NO. COA09-434

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

STATE OF NORTH CAROLINA

v. Cleveland County
No. 06 CRS 57172

LUDENIA DANIELLE ARCHIE,
Defendant.

Appeal by defendant from judgment entered 4 August 2008 by Judge Forrest D. Bridges in Cleveland County Superior Court. Heard in the Court of Appeals 30 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General K. D. Sturgis, for the State.

Marilyn G. Ozer for defendant-appellant.

GEER, Judge.

Defendant Ludenia Danielle Archie appeals from her conviction of second degree murder. Defendant focuses her appeal on (1) the trial court's rulings regarding certain evidence related to the victim's mental health and (2) the trial court's refusal to allow defendant's counsel, in his closing argument, to refer to the victim as a psychopath.

With respect to the exclusion of the victim's mental health medical records, we hold that defendant has failed to demonstrate prejudice since substantial evidence was admitted from unbiased third parties regarding the victim's mental health history,

including testimony from defendant's expert witness who had reviewed the mental health records.

Although the trial court also refused to allow defendant to have her expert testify regarding the effects of cocaine on a person suffering from paranoid schizophrenia, as was the victim, we find no error because the expert witness provided only a general theoretical explanation and did not specifically tie that explanation to the victim's conduct on the night of his death. The expert's testimony would not have shown how cocaine would have affected the victim in this case given the levels of cocaine determined to be in his system around the time of his death.

Finally, the trial court did not err in barring defense counsel from characterizing the victim as a "psychopath" in closing arguments because there was no evidence that the victim was a psychopath. We, therefore, hold that defendant received a trial free of prejudicial error.

Facts

The State's evidence tended to show the following facts. Defendant and Kenneth Littlejohn had been in a relationship since 2002. Defendant had a two-year-old daughter with Littlejohn; she also had two other older children, ages eight and 13, from a prior relationship. Although defendant and Littlejohn never lived together, Littlejohn spent some nights at defendant's house, some at his mother's, and some at the homes of other girlfriends.

On 6 November 2006, defendant discovered that a handgun was missing from a box beneath her bed. She became very upset because

this gun had belonged to her late brother, and it "was the only thing [she] had to . . . remember [him] by." She believed Littlejohn had taken the gun because he had been the only other person in the house, and he had previously stolen from her.

Defendant wanted the gun back and began to try to track it down. She first called Littlejohn's mother who told her where Littlejohn was. When defendant called Littlejohn at that location, Littlejohn hung up on her as soon as she confronted him about stealing the gun. Defendant then contacted the police and reported the theft. Afterwards, defendant called Littlejohn's mother back and complained about him stealing the gun. Littlejohn's mother told defendant that she thought "he's back on that shit," which defendant took to mean that he was smoking crack cocaine again.

Defendant next spoke with her cousin and "asked her to keep her eyes and ears open." Her cousin advised her to check with Kenneth Washington on Smith Street because Littlejohn had sold things to Washington in the past. Later that night, after defendant picked up her 13-year-old son from a store, she decided to drive over to Smith Street to see if she could find Washington and her brother's gun. She had a .25 caliber handgun of her own in the car at the time. She arrived at Smith Street, pulled up in front of a house, and honked the horn, but no one came to the door.

She was about to get out of the car when suddenly Littlejohn came from around one of the houses. Littlejohn approached the car, and the two began arguing about the gun. At some point, defendant

grabbed her gun from the console, pointed it at Littlejohn, and shot him three times. Defendant then drove away.

Littlejohn subsequently died of his gunshot wounds. At trial, the medical examiner testified that one bullet had gone through two ribs on the right side, through the sternum, through the right side of the heart to the left side of the heart, and stopped at the posterior left chest wall. That wound was fatal. Another bullet entered the left lower back and went toward the front of the stomach area, where it stopped. A third bullet entered the back side of the mid-calf and exited not far away at the shin part of the leg. The medical examiner was not able to determine how close the gun was fired or in what order the bullets entered.

The toxicology report done for the autopsy showed cocaine, cocaine metabolites, caffeine, and nicotine in Littlejohn's system. The medical examiner testified that the presence of cocaine indicated that cocaine had been consumed very recently, while the presence of metabolites indicated that cocaine had also been consumed a day or two earlier. The report stated that Littlejohn had a level of .70 milligrams per liter of metabolites, which the medical examiner characterized as "not a lot," as well as a cocaine level of .020 milligrams per liter.

Although defendant was indicted for first degree murder, the State elected on the first day of trial to proceed only on a second degree murder charge. At trial, defendant testified on her own behalf and admitted shooting Littlejohn, although she claimed she had done so in self defense. According to defendant, Littlejohn

"kept saying why did [she] tell his mama that he had taken the gun." Defendant testified that Littlejohn became really upset and stuck his head in her car. She then leaned over and "mushed his face . . . pretty hard with [her] hand," pushing his head out of the car.

Littlejohn, however, approached her again, ranting and yelling. When defendant told him she was going to call the police, Littlejohn kept coming toward her and replied, "I'm going to give those motherfuckers a reason to come to get me." Defendant testified:

> I felt at that moment when [Littlejohn] said that to me and I looked at him he had hate -- that look of hate in his eyes and he was -- he just looked wild. You know, and he looked crazy and I felt at that very moment that this was it. That this is the day that [Littlejohn] is finally going to kill me and maybe even my son.

Although defendant was not certain whether Littlejohn was carrying any weapons, she believed he had stolen her brother's gun, knew he had a habit of "always" carrying a knife in his pocket, and said he was "bad about . . . having a bottle of kerosene and some gas mixed in a bottle." She testified that she "did not want to take [her] eyes off of him, because [she] never knew what he was going to do." Defendant also admitted, however, that although she was scared, she did not drive away or call to anyone for help because she was so intent on getting her brother's gun back.

Defendant, in explaining why she feared Littlejohn, cited previous threats that frequently involved fire. She testified that one night, when she arrived at her mother's house, Littlejohn was

there waiting for her, holding a bottle he said was filled with kerosene and gasoline and that he "was going to dash it on [her]." On another occasion, after Littlejohn was unable to reach her by phone, he came to her house with a gas can and threatened to "burn [her] house with [her] and [her] children in it." Another time, defendant came out of her bathroom to find Littlejohn standing in the hallway. He threw a bottle of rubbing alcohol on her, lit a piece of newspaper, and tried to set her on fire. Once, he threatened "to kill [her] and bury [her] and bury [her] baby on top of [her]. . . . [H]e was going to make sure that all [her] family would be wearing black."

Littlejohn had also been physically violent toward defendant. He ripped micro braids from her head, tearing out some of her own hair in the process. When he became upset about her being out too late, he woke her up in the middle of the night with his knee pressed against her arm and a trash bag covering her face. He "was whispering in [her] ear that it only takes two minutes and two seconds for a person to stop breathing." Another time, when he wanted to know where she had been, he pushed her and punched her in the eye.

Defendant testified that she was also aware of multiple incidents when Littlejohn had been violent toward others. He told her he kidnapped Barbara Murray, a math teacher at the high school he had attended, from a jewelry store, but he "didn't get in trouble for it because . . . he was crazy." He also told her he had drugged and beaten Lori Borders, the mother of his other

children, "left her there for dead" behind a grocery store, and intended to "get a knife to go back and finish her off," but the police apprehended him in the meantime.

Littlejohn told defendant that he was a schizophrenic, but that he "didn't take the medication because it made him feel like a zombie." Instead, he "smoked the weed because it mellowed him out." Littlejohn also told defendant that he was not sent to prison for his prior assaults because he was crazy. He said "he won't do no time for [harming her] cause he's crazy and he'll take some pills and he'll be out to get [her]."

Several witnesses corroborated defendant's testimony with regard to Littlejohn's violent behavior. Murray, the teacher, described him as "dangerous and violent" and recounted his assault and attempted kidnapping of her in the jewelry store parking lot. Officer Jason Lail of the Shelby Police Department testified that he had come across Littlejohn on several occasions in the course of his duties and found Littlejohn to be "very violent, intimidating." Officer Lail had responded to the scene of Borders' assault and kidnapping in January 1996. Officer Lail described Borders as "bloody and battered," and his report of the crime was introduced.

Officer Shannon Porter testified that she too had come into contact with Littlejohn in her capacity as a law enforcement officer and that, in her opinion, Littlejohn had a "violence tendency towards [her]." In addition, Officer Danyeal Emory testified that she met defendant in 2005 when she responded to a call at defendant's residence after defendant reported one of

Littlejohn's threats. Officer Emory saw that defendant had a black eye, and she also recalled seeing "a gas can on the carport and that was another reason [Officer Emory] was a little bit more concerned about her and the safety of her children." When asked about Littlejohn's reputation for danger and violence, Officer Emory responded that she had done a background check, and "he ha[d] numerous assaults on females, so I knew he had a history. He had a violent and criminal history."

Dr. John Frank Warren, III, a forensic psychologist expert for the defense, testified that based on his review of Littlejohn's medical records, he agreed with the prior diagnosis that Littlejohn was a paranoid schizophrenic. Dr. Warren explained that the essential feature of paranoid schizophrenia is the presence of "prominent delusions or auditory hallucinations" and that "persecutory themes . . . may predispose the individual to violence." Dr. Warren noted that Littlejohn had been admitted as a psychiatric patient at Broughton Hospital twice: 29 June 1994 through 6 July 1994 and 12 February 1995 through 2 March 1995. Subsequently, he was followed by the area mental health center.

Dave Cloutier testified for the defense as an expert in the science of the use of force and in crime scene investigation. He explained that a person's use of force is based in part on "pre-attack queues [sic]" and "use of force variables." Pre-attack cues are signals that "may indicate [an] individual is about to attack or that a threat is likely eminent [sic]." Use of force variables are "generally the circumstances or events that would influence the

selection of the level of force that an individual would desire to use or choose to use based on the circumstances." Upon reviewing defendant's case file, Cloutier identified as pre-attack cues defendant's description of Littlejohn's expression "as being demonic or looking like a demon," Littlejohn's threatening "to give 'those motherfuckers a reason for coming,'" and his moving toward her "in a very rapid aggravated" way.

Cloutier also identified the following use of force variables: "her previous knowledge of his propensity for violence, previous assaults that had occurred to her by him as well as other individuals that she was aware of. The time of day which was, as I recall about ten o'clock at night, so it was dark. And her inability at that point to actually see what was in his hands. His actions, his threats, his movements towards her[,]" and, in addition, her knowledge of Littlejohn's psychiatric diagnosis. Cloutier further testified that defendant could have fired the three rounds from her gun in less than one second.

On 1 August 2008, the jury found defendant guilty of second degree murder. The trial court sentenced defendant to a mitigated-range term of 96 to 125 months imprisonment. Defendant timely appealed to this Court.

I

Defendant argues on appeal that the trial court erred in refusing to admit Littlejohn's medical records. Littlejohn's records contained information from his two admissions to Broughton Hospital, including (1) that he was diagnosed with hypomanic

disorder, personality disorder not otherwise specified, and cyclothymia; (2) that he slashed his girlfriend with a knife in 1994, resulting in her needing 13 sutures; (3) that he admitted to multiple impulses to hurt other people; (4) that he admitted he wanted to kill himself and had thought about killing his girlfriend; (5) that he tried to control his surroundings by terrorizing others; and (6) that he admitted to injuring 11 people over the course of his life. His records from the area mental health center showed that he had been diagnosed with paranoid schizophrenia, but that he had been terminated from treatment due to non-compliance.

The trial court heard argument on the admission of these medical records later in the trial. The court ultimately ruled that the records were inadmissible based on the following reasoning:

> First of all, I believe that the jury has previously seen and heard at least some evidence of every single incident of specific conduct of bad acts of this alleged victim that were known to the Defendant at the time of this particular encounter. As far as I know to be the case that all of that evidence has come in. There has also previously been admitted through a number of witnesses including the Defendant testimony concerning the character and the reputation of Mr. Littlejohn for danger and violence. And I have previously instructed the jury as I anticipate doing again during the final jury instructions as to the bearing that that type of evidence has on the issues in this particular case. The purposes for which that type of evidence may be received. So at this point, first of all, that additional evidence appears that it would be, first of all, cumulative in nature as to the specific bad acts that are already into evidence.

> Secondly, it appears that there are a number of other specific bad acts encompassed by those medical records, at least as to some of which I have not received any indication that those particular incidents were known to the Defendant at the time. Secondly, [sic] some of those records are fairly remote in time as to these particular events going back to 1994 through approximately 2000. Third, those medical and mental health records are fairly voluminous, contain much of the language of healthcare providers which may cause confusion of the issues. May tend to inject other issues into this trial and so I've conducted a 403 balancing as to those records as well. And finally, quite frankly, I find that many of -- much, if not all, of that information simply is not relevant to the actual issues that are involved in this case.

In short, the trial court excluded the records because (1) some of the material was cumulative of evidence already presented, (2) the records included acts of the victim of which defendant did not have knowledge and, therefore, were irrelevant, (3) some events mentioned in the records were remote in time, (4) the technical language might tend to confuse the jury, and (5) much of the information contained in the records was irrelevant.

We need not address whether the trial court erred in refusing to admit Littlejohn's medical records because defendant has failed to demonstrate that she was prejudiced by that exclusion. Under N.C. Gen. Stat. § 15A-1443(a) (2009), defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial."[1]

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[1]Although defendant makes a general due process argument in her brief on appeal, this issue was not raised at the trial level, and accordingly we apply the prejudice standard for non-

In arguing she was prejudiced, defendant points to *State v. Everett*, 178 N.C. App. 44, 630 S.E.2d 703 (2006), *aff'd per curiam by an equally divided court*, 361 N.C. 217, 639 S.E.2d 442 (2007). She contends that Littlejohn's "neutral" medical records were not cumulative because the jury could have found defendant's testimony self-serving and, therefore, she was prejudiced by the exclusion of more credible, neutral evidence. The defendant in *Everett* was tried for murder and, like defendant in this case, contended that she acted in self defense. *Id.* at 50, 630 S.E.2d at 707-08. This Court held that the trial court erred in excluding a car salesman's testimony about acts of violence of the victim at a car dealership because that incident, "which was known by defendant, [was] relevant and admissible to show whether her 'apprehension of death and bodily harm was reasonable.'" *Id.* at 52, 630 S.E.2d at 708 (quoting *State v. Winfrey*, 298 N.C. 260, 262, 258 S.E.2d 346, 347 (1979)). The Court further concluded that the error "was prejudicial in light of defendant's assertion of self-defense, [the car salesman] being defendant's *only* neutral witness, and defendant's testimony regarding the car dealership incident possibly being viewed by the jury as self-serving." *Id.* at 54, 630 S.E.2d at 709 (emphasis added).

Defendant overlooks the critical point in *Everett*, which was that the error was prejudicial because *no other* witnesses, aside

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constitutional issues. *See State v. Elam*, 302 N.C. 157, 160-61, 273 S.E.2d 661, 664 (1981) (holding Court will not review constitutional questions "not raised or passed upon in the trial court").

from persons "closely associated with" the defendant, corroborated the defendant's explanation of her basis for fearing the victim. *Id.* at 53, 630 S.E.2d at 709. Here, by contrast, several neutral witnesses corroborated defendant's testimony, providing, as defendant admits in her appellate brief, "[c]opious evidence . . . concerning Mr. Littlejohn's long history of irrationally aggressive violent behavior and the resulting injuries suffered by his victims." Dr. Warren, who had reviewed the medical records at issue, summarized some of the information in the records and testified that Littlejohn was a paranoid schizophrenic, which, he said, meant Littlejohn had a predisposition to violence and interpersonal problems. Multiple police officers and a school teacher recounted specific episodes of Littlejohn's violence towards them, other women, and defendant, and they consistently characterized Littlejohn as being dangerous, violent, threatening, and intimidating.

Thus, since abundant evidence, which could in no way be construed as self-serving, corroborated the reasonableness of defendant's fear of Littlejohn, defendant has not demonstrated that there is a reasonable possibility that the jury would have rendered a different verdict if the medical records had been admitted. Accordingly, we hold that any error by the trial court in excluding the medical records was not prejudicial.

II

Defendant also contends that the court erred when it refused to permit Dr. Warren to explain the impact of a schizophrenic's

discontinuing antipsychotic medications and instead taking cocaine. According to defendant, the court erroneously "cherry-picked" what Dr. Warren could say about Littlejohn's mental health, resulting in the exclusion of relevant evidence critical to defendant's theory of self defense.

During a *voir dire* examination of Dr. Warren, he testified that Littlejohn had been diagnosed with, *inter alia*, paranoid schizophrenia and that Littlejohn's symptoms were consistent with that diagnosis. In describing the symptoms associated with paranoid schizophrenia, Dr. Warren explained that schizophrenia is a "psychotic disorder[]," which means there is "some loss of touch with reality." Paranoid schizophrenia, in particular, "is the type that involves suspicious and/or grandiose type psychotic symptoms which can include delusions which are false beliefs, but they can also include hallucinations which are seeing or hearing or tasting, feeling things" that do not exist. Symptoms of paranoid schizophrenia may include, in addition, "being anxious or angry or aloof or argumentative all the way through being self venturous or aggressive toward others."

Dr. Warren was also asked to explain on *voir dire* how the use of cocaine can affect someone with a psychotic disorder. "[W]ith any psychotic disorder," he noted, "the goal is not to stimulate further the central nervous system, which is where the crazy symptoms are, but rather to dampen those systems with anti-psychotic medication." Stimulants such as cocaine "aggravate the course of disorders that have a psychotic feature to them."

Following Dr. Warren's *voir dire* testimony, the trial court set out the following "parameters" for Dr. Warren's testimony before the jury:

> I would permit Dr. Warren to testify as to what is paranoid schizophrenia, what are the symptoms of it, how is it medicated and whether or not Mr. Littlejohn was, in fact, paranoid schizophrenic . . . based on the information and belief from the medical records. Now, specifically some of the things that I noted that seemed to go outside that would be some of the testimony about other mental disorders. Some of the testimony about how the use of cocaine can affect a person suffering from paranoid schizophrenia as well as some of the other areas of inquiry.

Defendant argues that when the court refused to allow Dr. Warren to testify before the jury about "how cocaine effects [sic] the behavior of someone needing psychotic medications," the trial court wrongly denied defendant the opportunity to have Dr. Warren present evidence that "would have corroborated [defendant's] testimony that she feared Mr. Littlejohn that night and was afraid to take her eyes off of him because he looked wild and crazy." Such testimony, she claims, "should have been admitted to place the jury in the defendant's situation by showing them [defendant's] fear of death and bodily harm by a psychotic individual was reasonable."

In *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985), the defendant similarly argued that the trial court's exclusion of his expert psychologist undercut his primary defense at trial. The defendant in *Knox*, who admitted being present at the scene of a robbery, contended that the robbery victim may have unconsciously

transferred his recollection of seeing the defendant during the robbery into an inaccurate memory of the defendant's being one of the perpetrators. *Id.* at 495, 337 S.E.2d at 156. The trial court, however, precluded him from offering expert witness testimony that the defendant contended supported this theory.

This Court noted that the testimony of the expert on *voir dire* "only remotely addressed" the defendant's theory. *Id.* at 496, 337 S.E.2d at 156. The Court pointed out that the expert "testified generally about the phenomenon of 'unconscious transference,'" but "did not discuss how unconscious transference would apply to the facts of this case or to similar circumstances . . . ." *Id.*, 337 S.E.2d at 156-57. "Specifically, he did not testify as to how the victim might unconsciously have transferred his recollection of seeing defendant during the robbery into an inaccurate memory of defendant as one of the perpetrators, which was defendant's theory of the case." *Id.*, 337 S.E.2d at 157. This Court, therefore, held that the trial court did not err in excluding the expert testimony. *Id.*

In this case, Dr. Warren's *voir dire* testimony, like the *Knox* expert's testimony, spoke only in general terms about cocaine usage by individuals with a psychotic disorder. He never attempted to relate Littlejohn's cocaine usage to his behavior. The medical examiner had previously testified about the levels of cocaine and metabolites found in Littlejohn's system, describing them as "not a lot." Dr. Warren never drew any connection between those levels

of cocaine and metabolites and the likely effect such levels would have on the behavior of a paranoid schizophrenic like Littlejohn.

Thus, nothing in Dr. Warren's testimony about cocaine usage would have specifically corroborated defendant's testimony about Littlejohn's appearing "wild" and "crazy" on the night he was shot. The trial court did not, therefore, err in excluding this testimony. *See also State v. Cass*, 55 N.C. App. 291, 301, 285 S.E.2d 337, 344 (finding no error in exclusion of testimony about tests previously administered to defendant where "relevance of these tests to defendant's mental capacity at the time the alleged crime was committed . . . was not established"), *disc. review denied*, 305 N.C. 396, 290 S.E.2d 366 (1982).

III

Defendant next argues that the trial court erred in refusing to allow defense counsel, during oral arguments, to characterize the victim as a "psychopath." Although counsel may generally exercise "wide latitude" in arguing to the jury, the "trial judge may limit the argument of counsel within his discretion." *State v. Whiteside*, 325 N.C. 389, 398, 383 S.E.2d 911, 916 (1989). "'A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006) (quoting *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985)).

During closing arguments, the trial court interrupted defense counsel, who "was arguing to the jury that the reason [defendant]

did not just drive away from [Littlejohn] was because a person needs to keep their eyes on a psychopath because a psychopath may have a weapon."[2] After the trial court excused the jurors, the following colloquy occurred:

> THE COURT: Psychopath?
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> [DEFENSE COUNSEL]: Psychotic.
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> [THE STATE]: No evidence.
>
> THE COURT: Big difference between a paranoid schizophrenia [sic] and a psychopath.
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> [DEFENSE COUNSEL]: I'll remove that from my argument.
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> THE COURT: Isn't the definition of psychopath, somebody who doesn't have a conscience?
>
> [DEFENSE COUNSEL]: I'll change the slide to psychotic.
>
> [THE STATE]: I would ask that it be changed to the only diagnosis that has been received into evidence that he was a paranoid schizophrenic.
>
> THE COURT: Well, just leave that blank.

Defense counsel, who apparently had the text on PowerPoint slides, then seemed to change the slide to read "[k]eep your eyes on [Littlejohn]."

With respect to the use of the word "psychopath," no evidence was presented that Littlejohn was a psychopath or that defendant believed Littlejohn to be a psychopath. N.C. Gen. Stat. § 15A-1230(a) (2009) provides that "[d]uring a closing argument to the

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[2]Counsel's closing arguments were not transcribed. This description is what defendant and the State have agreed was being argued by defense counsel. The bench conference was transcribed.

jury an attorney may not . . . make arguments on the basis of matters outside the record . . . ." *See also State v. Fletcher*, 354 N.C. 455, 486, 555 S.E.2d 534, 553 (2001) ("'Counsel are entitled to argue to the jury all the law and facts in evidence and all reasonable inferences that may be drawn therefrom, but may not place before the jury incompetent and prejudicial matters and may not travel outside the record by interjecting facts . . . not included in the evidence.'" (quoting *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341, 114 S. Ct. 392 (1993))), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73, 123 S. Ct. 184 (2002).

Defendant urges, however, that the word "[p]sychopath is not a medical term or a diagnosis used by medical professionals," but rather a lay term. She contends that, consequently, her counsel should have been allowed to use the word "psychopath" in the lay sense set out in common dictionaries. As support for her contention that the word "psychopath" is not a medical term or a diagnosis requiring expert evidence, she simply cites, without further explanation or a page cite, the *Diagnostic and Statistical Manual of Mental Disorders*, *Text Revision* (4th Ed. 2000). In fact, this text, known as the DSM-IV-TR, does not support defendant's contention. It specifically recognizes that the pattern associated with antisocial personality disorder "has also been referred to as psychopathy . . . ." *Id.* at 702.

In any event, ultimately, whether the word "psychopath" has a medical or diagnostic meaning is a question to be answered by

psychologists or psychiatrists. We cannot simply accept appellate counsel's assertions unsupported by an expert opinion in the record. *See State v. Looney*, 294 N.C. 1, 9, 240 S.E.2d 612, 617 (1978) (quoting psychiatrist's definition of "psychopath"); *see also State v. Daniels*, 337 N.C. 243, 289 n.1, 446 S.E.2d 298, 326 n.1 (1994) (Exum, J., concurring in part and dissenting in part) (noting that "a leading [psychiatry] text describes [antisocial personality disorder]: 'In common use, "antisocial personality" has been used interchangeably with the term "sociopath" or "psychopath."'" (quoting 3 Harold I. Kaplan et al., *Comprehensive Textbook of Psychiatry/III* 2817 (3d ed. 1980))), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895, 115 S. Ct. 953 (1995). The trial court did not, therefore, err in barring defense counsel from referring to the victim as a psychopath when that characterization was not supported by evidence.

Defendant contends that the trial court should have allowed defense counsel to replace the word "psychopath" with the words "psychotic" or "paranoid schizophrenic." Defense counsel, however, only asked to use the word "psychotic." *See* N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

Moreover, because the closing arguments were not transcribed, and defendant has not included a description of defense counsel's

full closing argument, we cannot determine whether this one exclusion prejudiced defendant. We cannot tell whether defense counsel discussed, in the course of the argument, Littlejohn's diagnosis of paranoid schizophrenia; the symptoms associated with that disorder, including anger and a predisposition to violence; Littlejohn's being prescribed antipsychotic medications; and his mental health history, including hospitalizations due to violence. Since defendant presented extensive testimony on these subjects, including expert witness testimony, it seems likely that these topics were a significant part of the closing, especially given the trial court's instruction on self defense, which specifically referenced the evidence of Littlejohn's violence. Accordingly, we cannot determine from the record that defendant was prejudiced by the trial court's ruling as to this one reference in the closing argument to Littlejohn's diagnosis.

Defendant also argues that the trial court erred in subsequently instructing the jury that "[t]here is no evidence that Mr. Littlejohn, in this case, Mr. Littlejohn was a psychopath. That was an inappropriate reference. Do not give any consideration whatsoever to [defense counsel]." Defendant contends that this instruction violated N.C. Gen. Stat. § 15A-1222 (2009), which provides that a "judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury."

In criminal cases, "it is only when the jury may reasonably infer from the evidence before it that the trial judge's action

intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). Reviewing whether a court impermissibly expressed its opinion requires that the court's statement be viewed within the context of all the instructions and the trial as a whole. *See State v. Rich*, 351 N.C. 386, 393-94, 527 S.E.2d 299, 303 (2000) (holding that charge of court must be read as a whole and construed contextually; isolated portions will not be deemed prejudicial when charge as a whole is correct).

With respect to the instruction not to give consideration to defense counsel, we believe the jury would have understood that the court was simply referring to defense counsel's argument with respect to the term "psychopath" and not to defense counsel's whole argument. Before counsel began their closing arguments, the court provided the jury with a general framework, explaining that the attorneys would summarize the evidence. The trial court also advised the jury that it should adhere to its recollection of the evidence when it conflicted with what the attorneys said. Although the court could have used more careful language, we do not think, when the statement is viewed in context, that the jury took the court's instruction to mean that the jury should disregard defense counsel's entire closing argument.

As for the trial court's instruction that there was no evidence that Littlejohn was a psychopath, we do not agree with defendant that the trial court erred. The court's statement was

correct: there was no evidence that anyone had labeled Littlejohn a psychopath. On appeal, defendant argues that the trial court should have clarified that it was addressing the "choice of the word psychopath" or explained that the court was distinguishing between psychopathy and paranoid schizophrenia. Defendant did not, however, request either clarification. Further, although defendant argues that "the jurors must have believed the judge was instructing there was no evidence Mr. Littlejohn was mentally ill," because we do not know what either counsel argued during closing arguments, we cannot tell whether — in the context of the arguments — that possibility is a realistic one. If the closing arguments had discussed, without comment by the trial court, Littlejohn's paranoid schizophrenia and the other evidence of his mental illness, then it is highly unlikely that the jurors would draw the inference posited by defendant on appeal.

The circumstances of this case are distinguishable from those of *State v. Sidbury*, 64 N.C. App. 177, 306 S.E.2d 844 (1983), on which defendant relies. In *Sidbury*, a critical issue in the case was the defendant's physical ability to hold a gun in his right hand. After the defendant's wife testified that the defendant always wore a glove on his disabled right hand and that the defendant had been playing cards with her during the time of the crime, the trial court asked the wife whether the defendant wore the glove while dealing cards, and later, as the jury was about to leave for the evening, he warned the jury not to play cards while wearing gloves. *Id.* at 178, 306 S.E.2d at 845.

This Court held that the trial court's impromptu question to the witness brought to the jury's attention the defendant's ability to deal cards while wearing gloves. *Id.* "The seed was thus implanted in the jurors' minds to question defendant's inability to handle a gun as opposed to his ability to deal cards with his glove on. The court indirectly reminded them of this seeming inconsistency by its statement at the end of the day" that the jurors should "'not try to play cards with gloves on.'" *Id.* at 178-79, 306 S.E.2d at 845. The Court concluded that "if one juror interpreted the court's remarks as questioning the credibility of defendant's evidence, that was one juror too many[,]" and reversed in part because the evidence was not overwhelming and the credibility issue went to "the heart of the case." *Id.* at 179, 306 S.E.2d at 845-46.

Here, by contrast, the evidence of Littlejohn's mental health issues *was* overwhelming: not only was it presented by multiple witnesses, but it was essentially unchallenged. Additionally, we do not find that by instructing the jury that there was no evidence Littlejohn was a psychopath, the court was expressing its opinion on the voluminous other mental health evidence that was offered. While the court did require defendant to leave a blank in the slide, the record does not indicate and defendant does not contend that the court ever prohibited defendant from using the terms "paranoid schizophrenic" or "psychotic" elsewhere during the closing argument. We, therefore, conclude that the trial court's comments did not prejudice defendant.

No prejudicial error.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).