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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-737

Filed 2 July 2024

Cleveland County, Nos. 18 CRS 054854–55, 054857–60

STATE OF NORTH CAROLINA

v.

DAVID GLEN WOLFINGTON, Defendant.

Appeal by Defendant from judgments entered 3 November 2022 by Judge Reggie E. McKnight in Cleveland County Superior Court. Heard in the Court of Appeals 28 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Ennis, for the State.

Mark Montgomery for Defendant.

GRIFFIN, Judge.

Defendant David Glen Wolfington appeals from judgments entered after a jury found him guilty of numerous offenses related to child abuse. Defendant argues the trial court erred by allowing the State to publish a puzzle depicting a shark to the jury during closing arguments. Defendant also contends the trial court erred by

allowing the State to introduce expert testimony vouching for the victim. We find no error in part and dismiss in part.

I. Factual and Procedural Background

In May 2013, Defendant moved in with Loretta and her three children: Tracy, Sarah, and James¹. Defendant and Loretta married on 7 July 2013 and later had a child together, Christian, who lived with the family in Texas. In September 2013, Defendant began sexually abusing his stepdaughter, Tracy. Tracy was ten years old. Over the next few years, Defendant's treatment of Tracy escalated as he began abusing her weekly.

In September 2017, Sarah, Defendant's stepdaughter and Tracy's sister, reported Defendant had sexually abused her for about two years from the ages of fifteen to seventeen. Texas authorities came to the family's home where Sarah and Tracy told them about the abuse.

At the end of September 2017, Loretta moved Tracy, James, and Christian to North Carolina. In January 2018, Defendant moved in with the family. Defendant resumed abusing Tracy weekly. On 1 August 2018, Sarah called from Texas and reported Defendant's abuse to the North Carolina Department of Health and Human Services. As a result of this call, a social worker was sent to investigate Sarah's

¹ We use pseudonyms to protect the juveniles' identities and for ease of reading. See N.C. R. App. P. 42(b).

complaint.

While at Loretta's home, a social worker observed James standing in a corner as punishment. Defendant was home at the time and Tracy and James denied any abuse. The next day, the social worker returned to Loretta's home. The social worker inspected the basement and reported a variety of concerns about its suitability for habitation. The social worker learned James lived in the basement and often did not have adequate food.

In September 2018, an in-home services case manager interviewed James who reported Defendant had physically abused and neglected him. The case manager also interviewed Tracy who reported Defendant had sexually abused her since the age of ten.

In October 2018, Tracy and James were evaluated at a children's advocacy center. Dr. Cerjan conducted Child Medical Examinations for both Tracy and James.

On 11 July 2022, a grand jury indicted Defendant for various offenses related to child abuse. On 24 October 2022, Defendant's matter came on for trial in Cleveland County Superior Court. During the trial, Dr. Cerjan, was called to testify on the State's behalf as an expert in pediatrics with experience in physical and sexual child abuse manifestations. During his testimony, the State introduced a medical report completed during his evaluation of Tracy. The report contained the words "consistent disclosure." Defendant raised a general objection and argued, "[h]e's been tendered as an expert, but I would contend that we did not open the door to that and that would

be completely speculation.” The trial court allowed the medical report into evidence over the objection.

Additionally, during closing arguments, the prosecutor used a puzzle with the image of a shark to explain the proof-beyond-a-reasonable-doubt standard to the jury. Defendant objected at trial to the use of the illustration. The judge overruled the objection and allowed the prosecutor to use the illustration.

On 3 November 2022, the jury returned a verdict finding Defendant guilty of statutory rape, statutory sexual offense, felony child abuse by a sexual act, contribution to the abuse or neglect of a juvenile, child abuse, and contributing to the delinquency, neglect, or abuse of a juvenile. Defendant gave timely notice of appeal.

II. Analysis

Defendant makes two arguments on appeal. First, Defendant argues the trial court erred by allowing the State to publish a puzzle depicting a shark to the jury during closing arguments. Second, Defendant argues the admission of Dr. Cerjan’s report describing Tracy’s account as a “consistent disclosure” was impermissible expert vouching and therefore error. We hold the trial court did not err by allowing the State to publish the illustration. Furthermore, we hold Defendant’s appeal concerning the admittance of Dr. Cerjan’s report was not properly preserved and therefore dismiss the appeal with respect to that argument. Accordingly, we find no error in part and dismiss in part.

A. The State’s Closing Argument

Defendant argues the trial court erred by allowing the State to publish a puzzle depicting a shark to the jury. Specifically, Defendant argues the State violated N.C. Gen. Stat. § 15A-1230(a) as use of the puzzle constituted an abusive statement that implicitly characterized Defendant as a shark. The State contends the issue was not properly preserved for appellate review.

In the context of closing arguments, “[o]ur standard of review depends on whether there was a timely objection made or overruled, or whether no objection was made and [the] defendant contends that the trial court should have intervened *ex mero motu*.” *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003). If a defendant fails to raise an objection at trial, “this Court must determine if the argument was ‘so grossly improper that the trial court erred in failing to intervene *ex mero motu*.’” *Id.* (citing *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002)). When trial counsel does object, we review for whether “the trial court abused its discretion by failing to sustain the objection.” *Id.* (quoting *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2003)).

Thus, we must first address whether Defendant’s argument is preserved. During the State’s closing argument, Defense counsel objected to the use of the shark puzzle; however, counsel’s objection did not specify the grounds upon which the objection was based. *See* N.C. R. App. P. 10(a)(1) (“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.” (emphasis added)).

While not stating the specific grounds for objection, it is apparent from the context that Defendant’s trial counsel was objecting to the State’s use of the shark puzzle. *See Walters*, 357 N.C. at 103–04, 588 S.E.2d at 364–67 (holding a defendant’s general objection following a comparison to Adolf Hitler during closing arguments to be sufficient to preserve the issue for appeal as the grounds for objection were apparent from the context). Accordingly, Defendant preserved this issue for appellate review.

Thus, having determined the issue is properly preserved, we review the trial court’s ruling for an abuse of discretion. An abuse of discretion occurs where the ruling “could not have been the result of a reasoned decision.” *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996) (citation omitted). When reviewing a ruling during closing arguments under the abuse of discretion standard, we must determine if (1) the remarks were improper and (2) the remarks prejudiced the defendant and therefore should have been excluded. *Walters*, 357 N.C. at 101, 588 S.E.2d at 364 (citing *Jones*, 355 N.C. at 131, 558 S.E.2d at 106).

During closing arguments, there are limitations on the statements an attorney may make to the jury:

[A]n attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the

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defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230 (2023). “Generally, counsel is allowed wide latitude in the scope of jury arguments.” *State v. Hill*, 347 N.C. 275, 298, 493 S.E.2d 264, 277 (1997) (citation omitted).

The reviewing court must consider the statements in the prosecutor’s closing argument in the context in which they were made and the overall facts to which they referred, not in isolation or out of context. *State v. Thompson*, 359 N.C. 77, 110, 604 S.E.2d 850, 873 (2004) (citation omitted). Our Supreme Court has also held that prosecutors may, in “zealous representation of the State, [] use [] vivid analogies to illustrate points for the jury.” *State v. Bell*, 359 N.C. 1, 22, 603 S.E.2d 93, 108 (2004); *see also State v. Willis*, 332 N.C. 151, 171, 420 S.E.2d 158, 167 (1992) (holding the State’s use of the phrase “when you try the devil, you have to go to hell to find your witnesses” to be an appropriate illustration of the type of witnesses available).

Here, the State used an incomplete puzzle showing a shark to illustrate a complex legal concept. The prosecutor told the jury:

So let’s talk about reasonable doubt. It’s an instruction. It is the standard by which all -- by which you find the evidence. . . . How do you know with something you didn’t see? How can you be fully satisfied and entirely convinced? . . . This is a puzzle. It’s a puzzle with a lot of interlocking pieces. There are some pieces missing. Are you fully satisfied and entirely convinced that’s a puzzle showing a

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shark? . . . There's some missing pieces. If you had those pictures side by side, you might figure out where they go. But with or without those pieces, you've got the full picture. . . . You know everything you need to know. You have every piece that needs to be put together to have a full -- to be fully satisfied and entirely convinced what the picture in that puzzle is. That's beyond a reasonable doubt. You don't have a reason to doubt what it is. You don't have a reason to doubt what happened, because you know who should, could, was willing to, and did tell you the truth, the whole truth. You got the whole picture, even though you didn't see it yourself. And the picture is that that man molested those girls and tortured that child.

As made apparent by the lengthy explanation, the State used the shark puzzle to illustrate reasonable doubt. Despite Defendant's contention, the State did not engage in abusive conduct as it did not directly call Defendant a shark. Considering the State's use of the illustration and explanation in context, the judge could have reasonably concluded the puzzle analogy was helpful to the jury's understanding of the proof-beyond-a-reasonable-doubt standard and did not rise to the level of abuse and name-calling prohibited by the statute. Simply put, the illustration was used to explain to the jury a complex legal theory; therefore, we cannot say the trial court abused its discretion allowing the argument.

Even assuming, arguendo, that the State's remarks were improper, Defendant fails to show prejudice. Prejudice occurs when there is a reasonable possibility a different outcome would have resulted had the error not occurred. N.C. Gen. Stat. § 15A-1443(a) (2023); *State v. Allen*, 353 N.C. 504, 509, 546 S.E.2d 372, 375 (2001) ("In order to demonstrate prejudicial error, a defendant must show that there is a

reasonable possibility a different result would have been reached had the error not occurred.” (citations omitted)).

Here, because the State produced ample evidence of the various forms of child abuse Defendant inflicted upon James and Tracy, the State’s use of the puzzle was not prejudicial. The jury found Defendant guilty of all six charges. It is unlikely the jury would have returned a different verdict had the trial court sustained Defendant’s objection to the illustration. *See State v. Goins*, 377 N.C. 475, 480, 858 S.E.2d 590, 595 (2021) (concluding an improper statement to not be prejudicial where there was ample evidence of the defendant’s guilt).

Thus, the trial court did not abuse its discretion by overruling Defendant’s objection to the State’s use of a puzzle depicting a shark during closing arguments. We hold the trial court did not err.

B. Expert Vouching

Defendant contends the trial court erred by admitting into evidence a medical report introduced by the State which characterized Tracy’s statements as a “consistent disclosure.” Specifically, Defendant argues the use of the term “consistent disclosure” constitutes impermissible expert vouching. However, the State contends Defendant made a general objection that was insufficient to preserve the issue for appeal. Further, the State contends Defendant failed to argue plain error in his brief and therefore Defendant has waived all appellate review on this issue.

Again, we must first address whether Defendant’s argument is preserved.

Pursuant to N.C. R. App. P. 10(a)(1) an objection must be stated with specificity. N.C. R. App. P. 10(a)(1). The party making an objection must state the specific grounds if not apparent from the context. *Id.* The objecting party must also obtain a ruling upon the party's objection from the trial court. *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 304 (2019) (citation omitted). Our Supreme Court has held "the Rules of Appellate Procedure are mandatory and not directory." *Id.* (quoting *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007)). If the objecting party fails to object with specificity or the grounds for objection are not made apparent by the context, the issue is not preserved and will only be reviewed for plain error. N.C. R. App. 10(a)(4).

"The specificity requirement in Rule 10(a)(1) prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required." *Bursell*, 372 N.C. at 199, 827 S.E.2d at 305 (citing *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195, 657 S.E.2d 361, 363 (2008)). Additionally, "the specificity requirement helps to 'contextualize[] the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party.'" *State v. McLymore*, 380 N.C. 185, 193, 868 S.E.2d 67, 74 (2022) (quoting *Bursell*, 372 N.C. at 199, 827 S.E.2d at 305). On appeal, parties are not bound to arguments identical to those made at trial in support of an objection. *Id.* However, a party's objection must put "the trial court and opposing party on notice

as to what action is being challenged and *why the challenged action is thought to be erroneous*—or if the what and the why are ‘apparent from the context,’ N.C. R. App. P. 10(a)(1)—the specificity requirement has been satisfied.” *Id.* (emphasis added).

In criminal cases, an instructional or evidentiary error not preserved by an objection at trial may be appealed for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Under plain error review, appellate courts can alleviate the harshness of preservation rules. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). However, “[p]lain 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. Booth*, 286 N.C. App. 71, 74, 879 S.E.2d 370, 373 (2022) (citing *State v. Thompson*, 254 N.C. App. 220, 224, 801 S.E.2d 689, 693 (2017)). Our Rules of Appellate Procedure provide that,

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.

N.C. R. App. P. 10(a)(4). Thus, a defendant must specifically and distinctly argue in their appellate brief that the trial court plainly erred. *State v. Anthony*, 271 N.C. App. 749, 753, 845 S.E.2d 452, 456 (2020); *see also* N.C. R. App. P. 10(a)(4).

Here, Defendant lodged a general objection to State’s Exhibit 49-R. Defendant stated, “[y]our Honor, we would object for the record. Don’t wish to be heard further.”

The trial court then responded to Defendant's objection, "[t]he Court having reviewed State's Exhibit 49-R, State's Exhibit 49-R is admitted into evidence. The Court will note defense counsel's objection." Defendant made a general objection that did not specifically allege the basis of their objection. The grounds for the objection are not apparent from the context in which the objection was made as there are multiple sentences written on State's Exhibit 49-R. The words "consistent disclosure" are just a few among many. Looking at the objection in the context in which it was made, it is not clear Defendant was objecting that the words "consistent disclosure" constituted impermissible expert vouching.

We must now look to whether Defendant specifically and distinctly argued this issue under the plain error standard of review in his appellate brief. In his brief, Defendant argued his trial counsel's objection was sufficient to preserve the issue and thus we should review the trial court's ruling for an abuse of discretion. However, he only briefly discussed plain error when stating "[i]t is true that our Supreme Court held once that the use of the term 'disclosed, **standing alone**', is not plain error." This brief and conclusory statement does not rise to the level of specificity and definiteness required by our precedent. *See State v. Dawkins*, 265 N.C. App. 519, 525, 827 S.E.2d 551, 555 (2019) (holding a mere statement that a defendant was prejudiced by a trial court's purported error to be insufficient to warrant plain error review); *see also State v. Smith*, 269 N.C. App. 100, 105, 837 S.E.2d 166, 169 (2019) (holding the defendant's brief failed to specifically and distinctly allege plain error

and was therefore insufficient to warrant appellate review).

As Defendant's brief failed to specifically and distinctly argue that the admittance of Exhibit 49-R amounted to plain error, Defendant has failed to adequately preserve the issue on appeal and has waived appellate review on this issue. We dismiss this issue.

III. Conclusion

For the aforementioned reasons, we find no error in part and dismiss in part.

NO ERROR IN PART; DISMISSED IN PART.

Judges FLOOD and THOMPSON concur.

Report per Rule 30(e).