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NO. COA09-1636

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v. Johnston County
No. 07 CRS 56337

JAMES LEE SPELLMAN

Appeal by Defendant from judgment and order entered 28 April 2009 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 12 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General Anita LeVeaux, for the State.

Sue Genrich Berry for Defendant.

STEPHENS, Judge.

I. Procedural History

On 10 September 2007, Defendant James Lee Spellman was indicted on one count of first-degree rape of a child under the age of 13 years, in violation of N.C. Gen. Stat. § 14-27.2(a)(1). Defendant was tried during the 20 April 2009 session of Johnston County Superior Court. On 28 April 2009, the jury returned a verdict finding Defendant guilty. The trial court sentenced Defendant to 288 to 355 months in prison. Additionally, the trial court found that Defendant had been convicted of a reportable conviction under N.C. Gen. Stat. § 14-208.6 and that the offense is

an aggravated offense. Thus, the trial court ordered that Defendant, upon release from prison, register as a sex offender for his natural life and be enrolled in a satellite-based monitoring program for his natural life. Defendant entered notice of appeal in open court.

II. Evidence

The evidence presented by the State tended to show the following: At the time of trial, the State's prosecuting witness and the victim in this case, Kerry,[1] was a 14-year-old ninth grader. Kerry and her younger brother Alex,[2] who was 13 at the time of trial, were living in a foster home.

Kerry and Alex were born to an adolescent mother who died of acute lymphatic leukemia when Kerry was two and Alex was one. Kerry and Alex were taken into the care of their grandmother, who was not able to provide adequate care for them. The Department of Social Services removed the children, who had been severely neglected, and placed them in foster care. When Kerry was about four or five, Delois Spellman, who is the children's aunt and Defendant's wife, discovered they were in foster care and brought them to live in the Spellman's home. Mrs. Spellman and Defendant adopted Kerry and Alex when Kerry was five.

Kerry testified that at first "it was okay" living with the Spellmans. But things started to change when Kerry was around seven or eight years old. Mrs. Spellman would beat Kerry and Alex

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[1] "Kerry" is a pseudonym.

[2] "Alex" is a pseudonym.

with a metal ruler and extension cords and curse at them. At times, Defendant "would try to take up for" Kerry and Alex when Mrs. Spellman would hit them. At one point, Mrs. Spellman told Kerry that if she ever found out there was "something going on" between Kerry and Defendant, she would put both of them in their graves.

When Kerry was about 10 years old, Defendant approached her when she was by herself in the field next to their house and said to her, "'What I'm about to do to you, you better not tell nobody.'" About 2:30 the following morning, Defendant came into Kerry's room and woke her up. Defendant was wearing a black shirt and tight black underwear. Defendant put his hand on her chest and held her down. He pulled her pajama pants and underpants down. Then, while he was on top of her, he stuck his penis into her vagina. Kerry tried to push him away, but was unable to. Although "[i]t hurt[,]" Kerry did not scream or cry out because she was scared. Defendant "smelled like beer." The next morning, Kerry noticed blood on her sheets. She left the sheets on the bed and thought about telling Mrs. Spellman about the incident, but chose not to because Mrs. Spellman "kept making threats and I thought she would follow through with them." At that time, Kerry didn't tell anyone else what had happened.

Defendant began to come into Kerry's bedroom on a regular basis – first, every other weekend and then, every weekend. He would always come in around two or three in the morning when her aunt was asleep, would always be wearing underwear and a t-shirt,

and would always smell like beer. Defendant threatened Kerry that "if I ever told, and then he left it at that." Kerry took that to mean that he would hurt her if she ever told. The last time Defendant came into Kerry's room was two days before her thirteenth birthday. A couple of days after that incident, Kerry ran away because she "got tired of them abusing me[.]" She was admitted to Holly Hill Psychiatric Hospital. While at the hospital, Kerry told the staff that Mrs. Spellman was physically abusing her and that her brother was sexually touching her. Kerry did not tell them that Defendant was abusing her.

After Kerry left the hospital, she went to live with another aunt. When she ran away from that home, Kerry was returned to Holly Hill. After her second release from Holly Hill, Kerry joined her brother in the therapeutic foster care home of Ms. Holmes. Kerry liked living in Ms. Holmes' home and felt safe there. Kerry had a good relationship with Ms. Holmes' teenaged daughter, Deisha,[3] and at a certain point, Kerry disclosed to Deisha that Defendant had raped her.

Ms. Holmes testified that Kerry told her that "Mr. Spellman had raped her when she was nine and had done it a lot." Ms. Holmes reported Kerry's disclosure to the Johnston County Department of Social Services ("DSS") and a social worker interviewed Kerry. DSS contacted the local law enforcement agency who interviewed Kerry as well as Mrs. Spellman's three daughters from a previous relationship.

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[3] "Deisha" is a pseudonym.

Over Defendant’s objection, the State introduced testimony from Mrs. Spellman’s three daughters. Mrs. Spellman’s oldest daughter, Delia,[4] was 15 when her mother met and married Defendant. At that time, Defendant, her mother, two sisters, and one brother all moved into a trailer home together. Delia testified that when she was growing up, her mother used to beat her with extension cords, a broom, and belts. Delia further testified that Defendant would come into her room around two or three in the morning, “lay on top of me and start humping me. He at one time put his finger inside my vagina.” Defendant would be wearing only underwear and smelled of alcohol when he came into Delia’s room. This happened “mostly on weekends” when her mother was asleep and happened “so much” until Delia left home. Delia got pregnant at the age of 16, had the baby at the age of 17, and moved out of the house at the age of 18. Although Delia told her mother what Defendant was doing, Mrs. Spellman kept saying “he’s not going to bother y’all. He’s not going to hurt y’all.”

Mrs. Spellman’s middle daughter, Alaina,[5] was 40 years old at the time of the trial. Alaina testified that she was 12 when her mother met and married Defendant. While she was growing up, her mother disciplined Alaina and her siblings by spanking them with drop cords and switches. There were times when this would leave bruises or injuries. When Alaina was around 14 or 15 years old, Defendant came into her room early one morning after he had spent

[4] “Delia” is a pseudonym.

[5] “Alaina” is a pseudonym.

that Friday evening drinking and watching television. Defendant was wearing tight, white underwear and Alaina "was thinking he was going to try and mess with me." Alaina jumped out of bed, ran to the kitchen, and got a butcher knife. Alaina threatened to cut Defendant's throat if he ever came into her room again. "I was screaming and shouting at him and woke my mama up." Her mother asked Defendant what he was doing in Alaina's room, and Defendant said he was looking for the bathroom.

The following Saturday evening, Alaina "could hear my doorknob moving with him trying to come in. So finally I got tired of it. So I pushed my dresser to my door so he could not come in." Thereafter, Alaina slept with the knife under her pillow, and slid the dresser in front of the bedroom door on Friday, Saturday, and Sunday nights "so I could get some sleep." Alaina told her mother about Defendant continuing to try to come into her room, but Mrs. Spellman responded that he was just looking for the bathroom and that he wasn't going to hurt her because "he sleepwalks."

Mrs. Spellman's younger daughter, Sarah,[6] who was 36 at the time of trial, was eight or nine when her mother met and married Defendant. Although Sarah did not recall being beaten by her mother, she remembers her older siblings being beaten. Sarah testified that when she was 12, Defendant

> came into my room and raped me. He got on top of me. He told me if I told anybody that he was going to kill my mom. He put his penis in my vagina, and it hurt. I remember that it hurt really bad. I dealt with that until I

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[6] "Sarah" is a pseudonym.

> was 17 years old. He would come into my room and he would have sex with me.

At first she tried to fight him off, but she was scared. Then it "just kind of [got] to the point where he was just going to do it." This abuse would occur around two or three in the morning and Defendant would come into Sarah's room in his white underwear after he had been drinking.

Sarah moved out of Defendant's house and into her older sister's house. However, she became pregnant and moved back in with her mother and Defendant. Sarah "was determined that he was not going to touch me any more" when she moved back in. The last time Defendant came into her room, Sarah tried to hit him with an ashtray. She told her mother what Defendant had been doing, but her mother didn't believe her and told her she was lying. Sarah went to her brother's trailer, which was adjacent to Defendant's trailer, and called the police. Sarah pressed charges, but her mother kept saying that she couldn't take care of the bills by herself and pressured Sarah to recant her allegations. Sarah was only 17 and pregnant and "didn't want to do anything to jeopardize my baby," so she let the charges drop.

Dr. Sharon Cooper, an expert in developmental and forensic pediatrics, examined Kerry on 9 October 2008. Dr. Cooper performed a physical examination of Kerry and obtained behavioral and medical histories from Kerry. Dr. Cooper interviewed Amy Keith, the DSS social worker who brought Kerry in for the examination. Dr. Cooper also interviewed Delia, Alaina, and Sarah.

Dr. Cooper testified that when Kerry was first brought to Holly Hill in 2007, "she was noted to have a lot of physical evidence of having been chronically, physically abused, many scars and injuries that really clearly showed that she was severely, physically abused." Dr. Cooper noted that Kerry had a "dampened affect" and was a "resigned sad child." Dr. Cooper testified that "[t]his is extremely common in children who have been chronically abused." Dr. Cooper found that evidence of the physical injuries described by Kerry was "certainly extremely present on her body. So there was no doubt of what she was saying regarding the physical abuse."

Kerry told Dr. Cooper that when she was about nine, Defendant "began to rub himself up against her buttocks and back while she was doing the dishes." Defendant would also open the door to the bathroom and watch Kerry use the toilet. This made her afraid to use the bathroom. Kerry described ways in which Defendant would have intercourse with her and told Dr. Cooper that Defendant told Kerry, "'You better not tell.'"

Kerry had numerous scars all over her body, including "loop marks that are permanent on her back, over her buttocks, down her legs that you see with extension cords. She had linear marks that were permanent that were across her buttocks in the lower part of her back secondary to having been beaten by, I believe she described it as a toilet bowl plunger as well as a broom." Kerry was "quick to explain" that she began cutting herself after Defendant began sexually abusing her and also developed a habit of

taking a pencil eraser and rubbing it against her skin until she rubbed the skin off so that she would be bleeding. Dr. Cooper testified that Kerry "appeared to be very candid in explaining all the different injuries she had."

Dr. Cooper testified that "there were several abnormal findings" on Kerry's genital examination. "The first and important one was that there was a roughing and a changing of the tissues . . . [in the] area referred to as the posterior fourchette . . . ." Dr. Cooper explained that "when a child has a penetrating injury into the vagina, this part of the anatomy gets stretched a great deal. It's very common therefore for you to get little tiny tears of the posterior fourchette." Moreover, "the injury that we see here is typically from attempted penetration that finally ends up inside the vagina."

The other significant finding from the genital examination was that "part of the hymenal tissue was dramatically decreased in that it was very thin" between the 4 o'clock and 8 o'clock position of the opening, which is "consistent with [] recurrent penetrati[on]." Dr. Cooper testified:

> So we had two abnormal findings. We had nonspecific change to the posterior fourchette consistent with prior trauma and you had absence and minimal evidence of hymenal [t]issue between the 4 o'clock and the 8 o'clock position of the opening, which is the vagina.
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> . . . .
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> These two findings are most consistent with the prior penetrating injury. It doesn't tell us what penetrated this child, but it does

> tell us the child has been penetrated repetitively.

Defendant's evidence tended to show the following: At the time of trial, Defendant was 57 years old and had been married to Mrs. Spellman for about 28 years. Defendant denied having any sexual contact with Kerry, Delia, Alaina, or Sarah. Defendant stated that Delia, Alaina, and Sarah resented that he had married their mother and tried to split them up. He further stated that Kerry did not want to live with Mrs. Spellman and found the area where they lived to be boring.

Melvin Parker, a local farmer who had known Defendant for 20 years, opined that he had always found Defendant to be "a truthful, honest and an honorable man." The assistant principal at the middle school Kerry attended opined that Kerry was not a truthful person.

III. Discussion

A. Admission of 404(b) Evidence

Defendant first contends the trial court improperly admitted the testimony of Delia, Alaina, and Sarah concerning the prior sexual abuse they endured by Defendant. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence prohibits the introduction of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show he acted in conformity therewith. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007). However, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation or plan. *Id.* "When evidence of the defendant's prior sex offenses is offered for

the proper purpose of showing plan, scheme, system, or design . . . the ultimate test for admissibility has two parts: First, whether the incidents are sufficiently similar; and second, whether the incidents are too remote in time." *State v. Davis*, 101 N.C. App. 12, 18-19, 398 S.E.2d 645, 649 (1990) (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 328 N.C. 574, 403 S.E.2d 516 (1991).

Furthermore, although evidence may be admissible under Rule 404(b), the probative value of the evidence must still outweigh the danger of undue prejudice to the defendant to be admissible under Rule 403. *State v. Frazier*, 319 N.C. 388, 390, 354 S.E.2d 475, 477 (1987). "That determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *State v. Bidgood*, 144 N.C. App. 267, 272, 550 S.E.2d 198, 202, *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001).

In this case, the trial court first heard the testimony of Kerry, Delia, Alaina, and Sarah outside the presence of the jury and carefully considered it. The trial court found that the testimony of all four witnesses with regard to the acts allegedly committed or attempted by Defendant against them

> contain[s] significant similarities, specifically that the alleged conduct of the [D]efendant occurred at a time when each of the four witnesses lived in the home with the [D]efendant and he occupied a paternal position in the household; the conduct occurred when each of the four witnesses was either a young teenager or preteen; that the

> conduct occurred while each witness was in her room asleep and the [D]efendant's wife . . . was presumably asleep in another room. The conduct occurred always in the early morning hours, generally between one and [three] a.m., that the [D]efendant entered the room of the witness and each witness usually would detect the odor of alcohol about the [D]efendant's person; that the [D]efendant would be dressed in a [t]-shirt and briefs or tight underwear; that the [D]efendant would climb into the bed on top of the witness and either penetrate or attempt to penetrate the vagina of each witness with his penis. The Court does note both [Kerry] and [Sarah] alleged that the [D]efendant actually achieved vaginal penetration with them.

The trial court further found that "the alleged conduct of the [D]efendant testified to by each of those three witnesses was [not] so remote in time as to render [it] inadmissible."

Based on these findings, the trial court concluded that the testimony of Delia, Alaina, and Sarah was "admissible under 404(b) for purposes of establishing motive, opportunity, intent, preparation, plan, identity, and the absence of entrapment." Moreover, the trial court conducted the balancing test required by Rule 403 and concluded that "the probative value of the evidence is not 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 preparation of cumulative evidence." Accordingly, the trial court overruled Defendant's objections to the testimony of Delia, Alaina, and Sarah and admitted the testimony.

The North Carolina Supreme Court has been liberal in allowing evidence of similar sex offenses to show a common plan or scheme in

trials on sexual crime charges, especially when the alleged victims have been children. *State v. Cotton*, 318 N.C. 663, 666, 351 S.E.2d 277, 279 (1987); *see State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988); *State v. Gordon*, 316 N.C. 497, 342 S.E.2d 509 (1986); *State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986) (all admitting evidence of other similar sex offenses to show a common scheme or plan to molest children and concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice).

In *State v. Frazier*, 344 N.C. 611, 476 S.E.2d 297 (1996), our Supreme Court held that evidence of the defendant's prior sexual assaults was admissible under Rules 404(b) and 403 to show a common plan or scheme to sexually abuse female family members, including the victims in that case. *Id.* at 616, 476 S.E.2d at 300. All of the defendant's victims were adolescents at the time the defendant began to sexually abuse them. With each of the defendant's victims, he slowly began touching them and gradually reached more serious abuse culminating in intercourse. During the time of the abuse, the defendant gave his victims money and bought them gifts. Furthermore, the defendant threatened each victim that if she revealed to anyone what he was doing, she would be sent away or suffer some other severe consequence. All of the victims were related to the defendant either through his own marriage or the marriage of his children, and all of the victims lived with or near

him during the time of the abuse. Our Supreme Court found this evidence was a "classic example of a common plan or scheme." *Id.*

In this case, the challenged testimony tended to show that Defendant's prior acts of sexual abuse were strikingly similar to the acts of sexual abuse perpetrated against Kerry. As in *Frazier*, all of Defendant's victims were adolescents at the time Defendant began to sexually abuse them. Furthermore, similar to *Frazier*, all of the victims were legally related to Defendant, either through his own marriage or by adoption. Moreover, all of the victims lived in Defendant's home and the abuse took place in the victims' bedrooms. Defendant would most often perpetrate the abuse on weekends in the early morning hours, when Mrs. Spellman was asleep in the other room. Defendant would often smell of alcohol and would often enter the victims' bedrooms wearing only underwear. Finally, Defendant would penetrate or attempt to penetrate the vagina of the witness with his penis or his finger.

We conclude that Defendant's prior sexual offenses are sufficiently similar to the crime charged to be admissible for the purpose of showing Defendant's plan, scheme, system, or design to molest his adolescent daughters in their bedrooms in the early morning hours while his wife was asleep. *See State v. Boyd*, 321 N.C. 574, 578, 364 S.E.2d 118, 120 (1988) (evidence of defendant's prior sexual offenses committed upon a young female relative admissible as showing a scheme, where in both cases the defendant sexually assaulted "young female relatives left in his custody while his wife was working"); *State v. Everett*, 98 N.C. App. 23,

29, 390 S.E.2d 160, 163 (testimony by defendant's daughter concerning defendant's prior sex offenses against her admissible to show plan or scheme to sexually abuse his daughter and stepdaughter while wife at work, where evidence showed defendant raped each after putting them to bed, covering their faces with a cloth, and wiping each clean after intercourse), *disc. rev. denied*, 326 N.C. 599, 393 S.E.2d 884 (1990), *reversed on other grounds*, 328 N.C. 72, 399 S.E.2d 305 (1991).

Nonetheless, Defendant argues that "too much time passed between when the older three female witnesses were present in the household and when [Kerry] was present in the household to satisfy the temporal proximity requirement." We disagree.

In *Frazier*, our Supreme Court held that "strikingly similar" prior acts of sexual abuse occurring over a 26-year period were not too remote to be admissible to show a common plan to sexually abuse female family members. *Frazier*, 344 N.C. at 616, 476 S.E.2d at 300; *see also State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996) (upholding admission of evidence of prior sexual acts because of similarity to conduct charged despite 10-year gap between instances), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997). In this case, Defendant's abuse of Delia started in 1981 and continued until 1984 when she moved out. Defendant began abusing Alaina in 1984 and Sarah in 1985. Defendant's abuse of Sarah continued until 1990 when she moved out. Kerry moved into Defendant's home in 1999 when she was about five years old and Defendant began sexually abusing her in 2004 when she was 10.

Defendant's abuse of Kerry continued until 2007 when she moved out of the home. Although the prior acts of sexual abuse alleged by the three older female witnesses occurred between 14 and 23 years prior to the beginning of the charged conduct in the present case, we hold that the gap between the acts was not too remote in time to be considered as evidence of Defendant's common plan or scheme to molest his adolescent daughters, including Kerry, due to the significant length of time the abuse was perpetrated against all the victims and the striking similarities between Defendant's patterns of abuse.

Furthermore, we find no abuse of discretion by the trial court in admitting this testimony under the balancing test of Rule 403 since the prior incidents were sufficiently similar to the acts charged and not too remote in time. *Boyd*, 321 N.C. at 578, 364 S.E.2d at 120. Defendant's argument is overruled.

B. Admission of Opinion Testimony

Defendant next argues that the trial court committed plain error in allowing Dr. Sharon Cooper, an expert in developmental and forensic pediatrics, to testify regarding the believability of the victim's allegations in this case. We disagree with Defendant's characterization of the evidence and find no error in the admission of the challenged testimony.

Defendant failed to object to Dr. Cooper's testimony at trial and is thus limited to plain error review. N.C. R. App. P. 10(b)(2), 10(c)(4). "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).

"[T]he testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988); *see* N.C. Gen. Stat. § 8C-1, Rule 405(a) (2009) ("Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior."). However, "cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness." *Bailey*, 89 N.C. App. at 219, 365 S.E.2d at 655.

Defendant argues that the following testimony by Dr. Cooper is "opinion testimony about the believability of the child witness' allegations in this case[:]"

> If the child victim that we're seeing that day describes almost exactly the same kind of sexual abuse that other victims have described, then that certainly would lead us to believe more specifically that this child has had experiential knowledge.

Dr. Cooper also testified that Kerry "appeared to be very candid in explaining all the different injuries" that were evidenced by the numerous scars on her body. Dr. Cooper further testified that "we have four victims in this particular case" and "you already have four victims who have described the same type of things that happened to them over more than two decades of time." Dr. Cooper

also testified that children who have been victims of child sexual abuse are likely to have three diagnoses, "post-traumatic stress disorder, . . . anger issues, [and] insomnia after having experienced a life-changing circumstance, in this case child sexual abuse[.]" Finally, Dr. Cooper testified that she recommended that "any other child in this home needed to be thoroughly evaluated to make sure that they had not also been a victim of child sexual abuse or a victim of physical abuse, but especially a victim of child sexual abuse."

We disagree with Defendant's characterization of this testimony as "opinion testimony about the believability of the child witness' allegations in this case[.]" Dr. Cooper's statement that Kerry "appeared to be very candid in explaining all the different injuries" that were evidenced by the numerous scars on her body relates to Dr. Cooper's assessment of Kerry's demeanor during her physical examination. Dr. Cooper's statements regarding the sexual abuse of the other three victims concerned her investigation into Kerry's family history, which related to her diagnosis and treatment of Kerry. Moreover, Dr. Cooper's statement that children who have been victims of child sexual abuse are likely to have three diagnoses, "post-traumatic stress disorder, . . . anger issues, [and] insomnia after having experienced a life-changing circumstance, in this case child sexual abuse," was Dr. Cooper's permissible "expert opinion based on her examination of the child and based on her expert knowledge concerning abused children in general." *Id.* "'The fact that this

evidence may support the credibility of the victim does not alone render it inadmissible.'" *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (quoting *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (1987)), *aff'd per curiam*, 356 N.C. 428, 571 S.E.2d 584 (2002).

We conclude that Dr. Cooper's aforementioned testimony is permissible evidence relating to the diagnosis and treatment of sexual abuse of Kerry based on Dr. Cooper's thorough assessment and examination of Kerry. *Bailey*, 89 N.C. App. at 219, 365 S.E.2d at 655. Accordingly, the trial court did not err, much less commit plain error, in allowing the challenged testimony into evidence. The assignments of error upon which Defendant's argument is based are overruled.

Because we find no error in the admission of any of the evidence challenged on this appeal, we need not address Defendant's remaining argument that the cumulative effect of the trial court's "erroneous" evidentiary rulings was prejudicial to Defendant.

C. Satellite-Based Monitoring

By Defendant's final argument, Defendant contends that the trial court violated his state and federal constitutional protections against the enactment of *ex post facto* laws by ordering Defendant to be enrolled in and subjected to satellite-based monitoring ("SBM") for the rest of his life based on his conviction.

Defendant asks this Court, pursuant to its authority under Rule 2 of the North Carolina Rules of Appellate Procedure, to

address this argument under a plain error analysis as Defendant failed to raise this constitutional issue at trial and, thus, failed to preserve the issue on appeal. However, we need not invoke Rule 2 to prevent "manifest injustice" in this case as Defendant's arguments have already been addressed by, and rejected by, other panels of this Court, and those decisions are controlling authority in this case. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted)).

Pursuant to N.C. Gen. Stat. § 14-208.40A, if, after reviewing evidence submitted by the State and the defendant during the sentencing phase, "the court finds that the offender . . . has committed an aggravated offense, . . . the court shall order the offender to enroll in a satellite-based monitoring program for life." N.C. Gen. Stat. § 14-208.40A (2009). The SBM program applies to

> "any person sentenced to intermediate punishment on or after [the effective date] and to any person released from prison by parole or post-release supervision on or after that date. *This section also applies to any person who completes his or her sentence on or after the effective date of this section* who is not on post-release supervision or parole."

State v. Wooten, 194 N.C. App. 524, 528, 669 S.E.2d 749, 751 (2008) (quoting An Act to Protect North Carolina's Children/Sex Offender Law Changes, ch. 247, sec. 15(l), 2006 N.C. Sess. Laws 1074, 1079

(emphasis added)), *disc. review and cert. denied*, 363 N.C. 138, 676 S.E.2d 308 (2009). The legislation became effective 16 August 2006.

In this case, after sentencing Defendant to an active prison term of 288 to 355 months, the trial court found that Defendant's conviction was an aggravated offense and ordered that Defendant be enrolled in SBM for his natural life upon release from prison. Defendant argues that because the date of the offense for which he was convicted was 23 April 2004, which is "clearly before August 16, 2006, the effective date of N.C. Gen. Stat. § 14-208.40[,]" the SBM statute does not apply to Defendant. We disagree. Because Defendant will complete his sentence on or after 16 August 2006, the provisions of N.C. Gen. Stat. § 14-208.40 are applicable to Defendant. *See Wooten*, 194 N.C. App. at 528, 669 S.E.2d at 751 ("Defendant completed his sentence for a Class F felony and was eligible for release, but not eligible for post-release supervision after the effective date of the legislation. Therefore, defendant is a person who fits the criteria the legislature intended for participation in the SBM program.").

Moreover, although Defendant asserts that the SBM statutory scheme is punitive in nature and, thus, violates the *ex post facto* clauses of the state and federal constitutions, this Court has already rejected this argument in *State v. Bare*, __ N.C. App. __ , __ , 677 S.E.2d 518, 531 (2009) ("Defendant has failed to show that the effects of SBM are sufficiently punitive to transform the civil remedy into criminal punishment. Based on the record before us,

retroactive application of the SBM provisions do not violate the *ex post facto* clause.”).

Defendant received a fair trial, free of error.

NO ERROR.

Judges HUNTER and GEER concur.

Report per Rule 30(e).