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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-237

Filed 4 June 2024

Lee County, Nos. 19 CRS 495–96

STATE OF NORTH CAROLINA

v.

WILLIAM MACK FRIZZELL, Defendant.

Appeal by Defendant from judgment entered 3 October 2022 by Judge William R. Pittman in Lee County Superior Court. Heard in the Court of Appeals 1 November 2023.

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

Richard Croutharmel, for Defendant-Appellant.

CARPENTER, Judge.

William Mack Frizzell (“Defendant”) appeals from judgment entered after a jury found him guilty of two counts of indecent liberties with a minor. On appeal, Defendant argues the trial court: (1) plainly erred by allowing the State’s expert witness to opine that Suzie’s history and physical examination were consistent with sexual abuse; (2) reversibly erred by denying Defendant’s motion to redact portions

of his custodial interview with Captain Freeman; and (3) erred by failing to conduct a charge conference pursuant to N.C. Gen Stat. § 15A-1231(b) during sentencing. After careful review, we discern no error.

I. Factual & Procedural Background

On 12 November 2019, a Lee County grand jury indicted Defendant for six charges: two counts of statutory sex offense against a child less than fifteen years old, two counts of indecent liberties with a minor, and two counts of disseminating obscenity to a minor. On 23 March 2022, the State filed and served its notice of intent to seek aggravating factors against Defendant. On 3 October 2022, Defendant’s case proceeded to a jury trial.

Trial evidence tended to show the following. In September of 2019, Suzie¹ was five years old and resided in a three-bedroom mobile home in Lee County, North Carolina with her parents, her older sister, her younger brother, and Defendant—her maternal uncle² whom she called “Uncle Mack.” Additionally, Phyllis Boggs (“Boggs”), a family friend, occasionally stayed overnight at the family home. The sleeping arrangements in Suzie’s home at the time of these events were as follows: Suzie’s parents slept in one bedroom, Suzie and her younger brother shared the

¹ A pseudonym is used to protect the identity of the minor child and for ease of reading. *See* N.C. R. App. P. 42(b).

² Defendant is the brother of Suzie’s mother. Defendant and Suzie’s mother share a common father who, at the time of these events, resided on the property in a separate building in the backyard.

second bedroom, Suzie's older sister slept in the third bedroom, and Defendant slept on a small bed located in the living room.

On 22 September 2019, Suzie went on an overnight camping trip to Jordan Lake in Chatham County, North Carolina with her mother, her friend, and her friend's grandmother. The following day, Defendant and Suzie's younger brother drove out to Jordan Lake to pick up Suzie and her mother. After Suzie, her mother, and her younger brother took one last swim in the lake, Defendant drove everyone back home. When they arrived home at around 11:00 a.m., Suzie's mother changed the children out of their wet clothes and settled them down for a nap. As Suzie went down for her nap she was wearing pants, a shirt, and underwear. After putting the children in their beds, Suzie's mother went to her own bedroom to lie down.

Roughly an hour later, Suzie's mother was awakened by the sound of the phone ringing. She got up, answered the phone, and then started walking into the hallway towards the bathroom when she noticed Defendant peeking around the living-room corner, before scurrying into the kitchen to sit and play with Suzie's younger brother. Suzie's mother thought Defendant's behavior was odd, and she went into the living room where she observed Suzie in Defendant's bed squirming under the covers. Suzie's mother pulled back the covers and saw that Suzie was not wearing any pants or underwear and was putting on a pullup diaper.

Shortly after discovering Suzie in Defendant's bed, and because she wanted to speak with Suzie alone, Suzie's mother asked Defendant to drive to Fayetteville,

North Carolina, to pick up Boggs. After Defendant left, Suzie's mother asked Suzie whether Defendant had been "mess[ing] with her?" Suzie started to cry and shook her head "no," but ultimately nodded her head "yes" when asked a second time.

During their conversation, Suzie expressed concern about whether she would be able to continue to see Defendant if she were to tell her mother that he had touched her. Upon hearing this, Suzie's mother called Boggs, told her what happened, and asked her not say anything to Defendant when he arrived to pick her up. Then Suzie's mother called the police. Deputy Wesley Holder arrived at the family home at around 12:35 p.m. and spoke to Suzie's mother. After the interview, Deputy Holder contacted Corporal Terrance Simpson, who then contacted Captain Steve Freeman, to assist with the investigation.

After Corporal Simpson and Captain Freeman arrived, Deputy Holder transported Suzie and her mother to Central Carolina Hospital. Captain Freeman and Corporal Simpson stayed behind to gather evidence. When Defendant arrived back at the home after picking up Boggs, he voluntarily agreed to speak to Captain Freeman in his patrol car. The interview was recorded, admitted, and published to the jury as State's Exhibit 27.

Because Central Carolina Hospital did not examine children, they referred Suzie to UNC Hospital in Chapel Hill. Later that afternoon, at UNC Hospital, Gretchen Straub, a registered nurse working in the emergency department, treated Suzie. Straub spoke with Suzie's mother to obtain a brief history and asked Suzie

several questions to determine her understanding of the events leading up to her arrival at the hospital.

Suzie told Straub that on more than one occasion, a grown-up boy that lived with her touched her “where your pee comes out.” Suzie also told Straub that she saw Defendant’s private parts “whenever he was doing it,” and that this happened at her house “on the bed.” Straub attempted to physically examine Suzie, but Suzie refused to participate. Straub referred Suzie to the Harnett County Children’s Center (the “Advocacy Center”), an organization that specializes in working with children when there is suspected abuse.

On 7 October 2019, roughly two weeks after the camping trip, Suzie visited the Advocacy Center. There, Suzie participated in a forensic interview and a medical examination. The forensic interview, conducted by Jan Rogers, was recorded, admitted, and published for the jury as State’s Exhibit 34. In the interview, Suzie presented as “tentative,” meaning she was “reluctant[]” and “withdraw[n] a little bit.” Suzie was, however, able to identify Defendant as the perpetrator and demonstrate on a pair of anatomical dolls what happened. Suzie “pulled down the doll’s underwear,” placed “the male doll on top,” and “show[ed] [the male doll] . . . licking . . . the vaginal area.” Rogers testified that, based on her experience and expertise, this was “not normal knowledge [for] a five-year-old” and when a child can demonstrate these things, it suggests the act is something the child would have either seen or experienced.

After Captain Freeman received a copy of Suzie's forensic interview, he went to the magistrate and took out charges against Defendant. On 9 October 2019, he arrested and interviewed Defendant. The trial court admitted the interview ("Custodial Interview"), and it was played for the jury as State's Exhibit 31.

After Suzie's forensic interview on 7 October 2019, Deborah Flowers, a pediatric nurse practitioner at the Advocacy Center, conducted Suzie's medical examination. Flowers gathered a medical history from Suzie's mother, who advised Flowers that Suzie had been recently experiencing chronic itching in her genital area and bedwetting. Flowers, who was tendered as an expert in sexual assault and physical child abuse, acknowledged there are many possible reasons for bedwetting in a child, including medical causes, genetics, stress, and trauma. After two unsuccessful attempts to conduct a physical examination, Flowers referred Suzie to Dr. Jennifer Howell at UNC Hospital for a physical examination. On 18 November 2019, Dr. Howell performed a physical examination while Suzie was sedated.

Dr. Howell did not testify at Defendant's trial, but after conducting her examination, Dr. Howell provided her notes to Flowers. Based on Dr. Howell's notes, Flowers testified that Suzie had an "area over her outer labia that [Dr. Howell] diagnosed as atopic or contact dermatitis, which is basically kind of like a chronic irritation over the labia." Flowers went on to say that the "remainder of [Suzie's] exam was documented normal," but that the results were "consistent" with Suzie's disclosure because "[t]he medical literature is very clear that less than five percent of

girls and less than two percent of boys are going to have findings after they have been sexually abused.” Flowers explained that she would not expect, in Suzie’s case, to observe any physical findings considering the nature of the abuse Suzie disclosed. Flowers opined that based on Suzie’s disclosures and the history provided by Suzie’s mother, “[Suzie’s] history and physical exam [were] consistent with a medical diagnosis of child sexual abuse.”

Suzie, who was eight years old at the time of trial, testified that, on more than one occasion Defendant touched her “on the privates” with “[h]is hands, his tongue, and his privates.” To aid her testimony, Suzie demonstrated these acts to the jury using dolls. Suzie showed the boy doll pulling up the girl doll’s dress and then pulling down the girl doll’s underwear. She also testified that Defendant made her touch “his privates” with her hand and “made [her] lick his privates.” She explained that this happened in her bedroom and in the living room, and that she told her mother what happened afterward.

At the close of the State’s evidence, Defendant moved to dismiss all charges for insufficient evidence. The trial court granted Defendant’s motion as to the charges of disseminating obscenity to a minor but denied the motion as to the remaining four charges. On 10 October 2022, the jury found Defendant guilty of two counts of indecent liberties with a minor, but found him not guilty of the two counts of statutory sex offense against a child less than fifteen years old.

On 11 October 2022, during sentencing, the State presented evidence tending

to support an aggravated sentence based on four aggravating factors. Defendant moved to dismiss all four aggravating factors. The trial court submitted three aggravating factors to the jury, which found the existence of two: very young victim and abuse of a position of trust or confidence, including a domestic relationship. *See* N.C. Gen. Stat. § 15A-1340.16(d) (2023). After arresting judgment on the young-victim factor, the trial court sentenced Defendant to consecutive terms of thirty-six to fifty-three months' imprisonment and lifetime sex offender registration. On 11 October 2022, Defendant gave oral notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. §§ 7A-27(b)(1), 15A-1444(a) (2023).

III. Issues

The issues on appeal are whether the trial court: (1) plainly erred by allowing Flowers to opine that Suzie's history and physical examination were consistent with sexual abuse; (2) reversibly erred in denying Defendant's motion to redact portions of his Custodial Interview; and (3) reversibly erred with respect to the aggravating factor of abuse of a position of trust or confidence.

IV. Analysis

A. Expert Testimony

Defendant first argues that the trial court plainly erred in allowing Flowers to opine that Suzie had been sexually abused since there was no physical evidence to

support child sexual abuse. In support of his contention, Defendant asserts that Flowers's testimony amounted to an opinion that Suzie had in fact suffered child sexual abuse without any physical evidence to support this conclusion, which in turn constituted impermissible vouching for Suzie's testimony. We disagree.

1. Standard of Review

Because Defendant failed to timely object to Flowers's expert testimony at trial, this issue is not properly preserved for appeal. As Defendant appropriately acknowledges, we review this unpreserved evidentiary issue under a plain-error standard of review. *See State v. Patterson*, 209 N.C. App. 708, 711–12, 708 S.E.2d 133, 136 (2011). Under plain-error review, “[a] 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).

“Reversal for plain-error is only appropriate where the error is so fundamental that it undermines the fairness of the trial, or where it had a probable impact on the guilty verdict.” *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002). Indeed, plain error is a “grave error which amounts to a denial of a fundamental right of the accused,” and the error “would have had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Black*, 308 N.C. 736, 740–41, 303 S.E.2d 804, 806–07 (1983). “[P]lain error is always to be applied cautiously and only in the exceptional case” when the error “seriously affect[s] the fairness, integrity, or public

reputation of judicial proceedings.” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citing *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

2. Discussion

Defendant asserts Flowers’s testimony impermissibly vouched for Suzie’s testimony because Flowers’s opinion testimony was based solely on Suzie’s rendition of what occurred the day of the incident. We disagree.

Pursuant to Rule 702 of the North Carolina Rules of Evidence, expert witnesses may testify in the form of an opinion when they have “scientific, technical or other specialized knowledge [which] will assist the trier of fact to understand the evidence or to determine a fact in issue” N.C. Gen. Stat. § 8C-1, Rule 702 (2023).

Our state Supreme Court has explained that:

[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. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics *consistent therewith*.

State v. Stancil, 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002) (emphasis added) (citations omitted). Such a rule permits an expert witness to testify “only when the testimony is based on the special expertise of the expert, who because of his or her expertise is in a better position to have an opinion on the subject than is the trier of

fact.” *State v. Perdomo*, 276 N.C. App. 136, 139, 854 S.E.2d 596, 599 (2021) (quoting *State v. Warden*, 376 N.C. 503, 506–07, 852 S.E.2d 184, 187–88 (2020)). “Whether sufficient evidence supports expert testimony pertaining to sexual abuse is a highly fact-specific inquiry,” and “[d]ifferent fact patterns may yield different results.” *State v. Chandler*, 364 N.C. 313, 318–19, 697 S.E.2d 327, 331 (2010) (citation omitted). An expert’s testimony amounts to improper vouching for a witness’s credibility when the expert presents “a definitive diagnosis of sexual abuse” without “supporting physical evidence of the abuse.” *See id.* at 319, 679 S.E.2d at 331.

Here, Flowers, who was qualified as a pediatric expert in sexual assault and physical child abuse, testified that “[Suzie’s] history and physical exam was *consistent with* a medical diagnosis of child sexual abuse.” Although the added language “medical diagnosis” inches the needle closer to a definitive diagnosis of sexual abuse, Flowers’s testimony nonetheless stops short of an opinion that sexual abuse in fact occurred. *See Perdomo*, 276 N.C. App. at 139, 854 S.E.2d at 599–600.

Therefore, Flowers’s testimony did not rise to the level of “improper vouching” for Suzie’s testimony because Flowers did not present a definitive diagnosis of sexual abuse or assert that Suzie had *in fact* been sexually abused. *See Chandler*, 364 N.C. at 319, 679 S.E.2d at 331. On the contrary, Flowers opined that the “unremarkable” results of Suzie’s physical examination and Suzie’s disclosures to Rogers concerning the details of what she experienced were *consistent with* a diagnosis of sexual abuse. As such, Flowers’s statements were proper, and the trial court did not err in allowing

Flowers's testimony. Because the trial court did not err, Defendant cannot establish plain error. *See Black*, 308 N.C. at 740–41, 303 S.E.2d at 806–07.

B. Custodial Interview

In his next argument, Defendant contends the trial court violated Rules 404(b) and 403 of the North Carolina Rules of Evidence by admitting an unredacted version of the Custodial Interview. Specifically, Defendant argues that Captain Freeman's statement in the Custodial Interview, in which he suggests that Defendant had an addiction, should have been excluded because the statement implied that Defendant had a propensity for sexually molesting children, which constituted improper character evidence and unfair prejudice.

We first address whether Defendant's 404(b) and 403 arguments are properly preserved for appellate review. The State urges us to decline to address Defendant's arguments because neither issue was properly preserved for appellate review. We agree.

To properly preserve an evidentiary issue for appellate review, "a party must have presented the trial court with a timely request, objection, or motion, stating the specific grounds for the ruling sought if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Such objections must be made in a timely fashion "at the time [the evidence] is *actually introduced* at trial." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (emphasis added) (citation and internal quotes omitted). In other words, an objection made during a hearing outside of the

jury's presence and prior to the introduction of the evidence is insufficient to preserve the issue of whether the evidence is admissible. *State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) (citation omitted).

Our courts have routinely interpreted Rule 10 of the North Carolina Rules of Appellate Procedure “to provide that a trial court’s evidentiary ruling on a pretrial motion is not sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.” *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (emphasis omitted); *see also Snead*, 368 N.C. at 816, 783 S.E.2d at 737 (explaining that “[a]n objection made only during a hearing out of the jury’s presence prior to the actual introduction of the testimony is insufficient”).

Here, objections and discussion regarding the Custodial Interview happened on two occasions. On the morning of trial, the parties discussed several pretrial matters, including a “motion to redact recording” filed by Defendant. The trial court deferred ruling on the motion until it had a chance to review the video. On the third day of trial, the trial court conducted a hearing outside the presence of the jury to discuss which portions of the Custodial Interview should be redacted. Defense counsel stated the following: “[M]y request is to redact statements by Captain Freeman who says to [Defendant], ‘some people can’t help it. It’s a disease.’ He compares it to being like an alcoholic.” Defense counsel argued that the statements “implied something happened before” and were “prejudicial.”

The trial court determined the challenged comments, which it described as

“obviously interview tactics,” were not unfairly prejudicial and allowed the evidence to be admitted. Defense counsel requested that the court “[n]ote [her] objection to that,” and the trial court agreed. When the State later moved to admit the Custodial Interview during Captain Freeman’s direct examination, defense counsel did not renew her objection.

Although it is apparent from context that defense counsel’s objections concerning the Custodial Interview implicated both 404(b) and 403 grounds, defense counsel did not renew either objection when the State moved to introduce the Custodial Interview during Captain Freeman’s direct examination. Because the objections were not made “at the time [the evidence was] *actually introduced* at trial,” any argument with respect to the admissibility of the Custodial Interview, in whole or in part, under Rules 404(b) or 403 is not properly preserved for appellate review. *See Ray*, 364 N.C. at 277, 697 S.E.2d at 322 (emphasis added).

In order for an appellate court to review an unpreserved evidentiary issue, an appellant must “specifically and distinctly” assign plain error to the issue in their brief. *See State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995); N.C. R. App. P. 10(a)(4) (authorizing plain-error review of certain unpreserved criminal issues “when the judicial action questioned is specifically and distinctly contended to amount to plain error”).

Here, Defendant did not argue within his brief that the trial court plainly erred concerning redaction. Rather, Defendant maintains the issues were properly

preserved under N.C. Gen. Stat § 15A-1446(a). Subsection 15A-1446(a), however, requires errors to be “brought to the attention of the trial court by appropriate and timely objection or motion,” which necessarily implicates the rule that evidentiary objections must be made when the evidence is “actually introduced at trial.” *Ray*, 364 N.C. at 277, 697 S.E.2d at 322.

Because Defendant did not “specifically and distinctly” argue plain error, he is not entitled to plain-error review, and we decline to address his arguments with respect to the Custodial Interview. *See Frye* at 496, 461 S.E.2d at 677 (1995) (citing N.C. R. App. P. 10(a)(4)); *see also State v. Lewis*, 231 N.C. App. 438, 442, 752 S.E.2d 216, 220 (2013) (holding that the defendant waived appellate review where he did not allege plain error in his brief after failing to properly preserve an evidentiary issue at trial). Even assuming Defendant asserted plain error on appeal, the trial court did not err, let alone plainly err, in admitting the challenged portion of the Custodial Interview. The transcript reflects the trial court viewed the footage in advance, conducted a reasoned inquiry, and redacted certain portions it agreed were substantially more prejudicial than probative, including references to a lie-detector test. The trial court acted within its discretion in failing to redact the challenged interview tactics.

C. Aggravating Factors Charge Conference

In his final argument, Defendant contends the trial court erred by failing to conduct an aggravating-factors charge conference before submitting aggravating

factors to the jury, which materially prejudiced Defendant, as there was insufficient evidence to establish the abuse of a position of trust or confidence factor. We disagree.

1. Standard of Review

Defendant alleges a violation of a statutory mandate, which is a “question[] of law” reviewable de novo. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011). Under a de novo standard of review, this Court “considers the matter anew and freely substitutes its own judgment for that of the lower court.” *State v. Hughes*, 265 N.C. App. 80, 82, 827 S.E.2d 318, 320 (2019) (citing *Sutton v. N.C. Dep’t of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)).

2. Discussion

Defendant argues the trial court reversibly erred by failing to conduct a charge conference pursuant to N.C. Gen. Stat. § 15A-1231(b) during sentencing. He further argues that such a failure was materially prejudicial because the aggravating factor of position of trust or confidence was not defined for the jury, and the evidence failed to establish a position of trust or confidence existed between Defendant and Suzie.

Prior to closing arguments, “the judge must hold a recorded conference on instructions out of the presence of the jury,” where he or she “must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given.” N.C. Gen. Stat. § 15A-1231(b) (2023). A trial court’s failure to fully comply with this mandate, however, “does not constitute grounds for appeal unless

[the] failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.” *Id.* A defendant can establish material prejudice where “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” *State v. Dew*, 270 N.C. App. 458, 466, 840 S.E.2d 301, 307 (2020).

Our review of the record reveals the trial court held a charge conference pursuant to N.C. Gen. Stat. § 15A-1231(b). Following Defendant’s motion to dismiss, where he argued the State had not met its burden beyond a reasonable doubt as to each aggravating factor, the trial court brought in the jury and stated:

THE COURT: Ladies and gentlemen, we’re going to take a break . . . I have to meet with the lawyers about the charge I’ll give you after they argue their positions on the aggravating-factors.

The trial court then dismissed the jury and engaged in the following colloquy with the parties:

THE COURT: Somebody give one of each – one copy to each lawyer. Thank you. Counsel, this is my proposed charge. Take a look at it and see if you have any problems with it. It’s one I have used before. Just the particular charges are different. Factors, not charges. Any problems?

THE STATE: Not from the state.

DEFENSE COUNSEL: No, your honor.

Thereafter, the parties presented their closing arguments, and the trial court instructed the jury on the aggravating factors they were to consider for sentencing

purposes.

The charge conference commenced when the trial court excused the jury and provided the parties with a copy of its proposed charges. The parties were afforded an opportunity to object or request proposed charges; as the record demonstrates, defense counsel did not object to the proposed charges provided by the trial court. As Defendant did not include the trial court's proposed instruction in the record on appeal, which we note is his responsibility, we have no way of reviewing whether the jury charge was comparable to the document provided to the parties. *See Fortis Corp. v. Northeast Forest Prods.*, 68 N.C. App. 752, 754, 315 S.E.2d 537, 538–39 (1994) (stating that “[i]t is incumbent upon the appellant to see that the record on appeal is properly made up and transmitted to the appellate court”).

While it may have been better practice for the trial court to recite the numbers of the pattern jury instructions for the record, we nonetheless find the trial court satisfied its statutory duty to conduct a charge conference because it “informe[d] the parties of the [factors] . . . on which [it] will charge the jury and . . . informed [the parties] of what, if any, parts of tendered instructions will be given.” *See* N.C. Gen. Stat. § 15A-1231(b). In sum, by providing the parties with a copy of the proposed instructions and offering them an opportunity to object, the trial court conducted a charge conference in compliance with the statutory requirements. Because we find the trial court fully complied with N.C. Gen. Stat. § 15A-1231(b), we do not reach Defendant's arguments concerning material prejudice.

V. Conclusion

We conclude the trial court did not err in admitting Flowers's expert testimony or with respect to the aggravating-factors charge conference. Because Defendant's arguments regarding the Custodial Interview were not properly preserved for review, we decline to address them.

NO ERROR.

Judges ARROWOOD and FLOOD concur.

Report per Rule 30(e).