

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-588

Filed 21 May 2025

Onslow County, Nos. 19CRS052653 19CRS055890

STATE OF NORTH CAROLINA

v.

CHRISTOPHER DAVID CLOTEZ

Appeal by defendant from judgment entered 16 November 2023 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 25 February 2025.

*Attorney General Jeff Jackson, by Special Deputy Attorney General Orlando L. Rodriguez, for the State.*

*Mark L. Hayes for the defendant-appellant.*

TYSON, Judge.

Christopher David Clotez (“Defendant”) appeals from judgments entered upon a jury’s verdicts of guilty of statutory sex offense with a child, two counts of indecent liberties with a child, and first-degree sexual exploitation of a minor. We find no error.

**I. Background**

Kip, a twelve-year-old male minor, lived in Jacksonville with his parents and siblings in 2019. (pseudonyms used for the protection of minors). Shortly after the family moved to Jacksonville, Defendant, Kip's paternal uncle, who was born in 1980, began visiting the family. During these visits, Defendant would sleep on the floor in Kip's bedroom. Kip enjoyed spending time with Defendant because he did not have many friends in the area at that time.

Kip's brother told their father Kip was using his computer tablet to communicate with Defendant on 6 May 2019. Kip's father wondered what Kip and Defendant were talking about, took the tablet, opened the Marco Polo video messaging application, and reviewed it

The Marco Polo application does not prompt the videos to automatically play on the recipient's device. The recipient is notified by a small icon with the first initial of the sender's name. The recipient must click the icon for the video to display. The videos sent through Marco Polo are not permanently stored on devices or servers and can be deleted by either the sender or the recipient. After a video is sent it remains available on the accounts of the sender and recipient as long as the application remains connected to the internet.

Marco Polo retains data concerning every video sent within the application, including: to whom a video is sent, when a video is sent, and whether any videos have been deleted.

Kip's father clicked on one of the icons within the application. A video

appeared and displayed Defendant masturbating and saying: “I’m doing this wishing I was doing it with you.” Defendant admitted to sending the video, but asserted he had intended to send the video to someone else he was having a conversation with in the Marco Polo application at the same time.

Defendant testified he had met a man on the Bumble dating application, whose first name was extremely similar to Kip’s. Both Kip and the man were contacts in Defendant’s Marco Polo account. Defendant and the man had been exchanging sexual videos earlier in the day. Defendant produced screenshots of the man’s Bumble profile at trial. Defendant maintained both the man and Kip were represented by an icon with just the same first letter of their names.

Kip’s father took the tablet and turned it over to Jacksonville Police Lieutenant Ennio Giusti (“Lt. Giusti”). Lt. Giusti took possession of the tablet and initiated “airplane mode” to prevent the tablet from accessing the internet to prevent files from being deleted in the Marco Polo application.

Lt. Giusti opened the tablet and accessed the Marco Polo application. The first available video of Defendant and Kip’s conversation in the Marco Polo application showed Kip sitting on his bed with his penis exposed to the camera. Lt. Giusti also located the video, which Kip’s father had viewed the day before Defendant had recorded while masturbating. Lt. Giusti observed other videos of a sexual nature sent between Defendant and Kip.

Lt. Giusti wanted to preserve the videos, but was concerned about the sender

or the recipient's abilities to delete videos within the Marco Polo application. Lt. Giusti recorded all of the videos on the tablet within the Marco Polo application by placing a camera in front of the tablet and recording the tablet while playing the videos.

Lt. Giusti took the memory card from the camera, inserted it into his computer, uploaded the videos to the Department's server, and confirmed the recordings had captured what had displayed on and recorded from the tablet. Lt. Giusti created a DVD copy of the videos from the server. This DVD was later admitted into evidence as the State's Exhibit 3 and was published to the jury during Defendant's trial.

Lt. Giusti placed the tablet into an evidence bag. The tablet remained inaccessible for the next eleven months during the investigation. When investigators powered the tablet back on in anticipation of trial, all of the videos previously in the Marco Polo application were missing. Lt. Giusti testified this was "normal" when a device has been turned off for such a long period.

Lt. Giusti sent a search warrant to Marco Polo seeking copies of the videos. Marco Polo returned videos and a metadata spreadsheet of Defendant account detailing: when videos were sent, the account to which they were sent, and if the videos had been deleted. No user with the same name as the "Bumble" man with a name purportedly similar to Kip's name was shown to have communicated with Defendant on 6 May 2019. All videos from 6 May and a couple of days prior to 6 May from Defendant's Marco Polo account to Kip contained sexual content. All of

Defendant's videos from the same time period exchanged with others on Marco Polo did not contain sexual content.

Lt. Giusti was initially planning to travel to Virginia Beach, Virginia, to interview Defendant, but he discovered Defendant was employed as a counselor for troubled youth. Lt. Giusti contacted the Virginia Beach Police Department to arrest Defendant. The Virginia Beach Police Department searched Defendant's home and discovered a small dildo device.

Kip was interviewed at the Child Advocacy Center by Noemi Rivera on 8 May 2019. Kip did not allege any acts perpetuated by Defendant to Noemi during the interview. Kip was later interviewed by Jacksonville Police Detective Julia Parrish in August 2019. Kip alleged sexual abuse by Defendant. Lt. Giusti had not informed Kip of Virginia Beach police officers finding a dildo device at Defendant's residence. Kip used Play-Doh clay to create a "fake man's part[,] and demonstrated how it was put into his bottom." Kip also alleged Defendant had placed his hand on Kip's penis and showed him how to masturbate. Kip further alleged he had once helped Defendant masturbate.

Defendant was indicted on 5 November 2019 for statutory sex offense with a child, three counts of indecent liberties with a child, and first-degree sexual exploitation of a minor. He was convicted of all indicted charges, except the jury acquitted him of one count of indecent liberties with a child.

Defendant was sentenced as a prior record level I offender with zero prior

record level points in the presumptive range to an active term of 300 to 420 months for his statutory sex offense with a child conviction. Defendant's convictions for two counts of indecent liberties with a child and first-degree sexual exploitation of a minor were consolidated for judgment, and he was sentenced in the presumptive range to an active term of 73 to 148 months, all sentences to run concurrently. Defendant appeals.

## **II. Jurisdiction**

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

## **III. Issues**

Defendant argues the trial court erred by admitting State's Exhibit 3, by admitting expert testimony, and by failing to dismiss the sexual exploitation charge.

## **IV. The State's Exhibit 3**

Defendant argues the trial court erred by admitting State's Exhibit 3 in violation of the "best evidence rule." N.C. Gen. Stat. § 8C-1, Rule 1002 (2023).

The State asserts Defendant failed to preserve this argument for appeal. Defendant's counsel filed a pretrial motion *in limine* asserting violation of the "best evidence rule" to exclude the audio and video recordings, which became State's Exhibit 3. Defendant's motion *in limine* asserted: "What counsel has viewed with his client is not the original or [an] authenticate[d] duplicate an[d] is not admissible under Rule 1001." Defendant's arguments to exclude the evidence focused entirely

on Rule 1001. N.C. Gen. Stat. § 8C-1, Rule 1001 (2023).

Defendant also asserted an authentication issue with Exhibit 3 during the *voir dire* hearing. Defendant restated his objections to the admission of State's Exhibit 3 for the reasons previously raised. Defendant has not preserved his "best evidence" arguments under Rules 1001, 1002, 1003, and 1004. N.C. Gen. Stat. § 8C-1, Rules 1001-04 (2023). "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." N.C. R. App. P. 10(a)(1).

Presuming, without deciding, Defendant properly preserved this argument for appellate review, he is not entitled to relief. Under the North Carolina Rules of Evidence, "every [recording] sought to be admitted must be properly authenticated . . . and must satisfy the requirements of the 'best evidence rule' . . . or one of its exceptions." *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 276, 354 S.E.2d 767, 771 (1987) (citations omitted); *see also* N.C. Gen. Stat. § 8C-1, Rules 901, 1002-03 (2023). The "best evidence rule" states that "[t]o prove the contents of a writing . . . the original [recording] . . . is required, except as otherwise provided in these rules or by statute." N.C. Gen. Stat. § 8C-1, Rule 1002 (2023). Rule 1003 does not permit a duplicate if an issue with the authenticity of the original is raised or there are other fairness concerns. N.C. Gen. Stat. § 8C-1, Rule 1003 (2023). Defendant conceded he was the

person depicted in the videos contained in Exhibit 3.

Unlike in *State v. Moore*, where the police officer used his video camera on his cell phone to record a copy of the surveillance video, the State laid a proper foundation for the images chain of custody and admission, and Defendant conceded he was the individual speaking and depicted therein. *State v. Moore*, 254 N.C. App. 544, 565, 803 S.E.2d 196, 210 (2017). Defendant's argument is overruled.

### **V. Admission of Expert Testimony**

Defendant argues the trial court erred in admitting the expert testimony of Noemi Rivera, who conducted Kip's interview at the Child Advocacy Center. Defendant objected during *voir dire* and objected to the admission of her expert testimony pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993). Rivera had testified twice about what purported research had indicated about children and their alleged abuse in cases of accidental disclosure. Defendant then objected.

Our appellate rules provide:

In criminal cases, 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) (emphasis supplied).

"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[.]” N.C. R. App. P. 10(a)(1). “A motion *in limine* 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.” *State v. Anthony*, 271 N.C. App. 749, 752, 845 S.E.2d 452, 455 (2020) (internal quotations and citations omitted).

“Failure to object at trial waives appellate review, when evidence is tendered after counsel sought to exclude the evidence in a pre-trial motion to suppress or a motion *in limine*.” *Id.* (citation omitted). “A motion *in limine* will not preserve for appeal the issue of the admissibility of evidence if the defendant fails to further object to that evidence *at the time it is offered* at trial.” *State v. McClary*, 157 N.C. App. 70, 74, 577 S.E.2d 690, 692-93 (2003) (citations and internal quotation marks omitted).

“When the question does not indicate the inadmissibility of the answer, [the] defendant should move to strike as soon as the inadmissibility becomes known. Failure to so move constitutes a waiver.” *State v. Adcock*, 310 N.C. 1, 19, 310 S.E.2d 587, 598 (1984) (citation omitted). If a defendant does not move to strike an otherwise admissible answer, his objection is waived. *Id.*

Defendant does not argue the admission of this testimony constituted plain error. His brief did not “specifically and distinctly” allege the admission of evidence from the now-challenged [evidence] amounted to plain error, which was not preserved for appellate review. *See State v. Smith*, 269 N.C. App. 100, 105, 837 S.E.2d 166, 169

(2019). (citation omitted). Defendant has failed to “specifically and distinctly contend[] . . . plain error” and is not entitled to plain error review on this issue. *Id.* Defendant’s arguments concerning the admission are unpreserved and waived. *Id.*

## **VI. Ineffective Assistance of Counsel**

Defendant alternatively asserts his counsel’s failure to timely object to this testimony constituted ineffective assistance of counsel (“IAC”). In order to show IAC, 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 IAC has 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 a counsel’s deficient performance prejudiced him, 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.)

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.

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). When reviewing an IAC 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).

Given the other overwhelming evidence of Defendant’s guilt presented to the jury at trial and the jury’s acquittal on one indecent liberties with a minor charge, Defendant has not shown a reasonable probability the jury would have reached different verdicts. Defendant’s IAC argument has no merit and is dismissed.

## **VII. Sexual Exploitation Charge**

Defendant argues the trial court erred by denying his motion to dismiss the charge of first-degree sexual exploitation of a minor.

### **A. Issue**

The issue presented by a motion to dismiss criminal charges is “whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant’s being the perpetrator of such offense.” *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). In ruling on a motion to dismiss, all

evidence is viewed in the light most favorable to the State and all reasonable inferences are drawn in the State's favor. *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020) (citation omitted). Whether the State presented substantial evidence of each essential element of the offense is a question of law this Court reviews *de novo*. *Id.*

### **B. Standard of Review**

Where a defendant properly preserves a motion to dismiss, this Court reviews the denial of a motion to dismiss *de novo*. *State v. Parker*, 274 N.C. App. 464, 469, 852 S.E.2d 638, 644 (2020) (citation omitted). Under *de novo* review, this Court “considers the matter anew and freely substitutes its own judgment” for that of the trial court. *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

### **C. Analysis**

Our General Statutes defines first-degree sexual exploitation of a minor as:

A person commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, the person does any of the following: (1) Uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity.

N.C. Gen. Stat. § 14-190.16 (2023).

The trial court instructed the jury it must find three things beyond a reasonable doubt to conclude Defendant was guilty of first-degree sexual exploitation of a child: “First, that the defendant induced, encouraged, or facilitated [Kip] to engage in sexual activity for the purpose of producing material that contains a visual representation depicting this activity. Masturbation is sexual activity. Second, that [Kip] was a minor. And third, that the defendant knew the character or content of the material.”

The State produced uncontradicted evidence tending to show that Defendant had induced and encouraged Kip to engage in sexual activities for the purpose of recording and sending it for him. Kip testified Defendant had asked him to send a video of him while masturbating to Defendant. In one of the clips shown in State’s Exhibit 3, Defendant asked Kip if he had finished masturbating, asked Kip to record himself masturbating, and to send it to Defendant. The State’s evidence also tended to show Kip was a twelve-year-old minor on 6 May 2019. Defendant was aware of the character or content of the material because he was the person asking for the video recording of Kip while he was masturbating. Defendant’s argument is overruled.

### **VIII. Conclusion**

Defendant failed to timely object to the admission of State’s Exhibit 3 and has waived appellate review under either the preserved or the plain error rule. He also failed to timely challenge the admission of Rivera’s testimony. The trial court

STATE V. CLOTEZ

*Opinion of the Court*

properly denied Defendant's motion to dismiss the charge of first-degree sexual exploitation of a minor.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in Defendant's convictions, or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges WOOD and MURRY concur.

Report per Rule 30(e).