An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

NO. COA10-428

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

STATE OF NORTH CAROLINA

v.

JESSIE WAYNE SWEET

Wilkes County
Nos. 07 CRS 053114-6

Appeal by defendant from judgment entered 15 October 2009 by Judge Edgar B. Gregory in Wilkes County Superior Court. Heard in the Court of Appeals 13 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Catherine M. Kayser, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

BRYANT, Judge.

Where there is a transactional connection between offenses, the trial court does not abuse its discretion in allowing joinder. Where victim impact testimony was erroneously admitted during the guilt-innocence phase without objection, but the defendant failed to show the error probably changed the outcome of the trial, he is not entitled to relief. Where a letter is admitted to show the reaction it produced rather than for the truth of the matter asserted in it, the letter is not hearsay, and the trial court does not err in allowing its admission. Where trial counsel has his client's knowing consent to concede guilt as to one of the crimes

charged during closing arguments, defendant has not received ineffective assistance of counsel. However, where the elements of defendant's conviction offense do not fit within the statutory definition of an aggravated offense, the trial court errs in ordering him to enroll in lifetime satellite-based monitoring.

Facts

Defendant Jessie Wayne Sweet was indicted on charges of first-degree sexual offense, first-degree rape of a child, indecent liberties with a child, communicating threats, and misdemeanor child abuse. At trial, the evidence tended to show the following. In 2007, Sally,[1] began having nightmares. When Sally refused to discuss the nightmares with her mother, her mother asked Sally's aunt to talk to her. Sally told her aunt that defendant, her grandfather, had looked up her nightgown and touched her breasts when her parents were not at home. When her aunt asked if defendant had touched her genitals, Sally replied, "Yes, he put it in me. And I hate him." The aunt reported Sally's statements to her parents, who contacted the authorities.

Detective Linda Nichols of the Wilkes County Sheriff's Department was assigned the case and interviewed Sally and her younger brother, Steven. Sally told the detective about two incidents of sexual abuse by defendant that occurred when he was babysitting Sally after school. Sally also testified about the incidents at trial. The first occurred in November 2006, when

---

[1] The pseudonyms "Sally" and "Steven" are used to protect the identity of the child victims in this case.

defendant told then-eleven-year-old Sally to pull down her pants. Defendant pulled down her pants and put two of his fingers into her vagina. Defendant threatened to kill Sally if she told anyone. In January 2007, after Sally returned home from school, defendant exposed himself to her and put his penis into her vagina for about five minutes. When defendant finished, Sally noticed she was wet around her vagina. Defendant again threatened to kill Sally if she told what he had done.

Steven told Det. Nichols about an incident that occurred around the time of Steven's ninth birthday in November 2006. Sally was spending the night elsewhere. At trial, Steven testified that defendant was taking care of him while his mother was in the hospital, and Steven asked defendant to fix him some dinner. Defendant became angry and kicked Steven in the rear end with a pointed cowboy boot, causing him to fall to the floor. Defendant then picked Steven up by his arm, threw him onto his bed, and threatened to shoot Steven if he tried to open the door. Defendant refused to give Steven anything to eat that night. Steven also stated that defendant sometimes hit him in the chest and had kicked him in the back of the knee.

Prior to trial, the State moved to join all the charges against defendant, who objected to the joinder. The State argued there was a transactional connection between the offenses involving Steven and Sally because the child abuse of Steven and the sexual abuse of Sally occurred close in time to each other. The trial court granted the State's motion.

At trial, Det. Nichols testified about her interviews with Sally and Steven. Heather Holbrook, a child protective services worker, testified that she contacted Sally's parents after receiving an anonymous letter stating that a twelve-year-old girl had been raped by her grandfather and naming Sally's parents. When Holbrook contacted Sally's parents, she learned that they had already contacted authorities after Sally's disclosure to her aunt. The letter was admitted without objection. A medical doctor testified as an expert on child sexual abuse and stated that Sally showed signs of an old, healed injury to her hymen consistent with her report of sexual abuse and rape. A social worker testified as an expert on child sexual abuse about her interviews with Steven and Sally before their medical examinations.

Defendant presented no evidence. During closing arguments, defendant's trial counsel conceded defendant's guilt on the child abuse charge for kicking Steven. The following day, during jury deliberations, the State mentioned this concession and defendant's trial counsel told the trial court he had gotten defendant's permission to make the concession. The trial court then engaged in a colloquy with defendant about the concession and whether defendant had agreed to it. At one point, defendant stated that he had never kicked or touched Steven. However, after the trial court continued to discuss whether defendant had a problem with his trial counsel conceding the charge, defendant repeatedly said he did not disagree with Steven's statements and that he did not object to his attorney's statement to the jury. The jury found defendant guilty

of first-degree sexual offense, indecent liberties with a child, communicating threats, and misdemeanor child abuse, but not guilty of first-degree rape. During sentencing, the trial court found that defendant had been convicted of a sexual offense with a child and that it was an aggravated offense. As a result, the trial court ordered defendant to enroll in lifetime satellite-based monitoring.

Defendant makes five arguments on appeal. He contends the trial court erred in (I) allowing the State's motion for joinder and (II) ordering defendant to enroll in satellite-based monitoring; and committed plain error in (III) allowing a child victim to testify about how the sexual abuse had changed her and (IV) admitting an anonymous letter into evidence. Defendant also argues that (V) he received ineffective assistance of counsel at trial.

I

Defendant first argues the trial court erred in allowing the State's motion for joinder. We disagree.

Under our general statutes, "[t]wo or more offenses may be joined . . . for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2009). "The trial court's consolidation of charges with a transactional connection will only be disturbed upon a

showing of an abuse of discretion." *State v. Beckham*, 145 N.C. App. 119, 126, 550 S.E.2d 231, 236 (2001).

> In considering whether a "transactional connection" exists among offenses, our courts have taken into consideration such factors as the nature of the offenses charged, *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983), "commonality of facts," *State v. Bracey*, 303 N.C. 112, 117, 277 S.E. 2d 390, 394 (1981), the lapse of time between offenses, *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980), and the unique circumstances of each case, *State v. Boykin*, 307 N.C. 87, 296 S.E. 2d 258 (1982).

State v. Herring, 74 N.C. App. 269, 273, 328 S.E.2d 23, 26 (1985), *affirmed*, 316 N.C. 188, 340 S.E.2d 105 (1986). We will not reverse a trial court's determination if "[t]he offenses were not so separate in time and place and so distinct in circumstance that consolidation was rendered unjust and prejudicial to defendant." *State v. Bracey*, 303 N.C. 112, 118, 277 S.E.2d 390, 394 (1981).

Here, defendant was charged with misdemeanor child abuse for kicking Steven and throwing him on his bed between 1 and 24 November 2006. Steven testified that the incident occurred while defendant was babysitting him in his and Sally's home. Steven also testified that defendant threatened to shoot him if Steven attempted to leave the room. Defendant was indicted for taking indecent liberties with a child, first-degree sexual offense, first-degree rape and communicating threats in connection with his abuse of Sally. The indictment states that the date of these offenses fell between 1 November 2006 and 31 January 2007. Sally's testimony suggested that, in November 2006, defendant pulled down her pants, inserted his fingers into her vagina, and threatened her

if she told anyone. Sally testified that each incident occurred while she was in her home alone with defendant, who was acting as a babysitter.

Thus, the incidents involving Sally and Steven were temporally proximate, with two incidents occurring in the same month. Further, all of the incidents involved defendant abusing his minor grandchildren in the same location (their home) while he was left alone to babysit them. Additionally, although he was only charged with communicating threats to Sally, testimony showed that defendant threatened both victims during the abuse. These facts indicate a transactional connection among the offenses. Had separate trials been held, evidence of the offenses against each child would likely have been admissible under Rule of Evidence 404(b) to show defendant's common scheme or plan. The offenses here were not so separate in time and place and not so distinct in circumstance to render their joinder unjust and prejudicial to defendant, and, thus, we see no abuse of the trial court's discretion in allowing joinder. This argument is overruled.

II

Defendant next argues the trial court erred in ordering defendant to enroll in satellite-based monitoring ("SBM"). We agree.

In determining whether to order a defendant to enroll in satellite-based monitoring, our General Statutes provide:

> (b) After receipt of the evidence from the parties, the court shall determine whether the offender's conviction places the offender in one of the categories described in G.S.

> 14-208.40(a), and if so, shall make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.
>
> (c) If the court finds that the offender has been classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in a satellite-based monitoring program for life.

N.C. Gen. Stat. § 14-208.40A (2009). Further,

> (1a) "Aggravated offense" means any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6 (2009).

The State concedes that it is unable to distinguish this case from *State v. Davison*, __ N.C. App. __, 689 S.E.2d 510 (2009) and *State v. Singleton*, __ N.C. App. __, 689 S.E.2d 562, *disc. review improvidently allowed*, __ N.C. __, __ S.E.2d __ (2010). In those cases, this Court reversed trial court orders requiring defendants to enroll in SBM for the remainder of their natural lives.

> In *State v. Davison*, __ N.C. App. __, 689 S.E.2d 510 (2009), this Court considered whether the trial court properly determined that a defendant convicted of attempted first-degree sex offense and of taking indecent liberties with a child had committed "aggravated offenses" when the court based its

> determination in part upon the defendant's "recitation of the underlying facts giving rise to his convictions." *See Davison*, __ N.C. App. at __, 689 S.E.2d at __, 2009 N.C. App. LEXIS 2239 at *18. After reviewing the language of the statutes at issue, this Court held that the General Assembly's "repeated use of the term 'conviction'" compelled the conclusion that the trial court "is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction" when determining whether a defendant's "conviction offense [i]s an aggravated offense" under the procedures set forth in N.C.G.S. § 14-208.40A. *Davison*, __ N.C. App. at __, 689 S.E.2d at __, 2009 N.C. App. LEXIS 2239 at *19 (emphasis added). Shortly after *Davison* was decided, this Court applied this same rule when determining whether a defendant's conviction offense was an "aggravated offense" under the procedures set forth in N.C.G.S. § 14-208.40B. *See State v. Singleton*, __ N.C. App. __, __, 689 S.E.2d 562, __, 2010 N.C. App. LEXIS 34, *23 (2010). Thus, in order for a trial court to conclude that a conviction offense is an "aggravated offense" under the procedures of either N.C.G.S. §§ 14-208.40A or 14-208.40B, this Court has determined that the elements of the conviction offense must "fit within" the statutory definition of "aggravated offense." *See Singleton*, __ N.C. App. at __, 689 S.E.2d at __, 2010 N.C. App. LEXIS 34 at *23.

State v. Phillips, __ N.C. App. __, __, 691 S.E.2d 104, 106 (2010). We are bound by these prior decisions of this Court to reverse the trial court's order. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

III

Defendant also argues the trial court committed plain error in allowing a child victim to testify about how the sexual abuse had changed her. We disagree.

In criminal cases, our appellate rules allow plain error review of unpreserved evidentiary issues. N.C. R. App. P. 10(c)(4) (2009). "A reversal for plain error is only appropriate in the most exceptional circumstances and when the defendant establishes that absent the error, the jury probably would have reached a different result." *State v. Taylor*, 362 N.C. 514, 543, 669 S.E.2d 239, 263 (2008) (internal citation and quotation marks omitted), *cert. denied*, __ U.S.__, 175 L. Ed. 2d 84 (2009).

It is error for a trial court to admit irrelevant evidence. N.C. Gen. Stat. § 8C-1, Rule 402 (2009) ("Evidence which is not relevant is not admissible."). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401. Victim impact evidence includes physical, psychological, or emotional injuries, as well as economic or property loss suffered by a crime victim or her family members. N.C. Gen. Stat. § 15A-833 (2009). Although victim impact evidence is often relevant during sentencing, "the effect of a crime on a [victim or family member] often has no tendency to prove whether a particular defendant committed a particular criminal act against a particular victim; therefore victim impact evidence is usually irrelevant during the guilt-innocence phase of a trial and must be excluded." *State v. Graham*, 186 N.C. App. 182, 190, 650 S.E.2d 639, 645 (2007), *disc. review denied*, 362 N.C. 477, 666 S.E.2d 765 (2008).

Here, on direct examination, the State asked Sally how the incidents of sexual abuse by defendant had changed her. Sally testified that she had become less outgoing, started wearing baggy clothing, made worse grades at school and "just wasn't [herself] anymore." The State concedes, and we agree, that this victim impact testimony was irrelevant during the guilt-innocence phase of the trial and that the trial court erred in admitting it. However, we also agree with the State that the admission does not rise to the level of plain error. Given the consistent and uncontradicted testimony from Sally, a social worker, a detective and a medical expert about her sexual abuse at the hands of defendant, we do not believe that, absent the victim impact testimony, the jury would probably have acquitted defendant. This argument is overruled.

IV

Defendant next argues the trial court committed plain error in admitting an anonymous letter into evidence. We disagree.

Where a defendant fails to object to admission of evidence at trial, we review only for plain error. *See* N.C. R. App. P. 10(c)(4). Relief is granted under this standard only when the defendant proves that, but for the error, the jury would probably have reached a different result. *Taylor*, 362 N.C. at 543, 669 S.E.2d at 263.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c). "When evidence of such statements by one other

than the witness testifying is offered for a proper purpose other than to prove the truth of the matter asserted, it is not hearsay and is admissible." *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990). "Specifically, 'statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made.'" *Id.* (quoting *State v. White*, 298 N.C. 430, 437, 259 S.E.2d 281, 286 (1979) (decided prior to the enactment of the North Carolina Rules of Evidence)).

Here, during the testimony of CPS worker Holbrook, the State introduced an anonymous letter that had been sent to the Wilkes County Department of Social Services. The letter named Sally's parents and stated that a twelve-year-old girl had been raped by her grandfather. DSS treated the letter as a report of child abuse and assigned the matter to Holbrook. Holbrook testified that, when she contacted Sally's parents, she learned that they had already reported defendant's suspected abuse of Sally to law enforcement authorities. Holbrook took no further action based on the letter. Defendant did not object to admission of the letter at trial, but now argues plain error and asserts that the letter was hearsay.

The anonymous letter was not hearsay because it was admitted, not to prove the truth of the charges made in letter, but rather to explain Holbrook's reason for contacting Sally's parents and why there was no further investigation by DSS of the allegations presented in the letter. Thus, the trial court did not commit error, let alone plain error, in admitting the letter. This argument is overruled.

V

Defendant also argues that he received ineffective assistance of counsel at trial. We disagree.

"'[A] counsel's admission of his client's guilt, without the client's knowing consent and despite the client's plea of not guilty, constitutes ineffective assistance of counsel.'" *State v. Goode*, __ N.C. App. __, __, 677 S.E.2d 507, 510 (quoting *State v. Harbison*, 315 N.C. 175, 179, 337 S.E.2d 504, 506-07 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986)), *disc. review denied and appeal dismissed*, 363 N.C. 746, 689 S.E.2d 140 (2009). In such situations, 'the harm is so likely and so apparent that the issue of prejudice need not be addressed.'" *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507. In determining whether a defendant's consent is knowing, appellate courts have looked to whether the defendant was informed of the need for his consent, discussed trial strategy with counsel, and then gave consent. *Goode*, __ N.C. App. at __, 677 S.E.2d at 510-11.

Here, defendant contends that his trial counsel rendered ineffective assistance of counsel *per se* by conceding defendant's guilt of the physical abuse charge to the jury without defendant's consent. The record reveals that, while the jury was deliberating, defendant, trial counsel for defendant and the State, and the trial court engaged in a discussion about whether defendant's trial counsel had "pretty much conceded" his guilt of the misdemeanor child abuse charge:

> THE COURT: Yesterday, during your lawyer's argument, he indicated that he didn't have a

problem with anything that [Steven] had to say. The way I took that was that he was conceding that you were guilty of the offenses involving [Steven]. Did he have your consent, before he made that statement, to make that statement?

THE DEFENDANT: I don't remember.

THE COURT: Do you have any problem with your lawyer conceding that you are probably guilty of the offense involving [Steven]?

THE DEFENDANT: Is that where I'm supposed to have kicked him?

THE COURT: Yes, sir.

THE DEFENDANT: I didn't kick my grandson. I never touched my grandson.

THE COURT: Did you tell your lawyer that you did not want him to concede guilt to that charge of [Steven]?

THE DEFENDANT: I don't know what "concede" means.

THE COURT: That's a way of saying you didn't have any problem with him stating that he didn't have any problem with the statements of [Steven].

THE DEFENDANT: Oh, whatever. Yes.

THE COURT: Is it all right with you that he made that statement?

THE DEFENDANT: Yes.

THE COURT: Is there anything you want me to tell the jury about that statement, to bring them back and tell them that you wish he had not made that statement, or have him make a statement that you don't agree with him making that statement? Do you know what I'm asking you? In other words, the statement he made concerning [Steven's] statements, he said he didn't have any problem with the statement. It is it all right with you that your attorney said that?

THE DEFENDANT: That's fine, yes.

> THE COURT: You don't have a problem with it?
>
> THE DEFENDANT: No.
>
> THE COURT: All right. [Defense counsel], anything you want to say about that?
>
> [DEFENSE COUNSEL]: That was going to be my---
>
> THE COURT: Did you talk to him about the *Harbisson* [sic] decision?
>
> [DEFENSE COUNSEL]: Mr. Sweet, do you acknowledge that I came back there yesterday and asked your express permission to argue my closing any way I saw fit, and---
>
> THE DEFENDANT: Yes.
>
> [DEFENSE COUNSEL]: ---I asked you about that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: The court concludes, based on the responses of the defendant, that the defense counsel, before he made the statements concerning [Steven's] statements, that he had the permission and consent of his client to have made that statement. And under the State versus Harbisson [sic] decision, the court concludes that the statement was made with the consent of the lawyer [sic], and that the consent was given freely, voluntarily, and understandingly.

As reflected in the exchange quoted above, the trial court questioned defendant about whether he had consented to his trial counsel's closing argument strategy, and defendant repeatedly said that he had. The trial court and defense counsel complied with *Harbison*, and defendant has failed to show ineffective assistance of counsel. This argument is overruled.

Reversed in part; no error in part; no prejudicial error in part.

Judges STEELMAN and ERVIN concur.

Report per Rule 30(e).