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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-886

Filed 15 October 2024

Mecklenburg County, Nos. 19 CRS 226921, 226925–26

STATE OF NORTH CAROLINA

v.

GROMOKA J. CARMICHAEL

Appeal by defendant from judgments entered 2 February 2023 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 August 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General John F. Oates, Jr., for the State.*

*Christopher J. Heaney for defendant-appellant.*

ZACHARY, Judge.

Defendant Gromoka J. Carmichael appeals from the trial court’s judgments entered upon a jury’s verdicts convicting him of three counts of sexual offense with a child by an adult and one count each of statutory sex offense with a child by an adult and attempted sexual offense with a child by an adult. We conclude that Defendant received a fair trial, free from prejudicial error, but vacate and remand the judgments

in 19 CRS 226925 and 19 CRS 226926 for resentencing.

## **I. BACKGROUND**

The indictments in this case allege offenses committed by Defendant against R.W. and S.M.,<sup>1</sup> two minors. The alleged offenses occurred from October 2007 to October 2009 for the victim R.W. and from 4 to 5 July 2018 for the victim S.M.

On 22 July 2019, a Mecklenburg County grand jury returned true bills of indictment against Defendant for four counts of taking indecent liberties with a child, one count of statutory sexual offense with a child by an adult, three counts of sexual offense with a child by an adult, and one count of attempted sexual offense with a child by an adult.<sup>2</sup> Of these charges, two related to S.M.: one count of taking indecent liberties in 19 CRS 226920 and one count of statutory sex offense with a child by an adult in 19 CRS 226921. The remaining charges related to R.W.: one count each of taking indecent liberties in 19 CRS 226922 and 19 CRS 226924, two counts of sexual offense with a child by an adult and one count of attempted sexual offense with a child by an adult in 19 CRS 226925, and one count each of sexual offense with a child by an adult and taking indecent liberties in 19 CRS 226926.

Those charges came on for trial beginning on 25 January 2023. At trial, both R.W. and S.M. testified. Additionally, the State introduced—and the trial court

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<sup>1</sup> We use initials throughout this opinion to protect the identities of the minor victims.

<sup>2</sup> Prior to trial, the State dismissed one count of taking indecent liberties in 19 CRS 226920 involving S.M.

admitted, over Defendant's objections—testimony from both another minor, C.J., and C.J.'s grandmother, concerning uncharged abusive acts by Defendant against C.J.

**A. R.W.'s Testimony**

R.W. was born in October 1999 and lived with his mother—who is Defendant's cousin—"from the years of 2007 through 2009[,]” when R.W. was roughly seven to nine years old. During this time, Defendant would occasionally visit their home to see R.W.'s mother and help around the house, sometimes staying the night to babysit R.W. while R.W.'s mother was away. According to R.W., during several of those visits, Defendant “[p]erform[ed] sexual intercourse” with him. R.W. recalled that Defendant sexually assaulted him “[p]robably two . . . or three times” by “pull[ing] down [R.W.'s] clothes” and inserting body parts, including Defendant's penis, into R.W.'s anus, as well as performing oral sex on R.W.

Initially, R.W. was “scared to tell” his mother or authorities about Defendant's conduct, but he disclosed the abuse to his mother in 2019 when R.W. was “18 or 19 years old.” R.W.'s mother immediately reported the disclosure to law enforcement officers, who interviewed R.W. on 14 April 2019.

**B. S.M.'s Testimony**

S.M. was born in October 2007. According to S.M., when he was ten years old, S.M.'s parents invited family and friends—including Defendant—over for a party. In the evening after the party, S.M.'s parents left the home and Defendant stayed to babysit. After S.M. went to sleep, Defendant entered S.M.'s bedroom and asked

whether Defendant could sleep in the room with S.M. S.M. replied that he did not think that was “a good idea” because S.M. did not want Defendant in his personal space. Defendant walked away and S.M. fell asleep.

Later, S.M. woke up to use the bathroom, and when he came back, Defendant “was in [S.M.’s] room.” Defendant asked S.M. to “give him a massage.” S.M. began to give Defendant a back massage, but Defendant “started . . . to pull down . . . [Defendant’s] shorts” and “told [S.M.], let’s go lower . . . to [Defendant’s] behind[.]” When S.M. declined, Defendant suggested he could massage S.M. instead. S.M. declined again, but Defendant “grabbed . . . lotion” and “pushed [S.M.] . . . forward on [his] chest.” S.M. “tr[ie]d to escape,” but Defendant held him so that he could not move and “pulled down [S.M.’s] pants.” Defendant forced S.M. into an “arched position[.]” bent over on S.M.’s knees, and “[a]ll of a sudden [S.M.] felt” a “sharp” pain in his “butthole” from what he believed to be either Defendant’s finger or a fingernail. S.M. also said that he felt Defendant’s tongue touch his anus.

S.M. escaped from Defendant’s grip and ran into the bathroom. Several minutes later, S.M. emerged and saw that Defendant “was still in [S.M.’s] bed. It was like [Defendant] was waiting for me to get out [of the bathroom].” S.M. told Defendant: “I don’t do stuff like this[.]” Defendant told S.M. that “if [he] wouldn’t tell, [Defendant] would cook some chicken” for S.M. and eventually “walked away.” S.M.’s parents returned home shortly thereafter.

The next morning, after Defendant left, S.M. told his parents what happened. S.M. was taken by ambulance to the hospital that day, and on 6 July 2018, he was interviewed at Pat’s Place Child Advocacy Center.<sup>3</sup>

**C. Testimony Regarding Uncharged Abusive Acts**

The State also sought to introduce testimony about a prior incident of inappropriate behavior by Defendant toward another boy, C.J., as evidence of Defendant’s intent and modus operandi pursuant to Evidentiary Rule 404(b). However, due to C.J.’s reluctance to testify in court, the State moved for the admission of C.J.’s grandmother’s testimony concerning C.J.’s statements to her regarding the incident.

On voir dire, C.J.’s grandmother testified that approximately six years prior to trial, when C.J. lived with her, Defendant—her first cousin—would visit for social gatherings. She testified that one evening while Defendant was over, she was awakened when C.J. rushed into her room and told her that Defendant had just “pulled [his] pants down and smelled [his] butt.” C.J.’s grandmother “r[a]n in the front room, but [Defendant] was already gone.”

Following voir dire, Defendant objected to this testimony as inadmissible under Rules 403 and 404(b). The trial court determined that C.J.’s grandmother’s

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<sup>3</sup> Pat’s Place Child Advocacy Center is “a center providing services to children and their families when there are concerns that a child may be a victim of maltreatment or may have witnessed violence.” *State v. Shore*, 258 N.C. App. 660, 663, 814 S.E.2d 464, 467 (2018).

testimony was “admissible under [Rule] 404(b),” but nevertheless excluded the evidence as inadmissible as unduly prejudicial under Rule 403, concluding that “the probative value [of the testimony was] substantially outweighed by the prejudice” of Defendant’s inability to cross-examine C.J. The trial court added that it would admit C.J.’s grandmother’s testimony if C.J. were able to testify.

The following day, C.J. appeared to testify for the State. Defendant renewed his objections to any testimony regarding the incident. On voir dire, C.J. testified as follows:

[THE STATE:] Can you remember something inappropriate being done to you by [Defendant]?

[C.J.:] Yes.

Q. When do you remember, or if you don’t remember, that’s okay, but do you remember when that happened?

A. Four-and-a-half years ago.

. . . .

Q. So four-and-a-half years ago, around the age when you’re 13 or 14, what happened between you and [Defendant]?

A. I was playing my game one night and he came in [my grandmother’s living] room.

. . . .

Q. What happened when he came in the room with you when you were playing your videogame?

A. He distracted me.

Q. What do you mean by that?

A. He tried to take me against the wall.

....

Q. Was that while you were playing your videogame or after playing your videogame?

A. After.

Q. After you stopped playing your videogame but before he tried to take you—he, [Defendant]—tried to take you to the wall, what happened . . . ?

A. He tried to strip my clothes. . . . He tried to pull my pants down.

....

Q. Okay. Did he pull the clothes down on you?

A. Halfway. . . . Below my waist.

....

Q. After [Defendant] pulled your pants down to around your mid-thigh level, what happened after that?

A. He tried to touch me in my areas.

Q. What do you mean by that?

A. In private areas.

Q. Now, when you say “private areas,” do you mean your front private or your back private or something different?

A. Back.

....

Q. Do you remember, [C.J.], after this happened, after [D]efendant lightly grasped your butt cheek, what did you

do next?

A. I left in a hurry.

. . . .

Q. [D]o you remember if [Defendant], when he was lightly grasping your butt cheek and doing that to you, do you remember if he said anything to you?

A. He told me not to tell anyone.

On 1 February 2023, the trial court entered a written order with findings and conclusions regarding the Rule 404(b) evidence. The trial court concluded “that the evidence proffered by [C.J.] and [C.J.’s grandmother] is admissible for the purposes of [Rule 404(b)] to show [Defendant’s] motive, plan, to prove the identity of the perpetrator, and to show [Defendant] acted within a common scheme or plan.” The trial court specifically noted that “[a]ll three victims . . . were young African American boys when they reported being abused by [Defendant]”; that “[a]ll three victims report[ed] that these incidents happened at night time”; that “[a]ll three victims report[ed] that [Defendant] pulled down their clothing to assault their buttocks”; that in “all three cases, Defendant was an invited guest in the home where the victim was sleeping, and Defendant was at the home to socialize with a female caretaker of the victim”; and that “[e]ach case involved the victim being by themselves and Defendant entering the room where they were [lying] down.”

#### **D. Verdict and Sentencing**



On 2 February 2023, the jury returned verdicts finding Defendant guilty of four charges arising from his abuse of R.W.: three counts of sexual offense with a child by an adult (19 CRS 226925–26) and one count of attempted sexual offense with a child by an adult (19 CRS 226925). The jury also found Defendant guilty of one charge arising from his abuse of S.M.: one count of statutory sexual offense with a child by an adult (19 CRS 226921).

On that same day, the trial court entered judgment in 19 CRS 226921—the conviction involving S.M.—and sentenced Defendant to a term of 300 to 420 months in the custody of the North Carolina Department of Adult Correction. The trial court consolidated the two counts of first-degree sexual offense and one count of attempted first-degree sexual offense against R.W. in 19 CRS 226925 and imposed a consecutive term of 300 to 420 months. Finally, the trial court sentenced Defendant to a term of 300 to 420 months for the first-degree sexual offense conviction in 19 CRS 226926 against R.W., setting that sentence to run concurrently.

Defendant gave oral notice of appeal.

## **II. DISCUSSION**

Defendant raises three arguments on appeal. First, Defendant argues that the trial court erred in admitting testimony of alleged uncharged acts under Rules 404(b) and 403 of the North Carolina Rules of Evidence. Next, Defendant contends that the trial court committed plain error when it allowed noncorroborative testimony from a witness in connection with the uncharged acts, or alternatively, that he received

ineffective assistance of counsel when his counsel failed to object to the testimony on that basis. Finally, Defendant challenges the sentences entered on the judgments involving R.W., contending that “the State did not offer sufficient evidence of when the offenses occurred, and the jury made no findings as to when they occurred.”

### **A. Evidence of Uncharged Acts**

Defendant first challenges the trial court’s admission of evidence concerning an uncharged incident between Defendant and another male minor, citing Rules of Evidence 404(b) and 403.

#### **1. Standard of Review**

Rules of Evidence 404(b) and 403 have different standards of review that require “distinct inquiries.” *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). In considering a Rule 404(b) ruling, “we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).” *Id.* In contrast, this Court reviews a defendant’s challenge under Rule 403 for an abuse of discretion. *Id.* Under that standard, “the trial court’s ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Thaggard*, 168 N.C. App. 263, 269, 608 S.E.2d 774, 779 (2005) (cleaned up).

#### **2. Analysis**

“Evidence of other crimes, wrongs, or acts is not admissible to prove the

character of a person in order to show that he acted in conformity therewith.” N.C.

Gen. Stat. § 8C-1, Rule 404(b) (2023). However, our courts:

have characterized Rule 404(b) as a general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

*State v. Gray*, 210 N.C. App. 493, 496, 709 S.E.2d 477, 481 (2011) (cleaned up), *disc. review denied*, 365 N.C. 555, 723 S.E.2d 540 (2012).

Thus, specific instances of other crimes, wrongs, or acts are relevant and admissible to show “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.” N.C. Gen. Stat. § 8C-1, Rule 404(b).

While this “rule of inclusion . . . is constrained by the requirements of similarity and temporal proximity[,]” our appellate courts have recognized that “remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident” and “generally affects only the weight to be given such evidence, not its admissibility.” *Gray*, 210 N.C. App. at 498–99, 709 S.E.2d at 482 (citations omitted). Moreover, our Supreme Court has “permitted testimony as to prior acts of sexual misconduct which occurred more than seven years earlier” than the charged offenses. *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996);

*see, e.g., State v. Penland*, 343 N.C. 634, 654–55, 472 S.E.2d 734, 745 (1996), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997).

“[A]s to the ‘similarity’ component, evidence of a prior bad act must constitute substantial evidence tending to support a reasonable finding by the jury that the defendant committed a *similar* act.” *Gray*, 210 N.C. App. at 499, 709 S.E.2d at 482 (cleaned up). “[A] prior act or crime is ‘similar’ if there are some unusual facts present in both crimes.” *Id.* (cleaned up); *accord State v. Pabon*, 380 N.C. 241, 259, 867 S.E.2d 632, 644 (2022). However, the facts need not “rise to the level of the unique and bizarre.” *Pabon*, 380 N.C. at 259, 867 S.E.2d at 644 (citation omitted).

After determining that evidence is admissible under Rule 404(b), “the trial court must balance the danger of undue prejudice against the probative value of the evidence, pursuant to Rule 403.” *State v. Carpenter*, 361 N.C. 382, 389, 646 S.E.2d 105, 110 (2007). Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403.

Importantly, our courts have “been liberal in allowing evidence of similar offenses in trials on sexual crime charges.” *Frazier*, 344 N.C. at 615, 476 S.E.2d at 300. “The test for determining whether such evidence is admissible is whether the incidents establishing the common plan or scheme [under Rule 404(b)] are sufficiently

similar and not so remote in time as to be more probative than prejudicial under the balancing test of . . . Rule 403.” *Id.* at 615, 476 S.E.2d at 299.

Defendant contends that the behavior about which C.J. testified, “while odd and not acceptable, is not so similar [to the charged offenses] that it suggests the same person also committed” or attempted a sexual offense because “[w]hat C.J. described did not include any anal penetration or any attempt at tongue-to-anus contact.” We disagree.

In this case, C.J.’s testimony “tended to prove that [D]efendant’s prior acts of sexual abuse occurred continuously” over a period of years when Defendant had access to young boys through friends and family members “in a strikingly similar pattern.” *Id.* at 616, 476 S.E.2d at 300. As the trial court found, all three victims were male minors similar in age at the time of the abuse; Defendant was either related to or a close family friend of each victim; Defendant was babysitting or alone with each victim adjacent to social gatherings; and Defendant’s abuse focused on the buttocks or anus of each victim.

“[T]his evidence presents a classic example of a common plan or scheme.” *Id.* Based on the similarity of the allegations and the supported findings by the trial court, we conclude that the trial court admitted C.J.’s testimony regarding Defendant’s uncharged other acts for a proper purpose under Rule 404(b): to show a common plan or scheme. *See Pabon*, 380 N.C. at 259, 867 S.E.2d at 644; *Gray*, 210

N.C. App. at 499, 709 S.E.2d at 482 (“[A] prior act or crime is ‘similar’ if there are some unusual facts present in both crimes.” (cleaned up)).

Neither did the trial court abuse its discretion in failing to exclude the evidence concerning C.J. under Rule 403. In addition to the above, the trial court previously acknowledged that the admission of testimony concerning other acts against C.J. would be unduly prejudicial to Defendant under Rule 403 if C.J. were unavailable to testify. C.J. then made himself available to testify. In light of the trial court’s earlier ruling, it is clear that “the trial court was aware of the potential danger of unfair prejudice to [D]efendant” that would result from C.J.’s testimony. *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160 (citation omitted). The trial court did not abuse its discretion in admitting this evidence under Rule 403.

In sum, Defendant has failed to demonstrate that the trial court erred in admitting the challenged testimony concerning the uncharged prior acts by Defendant against C.J. Defendant’s arguments are overruled.

## **B. Corroborative Testimony**

Next, Defendant argues that the trial court “plainly erred in allowing testimony” by C.J.’s grandmother to corroborate C.J.’s testimony. Alternatively, Defendant argues that he received ineffective assistance of counsel due to the failure of his counsel to object to the admission of this testimony at trial, and further alleges cumulative error at trial.

### **1. Plain Error**

Before the jury, C.J.’s grandmother testified:

[C.J.] was playing his video game, and I was in the [bed]room laying down and fell asleep. C.J. came in and was saying, “Grandma, grandma grandma,” and I jumped up and I’m like, “What? What? What is it?” And he’s like, “[Defendant] in the front room pulled my pants down and smelled my butt.”

Defendant complains that C.J. did not state during his trial testimony that Defendant “smelled [his] butt[,]” as C.J.’s grandmother recounted. Therefore, according to Defendant, “[b]ecause the testimony by C.J.’s grandmother did not make C.J.’s testimony more credible (other than enhancing jurors’ sympathy), the testimony by C.J.’s grandmother was not corroborative” and “should not have been admitted as such.”

As Defendant notes, while he objected at trial to C.J.’s grandmother’s testimony under Rule 404(b), he did not object or “argue that the evidence did not corroborate . . . the key detail of [C.J.’s] testimony.” Instead, Defendant contends on appeal that the trial court’s admission of C.J.’s grandmother’s “testimony to corroborate [C.J.’s] testimony, where the testimony failed to corroborate the key point of [C.J.’s] testimony[,]” amounted to plain error.

A defendant can prevail on a claim of plain error “only by showing that a fundamental error occurred at trial.” *State v. Worley*, 268 N.C. App. 300, 303–04, 836 S.E.2d 278, 282 (2019) (cleaned up), *disc. review denied*, 375 N.C. 287, 846 S.E.2d 285 (2020). “To show that an error was fundamental, a defendant must establish

prejudice . . . .” *Id.* at 304, 836 S.E.2d at 282 (cleaned up). To establish prejudice, the defendant must demonstrate that, “after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (cleaned up). That is, the defendant must demonstrate “that the jury probably would have returned a different verdict had the error not occurred.” *State v. Lawrence*, 365 N.C. 506, 507, 723 S.E.2d 326, 327 (2012). “[I]f a defendant cannot show [that] the alleged error prejudiced him, he cannot meet the plain error standard.” *State v. Jones*, 280 N.C. App. 241, 257, 866 S.E.2d 509, 521 (2021), *disc. review denied*, 380 N.C. 686, 868 S.E.2d 861 (2022).

We conclude that Defendant has failed to demonstrate prejudice from the admission of C.J.’s grandmother’s testimony. Even without the challenged testimony, the State presented ample evidence supporting the charged offenses in this case, including the detailed testimony of both victims of the charged offenses, which demonstrated a years-long pattern of sexual abuse by Defendant of young boys, focused on their anal region. Considering the overwhelming evidence of the charged offenses, we cannot conclude that the jury likely would have returned a different verdict had the trial court declined to admit C.J.’s grandmother’s testimony. *See Lawrence*, 365 N.C. at 507, 723 S.E.2d at 327. Absent a showing of prejudice, Defendant cannot establish plain error. *Jones*, 280 N.C. App. at 257, 866 S.E.2d at 521. This argument is overruled.

## ***2. Ineffective Assistance of Counsel***



Defendant alternatively argues that “it was ineffective assistance of counsel for counsel not to move to strike the testimony” by C.J.’s grandmother as noncorroborative. We disagree.

To establish a claim of ineffective assistance of counsel, the defendant “must first show that his defense counsel’s performance was deficient and, second, that counsel’s deficient performance prejudiced his defense.” *State v. Crawford*, 225 N.C. App. 426, 429, 737 S.E.2d 768, 770 (citation omitted), *disc. review denied*, 366 N.C. 590, 743 S.E.2d 196 (2013). “Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004) (cleaned up), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (citation omitted). Where a defendant “can show no prejudice, [his] claim for ineffective assistance of counsel must fail.” *Crawford*, 225 N.C. App. at 430, 737 S.E.2d at 770.

For the reasons discussed above, Defendant has failed to demonstrate “a probability sufficient to undermine confidence in the outcome” of his trial. *Thompson*, 359 N.C. at 115, 604 S.E.2d at 876 (citation omitted). Because Defendant cannot establish prejudice, his claim of ineffective assistance of counsel likewise fails. *See Crawford*, 225 N.C. App. at 430, 737 S.E.2d at 770.

### **3. Cumulative Error**

Finally, Defendant alleges cumulative error, should this Court determine that “this error or any of the others are not sufficiently prejudicial by themselves for a new trial[.]”

“Cumulative errors lead to reversal when taken as a whole they deprived the defendant of his due process right to a fair trial free from prejudicial error.” *State v. Thomas*, 281 N.C. App. 159, 188, 867 S.E.2d 377, 398 (2021) (citation omitted), *disc. review denied*, 382 N.C. 717, 878 S.E.2d 808 (2022). Here, as discussed above, the admission of C.J.’s testimony was not error, and moreover, in light of the overwhelming evidence presented against Defendant, any other alleged error “had, at most, a miniscule impact on the trial[.]” *Id.* Accordingly, Defendant’s claim of cumulative error fails. *See id.*

### **C. Sentencing**

Lastly, Defendant argues that, on the convictions involving R.W., the trial court erred in imposing mandatory minimum sentences. The State concedes error, and we agree.

Regarding his abuse of R.W., Defendant was convicted of and sentenced for three counts of sexual offense with a child by an adult and one count of the attempted offense. The pertinent indictments charged these offenses as violations of N.C. Gen.

Stat. § 14-27.4A,<sup>4</sup> and alleged conduct by Defendant occurring between “the 4th day of October, 2007 and the 3rd day of October, 2009[.]” That statute classified the offense a Class B1 felony for sentencing. N.C. Gen. Stat. § 14-27.4A(b) (2009).<sup>5</sup>

Our General Assembly enacted N.C. Gen. Stat. § 14-27.4A with an effective date of 1 December 2008, and provided that it would apply to offenses committed on or after that date. *See* S.L. 2008-117, §§ 2, 22 2008 N.C. Sess. Laws 426, 427, 438. Prior to 1 December 2008, Defendant’s alleged conduct most closely fell within the offense of first-degree sexual offense: the act of “engaging in a sexual act . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]” N.C. Gen. Stat. § 14-27.4(a)(1) (2007). That offense was also a Class B1 felony.

Although both sexual offense with a child by an adult under § 14-27.4A(a) and first-degree sexual offense under § 14-27.4(a)(1) were classified as Class B1 felonies, § 14-27.4A(a) imposed a mandatory-minimum sentence of no “less than 300 months” that was not applicable under N.C. Gen. Stat. § 14-27.4. *Compare id.* § 14-27.4A (2009), *with id.* § 14-27.4 (2007).

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<sup>4</sup> Section 14-27.4A provided: “A person is guilty of sexual offense with a child if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years.” N.C. Gen. Stat. § 14-27.4A(a) (2009). Although it has since been recodified at N.C. Gen. Stat. § 14-27.28, this language remained substantially unchanged. *See* S.L. 2015-181, § 10.(a)–(b), 2015 N.C. Sess. Laws 460, 462.

<sup>5</sup> For a prior record level I offender, such as Defendant, the presumptive range of minimum durations for sentences permitted for a Class B1 felony under our Structured Sentencing Act was 192–240 months prior to 1 December 2008. *See* N.C. Gen. Stat. § 15A-1340.17 (2007).

For the convictions arising from his abuse of R.W., the trial court sentenced Defendant to mandatory-minimum, 300-month sentences. As Defendant contends—and the State concedes—this was error. The State’s evidence did not establish the exact dates of the offenses, and the verdict sheets did not require the jury to determine “whether the offenses occurred before or after 1 December 2008.” Where sentencing provisions have changed, “absent a determination by the jury by special verdict form as to the specific date of or date range of offense sufficient to determine which sentencing regime is applicable,” the defendant “must be sentenced under whichever statutory classification is lower.” *State v. Demick*, 288 N.C. App. 415, 425, 886 S.E.2d 602, 611 (2023).

Defendant and the State agree that Defendant must be resentenced under the Structured Sentencing Act, as it was in effect prior to 1 December 2008. “Consistent with [Defendant’s] argument, the State’s concessions, and the binding statutory and caselaw, we order just such relief.” *Id.* at 424, 886 S.E.2d at 610. Accordingly, the judgments in 19 CRS 226925 and 19 CRS 226926 are vacated and remanded for resentencing consistent with this opinion.

### **III. CONCLUSION**

For the reasons stated herein, we conclude that Defendant received a fair trial, free from prejudicial error. We vacate and remand for resentencing in 19 CRS 226925 and 19 CRS 226926, consistent with this opinion.

STATE V. CARMICHAEL

*Opinion of the Court*

NO ERROR IN PART; VACATED IN PART; AND REMANDED FOR  
RESENTENCING IN PART.

Judges CARPENTER and WOOD concur.

Report per Rule 30(e).