right to exercise his remaining peremptory challenge when the trial court reopened *voir dire*. However, the record reveals that Defendant failed to properly exercise his remaining

peremptory challenge, and instead attempted to strike the juror for cause. The trial court did not err by refusing to strike the challenged juror for cause within its discretion.

Defendant also argues that the trial court committed plain error by admitting expert testimony that Marilyn's abuse allegations were substantiated. Any such error was invited by Defendant, and he cannot argue plain error on appeal. In the alternative, Defendant argues that he received ineffective assistance of counsel due to his defense counsel's invitation of this error. However, Defendant fails to demonstrate a reasonable probability that, without this invited error, the proceedings would have ended in a different result, and Defendant's contentions of error fail.

### **BACKGROUND**

Defendant appeals from convictions of three counts of indecent liberties with a child, one count of statutory sexual offense by an adult against a child, and one count of second-degree forcible sexual offense, all involving Marilyn, Defendant's minor step-granddaughter, and Noel, Defendant's minor surrogate grandson.<sup>1</sup>

Between the dates of around or about 5 April 2018 and 13 April 2018, Marilyn stayed with her paternal grandmother ("Grandmother") and Defendant, her paternal step-grandfather. At this time, Marilyn was four years old. On the day that Marilyn's parents picked her up from Defendant's house, Marilyn reported to her mother that,

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<sup>1</sup> We use pseudonyms to protect the juveniles' identities and for ease of reading.

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during her stay, Defendant had touched her vagina in a rubbing motion. Marilyn's mother informed Marilyn's father, who confronted Grandmother and Defendant about the alleged abuse. Marilyn's mother contacted law enforcement the next day.

On 16 April 2018, Kids First interviewed Marilyn. During this interview, Marilyn again reported that Defendant had inappropriately touched her, and reported further that Defendant had also inappropriately touched her "brother" Noel.<sup>2</sup> Noel, the son of Marilyn's father's ex-girlfriend, often stayed with Defendant and Grandmother, whom he viewed as surrogate grandparents. At the time that Marilyn was assaulted, Noel was staying with Defendant and Grandmother. Marilyn's statement led Kids First to interview Noel as well. However, during his Kids First interview, Noel denied being the subject of any abuse by Defendant, and the investigation into Noel's abuse was closed.

In March 2019, Noel's third grade teacher noticed Noel engaging in attention-seeking behavior and "could tell something was going on or something was on his mind[,] but he would never say." On 15 March 2019, Noel's school behavioral coach had a conversation with Noel about his recent disruptive behavior. During this conversation, Noel indicated that he wanted to talk to the behavioral coach and his teacher about "something that was bothering him." Soon after, Noel reported that Defendant had sexually assaulted him beginning when he was four years old, stating

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<sup>2</sup> Though not biologically related, Noel was introduced to Marilyn as a brother.

that Defendant had done the “R word” to him “every time his grandmother would go buy groceries” and “would do things inappropriate.”<sup>3</sup> Noel’s school contacted his mother and the Department of Social Services, who reported the abuse to law enforcement, and the investigation into Noel’s abuse was reopened.

After disclosing what had happened to him to school personnel, Noel “would just self-destruct,” “try[ing] to tell his classmates that he’s been hurt[] [o]r . . . abused.” Noel’s attention-seeking behavior increased, and he began “writ[ing] on his arms with red and brown markers saying that he was bleeding” and “start destroying things[,]” leading him to receive in-school suspension. He also made drawings with suicidal themes.

On 21 May 2018, Defendant was indicted for two counts of indecent liberties based on his alleged conduct towards Marilyn in April 2018. He was indicted on 24 June 2019 for two additional counts of indecent liberties stemming from his April 2018 conduct towards Noel, as well as one count of forcible sexual offense and one count of statutory sex offense with a child by an adult for his conduct towards Noel between 1 January 2012 and 31 December 2013. The State subsequently dismissed one count of indecent liberties with a child involving Marilyn.

On 3 January 2022, Defendant’s trial began. During trial, then eight-year-old Marilyn testified that, in April 2018, while she was sitting in the living room wearing

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<sup>3</sup> Noel’s teacher testified that Noel “wouldn’t go into any other detail” beyond using the “R word” because “he doesn’t like saying the word.”

only a t-shirt, Defendant had rubbed her “privates” with his finger. Marilyn testified that Noel was also staying with Defendant and Grandmother at that time, but that neither Grandmother nor Noel witnessed the abuse. Marilyn’s testimony at trial differed in many details from what she told investigators in her Kids First interviews in April 2018, including whether she was wearing pants at the time of the abuse and whether Noel had witnessed her abuse.

Twelve-year-old Noel testified at trial that, when he would stay with Defendant, Defendant would “sexually touch” his “hotdog” by “play[ing] with it” and “grab[b]ing” it. Noel also testified that Defendant would take off Noel’s clothes and touch “[k]ind of inside” his butt with Defendant’s “hotdog” on multiple occasions when Noel was between four and seven years old. Noel stated that he did not tell his mother about the abuse because he “was scared she was going to cry in front of [him].” Noel also testified that when he had referred to his abuse as the “R word,” he intended it to mean “rape,” which he defined as “when you don’t want to do [a sexual act] and [somebody] make[s] you do it.”

On the third day of Defendant’s trial, an impaneled juror notified the trial court that she recognized and knew one of the State’s witnesses, a child therapist, as an acquaintance from a local Filipino American gathering. The trial court summoned the juror and conducted a further *voir dire*:

[THE STATE]: Anything about that relationship that would prevent you from being able to judge her testimony just as you would anyone else who has already testified?

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JUROR NUMBER 12: No, I don't think so.

[THE STATE]: No more questions.

THE COURT: [Defense counsel]?

[DEFENSE COUNSEL]: Thank you, Your Honor. [Juror 12], you said that you know [the child therapist] as an acquaintance?

JUROR NUMBER 12: Yes, sir.

[DEFENSE COUNSEL]: And how often would you say that you see her, was it just at the Filipino American [g]athering?

JUROR NUMBER 12: Yeah. I wouldn't say often. We belong to a different group.

[DEFENSE COUNSEL]: And how often do you hold the Filipino American [g]athering?

JUROR NUMBER 12: The last one, if I'm not mistaken, 2017.

....

[DEFENSE COUNSEL]: Anything about your relationship with [the witness] that would—that would influence your decision or that it would cause you to give her testimony more weight than anyone else?

JUROR NUMBER 12: I don't think so.

[DEFENSE COUNSEL]: And when was the last time you saw [the witness]?

JUROR NUMBER 12: Long time ago, I can't remember off the top of my head. I didn't even know her last name[,] . . . that is why I didn't recognize it from the list of witnesses.

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THE COURT: Any further questions?

[DEFENSE COUNSEL]: No, Your Honor.

After the trial court questioned the juror about her association with the witness,

Defendant attempted to strike the juror:

[DEFENSE COUNSEL]: Your Honor, I think it was an honest mistake on her part but she was asked the question in voir dire and my calculus at that time would have been different had I known that she had a personal relationship, however vague, with [the witness].

THE COURT: What does that mean?

[DEFENSE COUNSEL]: Your Honor, that means that I would ask she be struck.

THE COURT: On what basis?

[DEFENSE COUNSEL]: On the basis that she made an incorrect response during voir dire. I mean, unbeknownst to herself.

[THE STATE]: Then it's not an incorrect statement. She said that she did not even know [the witness's] last name, it wasn't until she saw her face-to-face. This happens in jury trials, it's just something that happens. As long as she stated, and she did, that she can be fair and impartial to both sides in this case and judge [the witness's] testimony the same as she would everyone else, which she said to me and she said to you, then I don't see any reason why she needs to be asked to step down and we have to use the alternate [juror].

THE COURT: Any further argument?

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: Are you moving to have her disqualified?

[DEFENSE COUNSEL]: Yes.

THE COURT: That motion is denied. You can bring the jury back in.

On 6 January 2022, the jury found Defendant guilty of one count of first-degree sex offense with a child, one count of forcible sexual offense, and three counts of indecent liberties with a child. The trial court entered judgments on those counts and sentenced Defendant to three active terms, totaling 402 to 612 months. The trial court further ordered that Defendant register as a sex offender for life and enroll in satellite-based monitoring for a period of ten years upon his release from prison. Defendant gave oral notice of appeal.<sup>4</sup>

### ANALYSIS

Defendant contends on appeal that he is entitled to a new trial based on two arguments: (A) that the trial court erred by not allowing him to exercise his remaining peremptory strike after reopening *voir dire* and (B) that the trial court committed plain error when it did not *sua sponte* strike the testimony of a child protective

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<sup>4</sup> The trial court ordered Defendant to register as a sex offender for life and enroll in satellite-based monitoring for a period of ten years. Defendant gave oral notice of appeal of his criminal judgments, but did not file written notice of appeal from the civil satellite-based monitoring order in accordance with Rule 3 of the Rules of Appellate Procedure. Defendant petitioned for writ of certiorari pursuant to Rule 21 of the Rules of Appellate Procedure requesting our discretionary review of the civil satellite-based monitoring order entered against him in Pasquotank County on 6 January 2022. However, we deny Defendant's petition for writ of certiorari seeking review of the order enrolling him in satellite-based monitoring by separate order.

services investigator who stated that her agency had substantiated Defendant's sexual abuse of Marilyn or—in the alternative—that, if the admission of this testimony did not amount to plain error, his trial counsel's failure to object to the testimony or elicitation of the testimony constituted ineffective assistance of counsel.

### **A. Peremptory Challenge**

Defendant contends the trial court erred by failing to remove a juror who revealed during Defendant's trial that she knew one of the State's witnesses. Defendant argues that, because he had one remaining preemptory strike after jury selection closed, once the trial court reopened *voir dire*, he had an "absolute right" to exercise his final preemptory strike to remove the impaneled juror pursuant to N.C.G.S. § 15A-1214. Defendant contends this error requires that his judgments be reversed and that he be granted a new trial.

We review questions of law, including statutory interpretation, *de novo*, considering the matter anew and freely substituting our judgment for that of the lower court. *See, e.g., State v. Boggess*, 358 N.C. 676, 680-83 (2004). "[T]he free exercise of preemptory challenges plays [a significant role] in a trial of a criminal case. Nonetheless, it is generally held that reasonable limitations on the procedure may be fixed so long as the right itself is not taken away." *State v. McLamb*, 313 N.C. 572, 576-77 (1985). "[T]he matter is one of discretion in our courts . . ." *Id.* at 577 (holding that the trial court's denial of defendant's request to exercise his remaining preemptory challenge was not an abuse of discretion).

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N.C.G.S. § 15A-1214(g) provides:

If at any time after a juror has been accepted by a party, *and before the jury is impaneled*, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists:

(1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.

(2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.

(3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

Any replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror.

N.C.G.S. § 15A-1214(g) (2022) (emphasis added).

“The purpose of the voir dire examination and the exercise of challenges, either peremptory or for cause, is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial.” *State v. Honeycutt*, 285 N.C. 174, 179 (1974), *vacated in part on other grounds*, 428 U.S. 903 (1976).

Though the situation is not addressed by N.C.G.S. § 15A-1214(g)(3), our Supreme Court has held that a trial court may also “reopen the examination of a juror

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after the jury is impaneled and that this decision [to reopen *voir dire*] is within the sound discretion of the trial court.” *State v. Holden*, 346 N.C. 404, 429 (1997) (citing *McLamb*, 313 N.C. at 575-76 and *State v. Kirkman*, 293 N.C. 447, 452-54 (1977)). The question in *Holden* was whether the trial court abused its discretion in re-opening the *voir dire*, not whether its decision to exclude or allow a juror was error. *See id.*

In *State v. Thomas*, we analyzed the holding in *Holden* and held that *Holden* stands for the proposition that there is an “absolute right to use a remaining peremptory challenge to remove a juror . . . even after the jury ha[s] been impaneled . . . so long as the trial court [has] not abused its discretion in reopening the examination of the juror.” *State v. Thomas*, 230 N.C. App. 127, 130, *disc. rev. denied*, 367 N.C. 266 (2013) (citing *Holden*, 346 N.C. at 429). We held in *Thomas* that *Holden* “simply adopted the statutory standard for challenging a juror after the juror had been accepted, but before the full jury had been impaneled, as codified in N.C.G.S. § 15A-1214(g)” to situations after the evidentiary portion of a trial has opened and the jury is already empaneled. *Id.* *Thomas* thus held that, as a logical link under *Holden*, “[o]nce the trial court reopens the examination of a juror, each party has the absolute right to exercise any remaining peremptory challenges to excuse such a juror.” *Holden*, 346 N.C. at 429. In *Thomas*, we explained:

[S]erious questions arise when this “right” is removed from the context in which it was established in N.C.G.S. § 15A-1214(g), and applied after the jury has been impaneled.

Possible troubling scenarios include: (1) near the end of a

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trial the defense believes is going against the defendant, a concern is raised about the conduct of multiple jurors. The trial court allows *voir dire* of those jurors and determines no improprieties were involved. The trial court refuses to excuse those jurors for cause, but the defendant has three remaining peremptory challenges and uses them all. The trial must start anew; (2) or the State believes a juror has appeared sympathetic to the defendant during trial. An unnamed officer of the court tells the prosecutor that the juror may have violated an instruction from the judge. The trial court allows *voir dire* to investigate, but finds no cause to remove the juror. The State uses a peremptory challenge to remove the one juror who could have prevented a conviction.

Further, it seems likely that, after a trial has started, a trial court will be reluctant to allow questioning of jurors whose actions are in question in order to avoid the opportunity for the use of peremptory challenges. However, trial courts should be encouraged to allow thorough investigations of jurors, when needed, to determine if there is reason to excuse them for cause.

*Thomas*, 230 N.C. App. at 130-131.

Prior to *Holden*, our appellate courts had held that a trial court's decision to allow a peremptory challenge after the jury has been impaneled is a matter for the trial court's discretion. *E.g.*, *McLamb*, 313 N.C. at 577 ("Indeed, although the matter is one of discretion in our courts, the general rule is that after a jury is impaneled, the parties have waived their rights to challenge peremptorily a juror."); *Kirkman*, 293 N.C. at 454 (citations omitted) ("In all the foregoing cases, the challenge in question was allowed before the jury was impaneled. We perceive no reason for the termination of this discretion in the trial judge at the impanelment of the jury."). We

held in *Thomas* that, “[t]o the extent that granting a peremptory challenge after reopening of examination of a juror was discretionary in *Kirkman*, our Supreme Court in *Holden* appears to have overruled *Kirkman*.” *Thomas*, 230 N.C. App. at 132-33 (marks omitted). We therefore vacated the defendant’s judgment and remanded for a new trial. *Id.* at 133.

In contrast to a peremptory strike, when a defendant challenges a juror for cause, it is typically “on the ground that [the juror] is unable to render a fair and impartial verdict.” *State v. Clemmons*, 181 N.C. App. 391, 393, *aff’d*, 361 N.C. 582 (2007). N.C.G.S. § 15A-1212 enumerates nine grounds for challenging a juror for cause, and provides that a for-cause challenge may be made where the juror

- (1) Does not have the qualifications required by G.S. 9-3.
- (2) Is incapable by reason of mental or physical infirmity of rendering jury service.
- (3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.
- (4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
- (5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime.
- (6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.

(7) Is presently charged with a felony.

(8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.

(9) For any other cause is unable to render a fair and impartial verdict.

N.C.G.S. § 15A-1212 (2022).

A challenge for cause is governed by different statutory provisions from the statute governing peremptory challenges, N.C.G.S. § 15A-1217, which grants each defendant six peremptory challenges in noncapital cases. N.C.G.S. § 15A-1217(b)(1) (2022). A peremptory challenge is one that is “made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or without being required to assign a reason therefor.” *State v. Allred*, 275 N.C. 554, 563 (1969). “[T]he reason for challenging a juror peremptorily cannot be inquired into.” *State v. Noell*, 284 N.C. 670, 682 (1974), *vacated in part on other grounds*, 428 U.S. 902 (1976). A peremptory challenge “is a challenge exercised without a reason stated, without inquiry and without being subject to the court’s control.” *State v. Smith*, 291 N.C. 505, 526 (1976). “[A]n examination of the [defendant’s] reasons for the exercise of his [peremptory] challenges in any given case is not permitted.” *Id.* (citing *Swain v. Alabama*, 380 U.S. 202 (1965)).

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Given these differences between the types of challenges, we must first determine if Defendant was making a challenge for cause or attempting to exercise a peremptory challenge. In this case, after questioning the juror about her association with the witness, the trial court and parties stated:

THE COURT: Anything from the State?

[THE STATE]: Your Honor, I don't think based on any of our questions that there is any reason to think that she would not be able to sit on this jury.

THE COURT: [Defense counsel]?

[DEFENSE COUNSEL]: Your Honor, I think it was an honest mistake on her part but she was asked the question in voir dire and my calculus at that time would have been different had I known that she had a personal relationship, however vague, with [the witness].

THE COURT: What does that mean?

[DEFENSE COUNSEL]: Your Honor, that means that I would ask she be struck.

THE COURT: On what basis?

[DEFENSE COUNSEL]: On the basis that she made an incorrect response during voir dire. I mean, unbeknownst to herself.

[THE STATE]: Then it's not an incorrect statement. She said that she did not even know [the witness's] last name, it wasn't until she saw her face-to-face. This happens in jury trials, it's just something that happens. As long as she stated, and she did, that she can be fair and impartial to both sides in this case and judge [the witness's] testimony the same as she would everyone else, which she said to me and she said to you, then I don't see any reason why she

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needs to be asked to step down and we have to use the alternate [juror].

THE COURT: Any further argument?

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: Are you moving to have her disqualified?

[DEFENSE COUNSEL]: Yes.

THE COURT: That motion is denied. You can bring the jury back in.

We conclude from the above exchange that Defendant was attempting to strike the juror for cause. Defendant responds that, although he did not use the “magic words” of “peremptory,” it was apparent from the context that he was exercising his remaining peremptory challenge. However, Defendant stated only that he was seeking to have the juror “disqualified.” Defendant did not use the term “peremptory,” and the trial court denied his motion to disqualify. Defendant *did* give an explanation for his decision to ask that the juror be removed, and the trial court questioned him about the same. *See Smith*, 291 N.C. at 526 (“[A peremptory challenge] is a challenge exercised without a reason stated, without inquiry and without being subject to the court’s control.”). Given trial counsel’s motion to the trial court and above arguments “ask[ing]” for the trial court to remove the juror, as well as the trial court’s inquiry into counsel’s reasoning for the same, we conclude the record reveals Defendant was seeking to strike the juror for cause. *See id.*; *see also Noell*, 284 N.C. at 682.

Given his failure to use the term “peremptory,” Defendant did not seek to exercise his remaining peremptory strike, and we agree with the State that “it was not the responsibility of the trial court to inquire further about the possibility or desire for [D]efendant to use his remaining peremptory challenge.” Moreover, Defendant does not challenge on appeal the trial court’s determination that there was no basis to challenge the juror for cause pursuant to N.C.G.S. § 15A-1214(g)(2). *See* N.C.G.S. § 15A-1214(h) (2022) (“In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have: (1) Exhausted the peremptory challenges available to him; (2) Renewed his challenge as provided in subsection (i) of this section; and (3) Had his renewal motion denied as to the juror in question.”); *State v. Richardson*, 59 N.C. App. 558, 563 (1982) (“[T]he trial court properly exercised its discretion in denying defendant’s challenge for cause.”), *rev’d in part on other grounds*, 308 N.C. 470 (1983). Defendant is not entitled to a new trial on this ground.

### **B. CPS Investigator’s Testimony**

Defendant next argues that a “[Child Protective Services] investigator testified the agency had substantiated the sexual abuse of” Marilyn by Defendant, and that this constituted inadmissible vouching testimony rising to the level of plain error and entitling him to a new trial. We hold that any error was invited error and not subject to plain error review.

“Plain error serves as an exception to the . . . general requirement that a timely objection at trial is required to preserve [a challenge of error] on appeal.” *State v. Boyd*, 209 N.C. App. 418, 424, *disc. rev. denied*, 365 N.C. 188 (2011). “When trial counsel fails to object to the admission of evidence, the trial court’s admission of the evidence is reviewed for plain error.” *State v. Clark*, 380 N.C. 204, 209 (2022).

To establish plain error [a] defendant must show that a fundamental error occurred at his trial and that the error had a probable impact on the jury’s finding that the defendant was guilty. . . . A fundamental error is one that seriously affects the fairness, integrity or public reputation of judicial proceedings. In determining whether the admission of improper testimony had a probable impact on the jury’s verdict, we examine the entire record of the trial proceedings.

*State v. Warden*, 376 N.C. 503, 506 (2020) (citations and marks omitted). “[P]lain error is to be applied cautiously and only in the exceptional case . . . .” *State v. Lawrence*, 365 N.C. 506, 518 (2012).

A “trial court commits a fundamental error when it allows testimony which vouches for the complainant’s credibility in a case where the verdict entirely depends upon the juror’s comparative assessment of the complainant’s and the defendant’s credibility.” *Warden*, 376 N.C. at 504. Specifically, “[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim’s credibility.” *Id.* at 506. “In addition, it is typically improper for a party to seek to

have the witness vouch for the veracity of another witness.” *Id.* at 507 (citing *State v. Robinson*, 355 N.C. 320, 334 (2002) and *State v. Gobal*, 186 N.C. App. 308, 318 (2007)). The testimony is permitted only “when the testimony is based on the special expertise of the expert, who because of [her] expertise is in a better position to have an opinion on the subject than is the trier of fact.” *Id.* at 506; see *Gobal*, 186 N.C. App. at 318.

Nonetheless, “[w]e have observed that the law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself in circumstances in which evidence, otherwise unexplained, is likely to mislead the jury.” *State v. Wilkerson*, 363 N.C. 382, 407 (2009), *cert. denied*, 559 U.S. 1074 (2010) (quotation omitted). “Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.” *State v. Albert*, 303 N.C. 173, 177 (1981). Moreover, a defendant is not prejudiced “by error resulting from his own conduct.” N.C.G.S. § 15A-1443(c) (2022). “Statements elicited by a defendant . . . are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law.” *Gobal*, 186 N.C. App. at 319. “[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review.” *State v. Barber*, 147 N.C. App. 69, 74 (2001), *disc. rev. denied*, 355 N.C. 216 (2002). “[P]lain error does not exist where even otherwise inadmissible evidence is

admitted by the State in order to answer the previous testimony of [a] defendant.”  
*Boyd*, 209 N.C. App. at 424.

In *Warden*, the defendant argued admission of the following testimony by an investigator amounted to plain error, entitling him to a new trial:

part of our role is to determine whether or not we believe allegations to be true or not true. If we believe those allegations to be true, we will substantiate a case. If we believe them to be not true or we don't have enough evidence to suggest that they are true, we would un-substantiate a case. We substantiated sexual abuse naming [the] defendant as the perpetrator.

*Warden*, 376 N.C. at 506 (marks omitted). Our Supreme Court held this amounted to plain error because, while “other evidence presented in [that] case served to corroborate the victim’s testimony[,] . . . there was no other direct evidence of the abuse.” *Id.* at 508; *see also State v. Hammett*, 361 N.C. 92, 99 (2006).

In the case at hand, after the State rested its case, Defendant called the CPS investigator as a witness. Defendant elicited the following testimony:

[DEFENSE COUNSEL]: . . . And what to your recollection occurred [during the first interview with Marilyn]?

[CPS INVESTIGATOR]: She had said that her coo-coo is where she pees from, that she was dancing in the front room at [Defendant’s] house. She had said her brother . . . was in the room, that [he] saw it and he started yelling loud, that [Defendant] touched her coo-coo with his hands and that [Defendant] also touched [Noel]. That he pulled her shorts down and that her grandma was at work, and that this was the first time it had happened.

[DEFENSE COUNSEL]: Now is that different than what

she told you?

[CPS INVESTIGATOR]: I mean, that was more information or detailed.

[DEFENSE COUNSEL]: Right. And it was—and—but she never said on that second interview which you observed that [Defendant] had penetrated her?

[CPS INVESTIGATOR]: Not during that first interview.

[DEFENSE COUNSEL]: But she told you when you met with her that he had?

[CPS INVESTIGATOR]: That he had put his sword into her body, uh-huh.

[DEFENSE COUNSEL]: So are those statements consistent with one another?

[CPS INVESTIGATOR]: I mean, she didn't say the exact same thing. . . . She just gave more information.

[DEFENSE COUNSEL]: And it was also different information?

[CPS INVESTIGATOR]: Yeah, it was different but more information, more details about what may have happened.

[DEFENSE COUNSEL]: But you said that you took his sword to mean his penis, correct?

[CPS INVESTIGATOR]: Yeah, that is what our agency took it as.

[DEFENSE COUNSEL]: And you also said that she stated that he sat on her without his clothes?

. . . .

[CPS INVESTIGATOR]: Uh-huh.

[DEFENSE COUNSEL]: She didn't say that in the Kids First interview, did she?

[CPS INVESTIGATOR]: Well, I mean with a child, especially that young, sometimes we have details that sometimes they share with us in the beginning that they may not share again, or we may interview them, you know, and we get more information or more detail.

[DEFENSE COUNSEL]: Or, in this case, different details?

[CPS INVESTIGATOR]: I mean, different details that, you know, she may have just remembered.

[DEFENSE COUNSEL]: So you don't know what the -- what, if any, results were there from the medical examination?

[CPS INVESTIGATOR]: Not without looking at my notes.

[DEFENSE COUNSEL]: So in your training and experience, you said that you have worked for CPS in Greenville for seven years. Have you ever investigated in that seven years allegations that turned to be unfounded?

[CPS INVESTIGATOR]: Yeah, there's been -- yeah, there's been times where we've unsubstantiated a case.

[DEFENSE COUNSEL]: And what is that generally based on?

[CPS INVESTIGATOR]: It's based off of the interviews that we have, based off of the CME, what their recommendations are, what their findings are.

....

[DEFENSE COUNSEL]: Your Honor, no further questions.

....

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[THE STATE]: Did you substantiate abuse in this case?

[CPS INVESTIGATOR]: We unsubstantiated regarding the mother and we substantiated for [Marilyn] as far as the sexual abuse by [Defendant].

....

[DEFENSE COUNSEL]: [W]hat is the -- tell me if you know, what is your standard for substantiating or non-substantiating abuse?

....

[CPS INVESTIGATOR]: So our policy, any time we make a case decision, before we make that decision we have to staff it in what we call a group staffing where we have multiple social workers and supervisors around the table, we give all the details about the case and they basically make recommendations and findings. And then me and my supervisor would get together and actually make the case decision to either substantiate or unsubstantiated based on the findings.

[DEFENSE COUNSEL]: No further questions.

The State seeks to distinguish the holding of plain error in *Warden* from the above passage in this case by arguing that any error was invited error in that Defendant “opened the door” to the discussion regarding substantiation. Specifically, the State maintains defense “[c]ounsel’s questions, combined with [the investigator’s] testimony, potentially created a favorable inference in the minds of the jurors that CPS had determined that the allegations against [D]efendant were unfounded or that CPS did not substantiate sexual abuse in [Marilyn’s] case.” The State thus maintains

Defendant opened the door for it to “dispel these assumptions” and elicit testimony from Ms. Plowman “as to the determination actually made by CPS regarding [Marilyn].” *See, e.g., Albert*, 303 N.C. at 177 (concluding the defendant’s testimony that he took a lie detector test, if “unexplained, could well lead the jury to believe that the State had refused to give [the] defendant such a test, or that [the] defendant had taken the test with favorable results”).

We agree that Defendant’s above questioning opened the door for the State to inquire into substantiation in this case. *See Boyd*, 209 N.C. App. at 424 (“However, defendant opened the door to this evidence by his own testimony regarding his interrogation.”). Here, the challenged testimony was inquired into first by Defendant and second by the State in attempts to explain the factual dissimilarities that existed amongst Marilyn’s reports, and the witness explained her agency’s policies and procedures in addressing those dissimilarities in determining whether to move forward with the investigation and prosecution. *See State v. Wilkerson*, 295 N.C. 559, 570 (1978) (“Nowhere in the record did either physician express or purport to express an opinion as to defendant’s guilt or innocence.”); *see also Warden*, 376 N.C. at 506-07 (quotation omitted) (“This rule permits the introduction of expert testimony . . . when the testimony is based on the special expertise of the expert, who because of [her] expertise is in a better position to have an opinion on the subject than is the trier of fact.”). We conclude Defendant invited any error where the challenged testimony was elicited in response to Defendant’s own questioning regarding the

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investigative procedures used in this case and asking about “unfounded” cases. *See Boyd*, 209 N.C. App. at 424 (“[P]lain error does not exist where even otherwise inadmissible evidence is admitted by the State in order to answer the previous testimony of defendant.”). Defendant is not entitled to a new trial on this ground.

Finally, Defendant argues, in the alternative, that he received ineffective assistance of counsel due to his trial counsel’s failure to object to the alleged improper vouching testimony or otherwise opening the door to the challenged testimony, therefore entitling him to a new trial.

As it presents a question of law, this Court considers de novo a defendant’s direct claim on appeal that he received ineffective assistance of counsel entitling him to a new trial. *Clark*, 380 N.C. at 215; *State v. Wilson*, 236 N.C. App. 472, 475 (2014). Claims of ineffective assistance of counsel “brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *Clark*, 380 N.C. at 215-16 (citation omitted).

A defendant’s right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution “includes the right to the effective assistance of counsel.” *State v. Braswell*, 312 N.C. 553, 561 (1985). Ineffective assistance of counsel occurs where it is established that “counsel’s conduct fell below an objective standard of reasonableness.” *Id.* at 561-62. In addition to the performance being

objectively unreasonable, the defendant must also “show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 562 (emphasis omitted). “The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel’s errors, there would have been a different result in the proceedings.” *Id.* at 563.

In this case, Defendant cannot establish he was sufficiently prejudiced by the above invited error, and thus his claim of ineffective assistance of counsel fails. From counsels’ inquiries, it was revealed any alleged improper substantiation was to explain the investigative procedures used by the witness and her agency. This was combined with the direct evidence of both victims’ detailed testimony at trial as to the abuse they experienced, as well as the testimony of Marilyn’s mother and Noel’s school personnel, who had noticed an onset of destructive behavior at school and to whom Noel first reported his abuse. *Cf. State v. Black*, 223 N.C. App. 137, 147-48 (2012) (sufficient prejudice to establish plain error, and consequently ineffective assistance of counsel, not shown where, even though “some details of [two witnesses’] descriptions of what occurred varied over time, their descriptions of the sex offenses remained essentially consistent, and the two girls testified to very similar experiences”), *disc. rev. denied*, 366 N.C. 576 (2013). In light of the other evidence present in this case, when compared to the potential impact of the investigator’s

testimony, Defendant cannot show that his counsel's invited error was "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Braswell*, 312 N.C. at 562 (emphasis omitted).

### **C. Clerical Error**

The trial court entered three judgments against Defendant, ultimately sentencing him to three active terms, to run consecutively. Each judgment form contains two checkboxes regarding the running of Defendant's sentences:

The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.

The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

Underneath the latter option, the form contains space to indicate case information.

In this space on its judgment form pertaining to Defendant's statutory sex offense against Noel, the trial court indicated the case information for Defendant's indecent liberties offense against Marilyn. However, the trial court failed to mark the checkbox stating that "[t]he sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below[.]" Although neither party asserts this error, we note that it is a clerical error which merits remand to the trial court for correction:

Although it is not raised by either party, we note a clerical error in the judgment.

....

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However[,] . . . the error in the judgment did not prejudice defendant in any way and constitutes, at most, a correctable clerical error. *State v. McCormick*, 204 N.C. App. 105, [114] (2010) (holding that the inclusion of an incorrect case number on the judgment was a mere clerical error that the trial court should correct on remand). Accordingly, we remand for correction of the clerical error in the judgment . . . .

*State v. Eaton*, 210 N.C. App. 142, 155-56, *disc. rev. denied*, 365 N.C. 202 (2011) (parallel citation omitted). The failure to mark this checkbox causes no prejudice to Defendant; thus, we remand for correction of this clerical error.

**CONCLUSION**

The trial court did not err in declining, in its discretion, to replace the challenged juror with an alternate after it reopened *voir dire*. Defendant invited any error regarding substantiation of abuse by the expert witness but cannot show the necessary prejudice to establish ineffective assistance of counsel. Defendant is not entitled to a new trial. We remand to the trial court for correction of its clerical error in failing to mark the checkbox indicating that Defendant's sentence for statutory sex offense against Noel should run consecutively to Defendant's sentence for indecent liberties against Marilyn.

NO ERROR IN PART; REMANDED FOR CORRECTION OF CLERICAL  
ERROR IN PART.

Judges GORE and FLOOD concur.

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Report per Rule 30(e).