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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-151

Filed 19 November 2024

Transylvania County, Nos. 21CRS105-12 21CRS118-22

STATE OF NORTH CAROLINA

v.

JOHNATHON JESSI MCKINNEY

Appeal by defendant from judgments entered 25 July 2023 by Judge George Cooper Bell in Transylvania County Superior Court. Heard in the Court of Appeals 24 September 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Colleen M. Crowley, for the State.*

*Law Office of Mark L. Hayes, by Mark L. Hayes, for the defendant-appellant.*

TYSON, Judge.

Johnathon Jessi McKinney (“Defendant”) appeals from judgments entered after a jury convicted him of six counts of statutory sex offense with a child, four counts of indecent liberties with a child, felony child abuse, statutory rape of a child, and incest. We discern no error.

## **I. Background**

Defendant and Brittany McKinney were married. Defendant and McKinney are the parents of two children: Beth and Ray. Defendant is also step-father to Cindy, whose natural parents are McKinney and John Henson. (Pseudonyms are used to protect the identity of minors.).

In late 2020, twelve-year-old Cindy was living with Henson. McKinney discovered “adult conversations” between Cindy and Cindy’s “boyfriend.” McKinney and Henson discussed taking her to a “woman’s doctor” who would “check [Cindy] down there.” Henson reported Cindy began to cry, told Henson she was not a virgin, and asserted Defendant had engaged in multiple sexual relations with her.

Defendant was indicted for sexual crimes involving Beth, Ray, and Cindy. Defendant was indicted for four counts of indecent liberties with a child, felony child abuse, six counts of statutory sex offense with a child by an adult, incest, and statutory rape of a child by an adult.

Cindy was twelve years old and living with McKinney and Defendant at a home on Homer McCall Road in North Carolina when Cindy alleged she had been first assaulted by Defendant. Cindy and Beth were on the bed coloring and watching a video. Cindy testified she fell asleep and awoke to find Defendant in bed with her. Cindy alleged Defendant inserted his penis inside her vagina.

Cindy further alleged she was asleep in another room at the same residence on the bottom bunk of a bunk bed with another child. Defendant picked up the younger

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child and moved her. Cindy testified she awoke to Defendant on top of her, with his hand on her chest holding her down, and again inserted his penis into her vagina. Cindy alleged Defendant stopped when the younger child woke up. Cindy further testified to another rape, which allegedly occurred in the Summer of 2020, in the State of South Carolina. Defendant was not charged for this allegation because it had allegedly occurred out of state. Cindy further alleged Defendant grabbed and touched her genital areas both over and underneath her clothing on more than five occasions.

Beth, born in October 2007, testified Defendant had inserted his penis inside of her mouth, when she was between the ages of six and eight. Beth also testified Defendant had touched her from behind and penetrated her vagina with either his finger or penis. Beth admitted she did not know if it was Defendant's finger or penis. Beth was initially interviewed by a DSS social worker in January 2015, but had denied any abuse. Beth was also interviewed a year later at a child advocacy center, but again denied any abuse. Beth then alleged Defendant had abused her during a February 2021 interview with a Detective.

Defendant had pleaded guilty to two counts of assault on a female in 2017. The victims, Amy and Beatrice Sisk (pseudonyms used to protect the identity of victims), were subpoenaed to testify at Defendant's trial. The State was unable to serve subpoenas on the Sisk sisters. The trial court ruled both Sisk females were unavailable as witnesses.

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The State offered and the trial court admitted over Defendant's objection under Rules 404(b), 803(4), 803(24), and 804(b)(5) two videos where each Sisk sister gave accounts to a social worker of Defendant touching them in a sexual manner. Defendant's counsel failed to timely object when the Sisk videos were actually admitted into evidence before the jury. The videos were created as child medical examinations at Mission Children's Specialists when the Sisk sisters were ten and thirteen-years old respectively.

The jury acquitted Defendant of charges of sexual exploitation, two counts of indecent liberties with a minor, and of statutory rape. Defendant was convicted of six counts of statutory sex offense with a child, four counts of indecent liberties with a child, felony child abuse, statutory rape of a child, and incest on 25 July 2023. Defendant's convictions were consolidated into two judgments, wherein he was sentenced to consecutive active sentences of 300 to 420 months as a prior record level II offender. Defendant appeals.

## **II. Jurisdiction**

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

## **III. Issue**

Defendant argues the trial court prejudicially erred by admitting the Sisk interview videos.

## **IV. Sisk Videos**

Defendant argues the trial court committed plain error by admitting the Sisk interview videos. The State offered and the trial court allowed over Defendant's objection, two videos where each Sisk sister gave accounts to a social worker accusing Defendant of touching them in a sexual manner under Rules 404(b), 803(4), 803(24), and 804(b)(5). Defendant's counsel did not renew a timely objection when the Sisk videos were actually admitted into evidence before the jury. Defendant did not preserve his objections. *See State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000) (A pre-trial motion is "not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial.") (citation omitted), *cert denied*, 532 U.S. 931, 149 L. Ed. 2d. 305 (2001).

Defendant concedes he did not preserve his evidentiary arguments. He seeks plain error review of these arguments. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . 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.").

### **A. Standard of Review**

Our Supreme Court has held plain error:

is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error,

something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings[.]

*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations, internal quotation marks, and brackets omitted).

“Unpreserved error in criminal cases . . . is reviewed only for plain error.” *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). In order for a defendant to prove plain error, he must show a fundamental error occurred and establish prejudice. *See Id.* at 518, 723 S.E.2d at 334.

Defendant bears the burden of showing that the unpreserved error “rises to the level of plain error.” *Id.* at 516, 723 S.E.2d at 333. Defendant must also show prejudice by “the error ha[ving] a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (citations and quotation marks omitted).

#### **B. 803(4)**

Defendant argues the trial court erred in admitting the Sisk sisters’ videos under Rule 803(4). Rule 803 provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(4) Statements for Purposes of Medical Diagnosis or

Treatment. – Statements made for purposes of medical diagnosis or treatment and describing medical history, or past symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C. Gen. Stat. § 8C-1, Rule 803(4) (2023).

“The conceptual foundation of Rule 803(4) is the rationale that statements made for purposes of medical diagnosis or treatment are inherently trustworthy and reliable because of the patient’s strong motivation to be truthful.” *State v. Corbett*, 376 N.C. 799, 811-12, 855 S.E.2d 228, 239 (2021) (citation omitted). The Rule 803(4) exception is based upon the trustworthiness of a declarant who “is motivated to describe accurately his or her symptoms and their source” to obtain a correct diagnosis and proper treatment. *State v. Hinnant*, 351 N.C. 277, 285, 523 S.E.2d 663, 668 (2000) (citation omitted).

In *Hinnant*, our Supreme Court established a two-part test for admissibility of hearsay evidence under Rule 803(4):

First, the trial court must determine that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment. The trial court may consider all objective circumstances of record in determining whether the declarant possessed the requisite intent. Second, the trial court must determine that the declarant’s statements were reasonably pertinent to medical diagnosis or treatment.

*Id.* at 289, 523 S.E.2d at 670-71.

To satisfy the first prong of the *Hinnant* test, the proponent of the evidence

must “demonstrate[e] that the declarant made the statements understanding that they would lead to medical diagnosis or treatment.” *Id.* at 287, 523 S.E.2d at 669. Our Supreme Court found the following three factors in *Hinnant* to be most probative in determining the reliability of a child’s statement: “(1) whether some adult explained to the child the need for treatment and the importance of truthfulness; (2) with whom, and under what circumstances, the declarant was speaking; and, (3) the surrounding circumstances, including the setting of the interview and the nature of the questioning.” *Corbett*, 376 N.C. at 812-13, 855 S.E.2d at 239 (internal quotation marks omitted).

“The second inquiry under Rule 803(4) is whether the statements of the declarant are reasonably pertinent to diagnosis or treatment.” *Hinnant*, 351 N.C. at 288, 523 S.E.2d at 670 (citations omitted). The hearsay exception does not apply where the declarant “was interviewed solely for purposes of trial preparation.” *Id.* at 289, 523 S.E.2d at 670. However, statements can be properly admitted under Rule 803(4) for a “dual” purpose “of medical intervention” and “future prosecution.” *State v. Isenberg*, 148 N.C. App. 29, 38, 557 S.E.2d 568, 574 (2001). The “victim’s identification of the defendant as [the] perpetrator” is “pertinent to continued treatment of the possible psychological and emotional problems resulting from the rape[.]” *State v. Aguallo*, 318 N.C. 590, 597, 350 S.E.2d 76, 81 (1986).

Here, the videotaped interview was conducted at Mission Children’s Specialists following the alleged assault on both sisters. The interview included



conducting a forensic interview and a medical exam for a child-victim diagnosis. Prior to the interview with both girls, the interviewer had explained the importance of being truthful in the interview. The interviewer testified both girls were interviewed and were given a medical exam afterward. During the interview, the two girls told a social worker how Defendant had allegedly touched them in a sexual manner. The trial court complied with the requirements of *Hinnant* and did not err in admitting the Sisk videos and did not commit plain error in admitting them without objection. *Id.*; *Hinnant*, 351 N.C. at 288, 523 S.E.2d at 670. Defendant's argument is overruled. In light of this decision, we need not review Defendant's remaining hearsay arguments.

### **C. Confrontation Clause**

Defendant asserts the admission of the Sick videos violated his rights under the Sixth Amendment's Confrontation Clause. U.S. Const. amend. VI. Defendant did not raise a constitutional objection to the submission of the videos at trial. "[A]ppellate courts will not ordinarily pass on a constitutional question unless the question was raised in and passed upon by the trial court." *State v. Muncy*, 79 N.C. App. 356, 364, 339 S.E.2d 466, 471 (1986) (citation omitted).

Our Supreme Court and this Court have permitted appellate arguments which were not made before the trial court that the admission of evidence was in violation of the Confrontation Clause rights to be reviewed under a plain error analysis. *See* U.S. Const. amend. VI.; *State v. Lemons*, 352 N.C. 87, 96, 530 S.E.2d 542, 547-48

(2000); *State v. Hough*, 202 N.C. App. 674, 678, 690 S.E.2d 285, 288 (2010). However, “[w]hen reviewing a constitutional issue under the plain error standard of review, the State is not required to prove that the error was harmless beyond a reasonable doubt.” *Hough*, 202 N.C. App. at 678, 690 S.E.2d at 288 (citation omitted).

The Supreme Court of the United States has held: “The Sixth Amendment’s Confrontation Clause provides that, in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. We have held that this bedrock procedural guarantee applies to both federal and state prosecutions.” *Crawford v. Washington*, 541 U.S. 36, 42, 158 L. Ed. 2d 177, 187 (2004) (citations, quotation marks, and brackets omitted).

Justice Scalia cited a very early decision from the Supreme Court of North Carolina in support of the original meaning and understanding of the right of confrontation:

Early state decisions shed light upon the original understanding of the common-law right. *State v. Webb*, 2 N.C. 103 (1794) (per curiam), decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: “[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.” *Id.*, at 104.

*Crawford*, 541 U.S. at 49, 158 L. Ed. 2d at 191.

Justice Scalia also reasoned:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability. . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee.

*Id.* at 42, 158 L.Ed.2d at 187 (internal quotation marks omitted).

Our Supreme Court more recently held the Confrontation Clause within the Sixth Amendment to the Constitution of the United States, and applicable to the states, bars admission of direct testimonial evidence, “unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant.” *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009). *See* U.S. Const. amend. VI.

This Court has held:

[T]he trial court must *first* make a determination of whether the relevant evidence is testimonial in nature, *if* the trial court determines that the evidence is testimonial, *then* it must determine whether the declarant witness is unavailable for trial; *only* upon finding the affirmative for the first two inquiries must the trial court make a determination concerning the defendant's prior opportunity to cross-examine the declarant witness.

*State v. Clonts*, 254 N.C. App. 95, 126, 802 S.E.2d 531, 552 (2017).

The Supreme Court of the United States examined the distinction between testimonial and non-testimonial statements, holding:

Statements are nontestimonial when made in the course of

police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Davis v. Washington*, 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006).

This Court held a young child's statements to medical personnel regarding alleged sexual abuse were not testimonial and the defendant's rights under the Confrontation Clause were not violated when the three-year-old child was deemed unavailable to testify. *See State v. Brigman*, 178 N.C. App. 78, 91, 632 S.E.2d 498, 506-07 (2006) (Three-year-old child's statement admitted under N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) were "not testimonial, and defendant's right to confrontation was not violated.").

This Court later applied the ruling in *Brigman*, and held in a similar situation involving an older, fifteen-year-old child that a medical interview "does not lead to the assumption that the victim might reasonably be expected to know that his statements might be later used at trial." *State v. McLaughlin*, 246 N.C. App. 306, 320-21, 786 S.E.2d 269, 81 (2016) (citation and quotation marks omitted).

Here, the questions in the interview reflected the primary purpose of attending to the Sick sisters' physical and mental health. They were told they were there for an interview to be followed by physical exam. The statements were made to a health

professional, not law enforcement. The primary purpose of the statements were not for prosecution. *See Crawford*, 541 U.S. at 74, 158 L. Ed. 2d at 206. Defendant's argument is overruled.

## **V. Ineffective Assistance of Counsel**

Defendant argues he received ineffective assistance of counsel for not preserving his evidentiary and Confrontation Clause arguments in violation of his Sixth Amendment right to counsel. U.S. Const. amend. VI.

In order to show ineffective assistance of counsel, a defendant must satisfy the two-pronged test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). The *Strickland* test for ineffective assistance of counsel has also been adopted by the Supreme Court of North Carolina for state constitutional purposes. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985).

To show ineffective assistance, Defendant "must show that his counsel's conduct fell below an objective standard of reasonableness." *Id.* at 561-62, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693.)

Pursuant to *Strickland*,

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must 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. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693; accord *Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248.

When reviewing an ineffective assistance of counsel claim, “this Court engages in a presumption that trial counsel’s representation is within the boundaries of acceptable professional conduct.” *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted). Our Supreme Court stated it “ordinarily do[es] not consider it to be the function of an appellate court to second-guess counsel’s tactical decisions[.]” *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986).

As held above, the trial court did not err in the admission of the Sisk sisters’ videos or violate Defendant’s right to confront witnesses against him. Defendant cannot meet the first prong of *Strickland*. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Defendant’s argument is overruled.

## **VI. Conclusion**

The trial court correctly concluded the Sisk sisters’ videos were admissible under Rule 803(4), the medical records exception. N.C. Gen. Stat. § 8C-1, Rule 803(4). The trial court’s admission of the Sick sisters’ videos did not violate Defendant’s Sixth Amendment right to confrontation. U.S. Const. amend. VI.

Defendant’s failure to preserve the above arguments did not constitute

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ineffective assistance of counsel. Defendant received a fair trial, free from prejudicial errors he preserved or argued. We discern no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges COLLINS and GRIFFIN concur.

Report per Rule 30(e).