NO. COA12-1565
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v. Davidson County
No. 10 CRS 57434

ZACHARY RUSSELL BOWMAN,
Defendant.

Appeal by defendant from judgment entered 27 July 2012 by Judge Christopher W. Bragg in Davidson County Superior Court. Heard in the Court of Appeals 14 August 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

GEER, Judge.

Defendant Zachary Russell Bowman appeals from his conviction of first degree murder. On appeal, defendant primarily argues that the trial court committed plain error by admitting testimony from non-medical lay witnesses that (1) a person's bladder voids of urine upon death and (2) if the victim had died while hanging, as claimed by defendant, she would have

suffered seizures from asphyxiation while dying and those seizures would have caused her body to leave noticeable damage to the wall area near where she allegedly hanged herself. We agree with defendant that only expert witnesses could express the opinions contained in the challenged testimony. While one of the witnesses properly testified to the voiding of the bladder, we hold that the trial court erred in admitting the remaining testimony. However, based on our review of the record, we do not believe there is a reasonable probability that absent the erroneously admitted evidence the jury would have found defendant not guilty. Consequently, we conclude defendant received a trial free from prejudicial error.

Facts

The State's evidence tended to show the following facts. In May 2010, Tosha Powers worked as an entertainer at "Platinum Diamonds" gentleman's club in Winston-Salem, North Carolina. Defendant and Ms. Powers had dated for about a year, and defendant did not approve of Ms. Powers' job. By late May, Ms. Powers no longer wanted to date defendant. Ms. Powers told Angela Norman, a co-worker, that defendant "had drug her around by her hair in front of her kids." In early June, Ms. Powers broke up with defendant, and she moved with her two middle-

school aged children into her father's house. Defendant was very angry about the break up.

In June 2010, Ms. Powers had bruises on her arms and wrists, three large bruises on her legs, bruises on her hips, and a large knot on the side of her head. Ms. Powers told co-workers that defendant had given her the injuries because he was jealous, and he accused her of cheating on him.

Throughout the summer of 2010, defendant called Ms. Powers 10 to 20 times a day. On one night, while Ms. Powers was working, defendant called her 30 times. Defendant would variously tell Ms. Powers that he was going to kill her, rape her, beat her up, kill her children, and kill her father.

On 20 August 2010, after defendant called Ms. Powers at work and threatened to kill her, Ms. Norman, her co-worker, called her younger brother, State Bureau of Investigation Assistant Special Agent Brian Norman, and Ms. Powers spoke to Special Agent Norman on the phone. While Special Agent Norman was on the phone, he could hear an "enraged" male voice on speakerphone in the background saying, "'I'll fucking kill you. I'm not scared of your father. I will kill him and the kids and burn the house down with you all in them.'" These statements were repeated "again, again and again," more than 10 times. Ms. Powers told Special Agent Norman that the male voice belonged to

defendant. Ms. Powers also told Special Agent Norman she was scared to contact the police because, if she did, "it would enrage him more and he would do something to her kids."

Also on 20 August 2010, Officer John Pratt, then with the Winston-Salem Police Department, responded to Platinum Diamonds regarding a report that defendant had engaged in domestic violence with and communicated threats to Ms. Powers. Ms. Powers was very upset and told Officer Pratt that defendant repeatedly called her and "threaten[ed] to kill her and her kids." She further stated there had been "at least eight previous incidents of domestic violence." Officer Pratt told Ms. Powers that she could get a warrant taken out against defendant for communicating threats, that she could obtain a domestic violence protective order against him, and that she could go to a battered women's shelter. Ms. Powers refused to go to a battered women's shelter because she believed it would disrupt her children's lives, and she "was afraid that if she prosecuted [defendant] it might make it worse."

Officer Pratt then called defendant. Defendant, acting "polite to the point of being overly polite," told the officer that he had not contacted Ms. Powers at all and that he would not do so in the future. After the 20 August 2010 incident, Ms. Powers wrote down defendant's name, birthdate, address, and

place of employment on a napkin and gave it to Ms. Norman. She told Ms. Norman that "[i]f anything happened to her [defendant] would be the one and that's his information."

Ms. Norman saw Ms. Powers at work on 28 September 2010, and Ms. Powers cried that morning and told Ms. Norman that defendant had again told her he was going to kill her. At some point after 6:00 p.m. that same day, defendant called Platinum Diamonds and asked for Ms. Powers. Miranda Groves, a manager, told defendant that Ms. Powers had already left for the day. Defendant was angry and yelling. He called Ms. Groves a "lying ass whore," and insisted that Ms. Groves "go get that stupid fucking bitch and put her on the phone." When Ms. Groves refused, defendant said, "'Either let me talk to her or I'm going to come up there and board the door shut and burn that place down with you all in it.'"

Before Ms. Powers left Platinum Diamonds that night, she was very upset and talked to Ms. Groves about getting a domestic violence protective order against defendant. Ms. Powers stated that "she was finished" and that "she had had enough." Ms. Powers' last words to Ms. Groves as she left the club at 8:30 p.m. that night were: "'Promise me if something happens that you will tell [the police] that [defendant] did this to me.'"

Just before 12:00 p.m. on 29 September 2010, defendant knocked on the door of a trailer home on Calvin Road in Thomasville, North Carolina and told the owner, Mindy Ward, that his girlfriend had hanged herself, and Ms. Ward needed to call 911. Defendant owned the trailer home, which was used for storage and did not have power, located next door to Ms. Ward's trailer. Jimmy Nicholson, who was at Ms. Ward's trailer, then ran after defendant into defendant's trailer while Ms. Ward called 911. Mr. Nicholson went to the back bedroom of defendant's trailer and saw Ms. Powers fully clothed, lying face up on a bed with her legs hanging off of the bed. Ms. Powers had "two dark purplish parallel lines across her throat." Defendant was kneeling beside the bed crying and rubbing Ms. Powers' head.

Mr. Nicholson checked Ms. Powers' neck for a pulse, but found none. In addition, Ms. Powers' skin was cold and clammy to the touch, and she was not breathing. While Mr. Nicholson performed CPR on Ms. Powers, defendant walked between the front door and the bedroom crying and repeatedly saying, "Why did you do this? You knew I loved you."

Roughly 15 or 20 minutes later, paramedics arrived and determined that there was no electrical activity in Ms. Powers' heart, so no further attempts to resuscitate her were made.

Defendant gave a statement to then-paramedic Taryn Michelle Strickland, claiming that earlier he had gone to the store, and Ms. Powers was fine. Defendant tried to hand Ms. Strickland a receipt from the store at least twice even though she had not asked for one. Defendant stated that when he returned from the store, Ms. Powers "was hanging from a white cord" inside the trailer, and she was not breathing. Upon further questioning, defendant stated that Ms. Powers told him, "'I love you,'" as defendant took her down from the cord.

Trooper Steven Michael Comer, Jr. of the North Carolina State Highway Patrol and Detective Nathaniel Paul Riggs of the Davidson County Sheriff's Office arrived on the scene shortly after receiving the emergency call. Defendant told Trooper Comer and Detective Riggs that he had gone to a nearby convenience store to get two drinks. Although neither officer asked for it, defendant again voluntarily produced a receipt for the drinks. The receipt was from a purchase at 11:56 a.m. that day. Defendant stated the trip took him about 15 to 20 minutes total. Defendant also told Trooper Comer that he and Ms. Powers had gone to defendant's storage trailer that day to pick up furniture and that defendant and Ms. Powers had been dating for over a year "without any troubles." He further stated that Ms. Powers had "tried to commit suicide one time in the past."

Defendant told the officers that when he returned to the trailer, Ms. Powers was hanging from a white electrical extension cord which was draped over a drywall screw partially exposed from the drywall overhanging a doorframe. Her feet were approximately two inches off the ground. Defendant claimed he "picked her up and tore the cord out, took it from around her neck, and brought her to the back bedroom and laid her on the bed there." He further claimed that when he took Ms. Powers down, she began breathing and said, "'I love you, Zach'" and then stopped breathing again.

The drywall screw defendant claimed Ms. Powers used to hang herself was still straight in the wall, centered in its hole, and was not bent. The wall area above the doorframe, surrounding the screw, was undamaged. The screw was located seven feet and one quarter inch from the floor. Ms. Powers was five feet six inches tall and weighed 124 pounds.

Trooper Comer and Detective Mark Hanna of the Davidson County Sheriff's Office observed that the white extension cord had a slip knot tied in it but that it did not appear that the knot was pulled tight like it would have been if it had borne weight. Further, the extension cord was situated "partially underneath [a] board on the floor." There was a chair near the area where defendant claimed Ms. Powers hanged herself, but the

chair was still upright, was off center from the area of the hanging, had a visible coating of dust on it that was undisturbed, and did not show any handprints or footprints. In addition, the "popcorn" material on the drywall to which the screw was affixed "seemed untouched left and right and below the screw."

According to Trooper Comer, at the time of death any urine in a person's bladder will be released. Detective Hanna observed that there was a wet spot of urine on Ms. Powers' jeans "centered around the vaginal area," as well as a wet spot of urine on the bed where Ms. Powers had been lying. However, the floor below the drywall screw, where defendant claimed Ms. Powers was hanging, was dry, as was the chair near that area and the flooring between that area and the bed.

After giving a statement to officers at the scene, defendant followed Detective Hanna to the Davidson County Sheriff's Office where he gave another statement. Defendant claimed that he had never hit Ms. Powers or had any physical confrontations with her. Defendant also stated that when he found Ms. Powers hanging, she was fully suspended and her feet were "PROBABLY BETWEEN A [sic] INCH . . . HIGHER THAN A [sic] INCH, MAYBE BETWEEN . . . A FOOT AND HALF [sic], TWO FOOT [sic]"

from the floor. He further stated he had no idea why Ms. Powers would hang herself.

On 30 September 2010, Dr. Deborah Radisch, a forensic pathologist and the Chief Medical Examiner for the State of North Carolina, performed an autopsy on Ms. Powers' body. Ms. Powers' body was delivered for the autopsy still wearing a "black cord necklace." Dr. Radisch observed bruise and contusion marks around Ms. Powers' neck, with two distinct markings across the front of the neck.

Detective Hanna and Detective Cory Mann of the Davidson County Sheriff's Office attended the autopsy and provided Dr. Radisch with the white electrical extension cord defendant claimed Ms. Powers had used to hang herself. Dr. Radisch performed a "side by side" comparison "of the electrical cord as well as the cord necklace with the marks on the neck." Based on this comparison, Dr. Radisch determined that the size of the necklace was "consistent with the size and characteristics [of] the marks on the neck," but the electrical cord was nearly twice as wide as the relevant markings on Ms. Powers' neck and, thus, did not correspond with those injury marks. Further, Dr. Radisch observed that the electrical cord contained a "groove separating one set of wires from the other" and, if that cord had been used as a ligature on Ms. Powers' neck, the groove

would probably have left a separate mark, and no such separate mark was present.

Dr. Radisch further examined Ms. Powers' neck injuries and observed there was "no evidence of any sharp upward slant or of a suspension point," evidence that would indicate death by hanging. Dr. Radisch determined that the marks on Ms. Powers' neck could be "consistent with the victim being face down and someone from behind twisting that rope necklace . . . causing asphyxiation." Based on these observations, Dr. Radisch determined that the cause of Ms. Powers' death was "asphyxiation due to a ligature strangulation" and that the manner of death was homicide.

On 25 October 2010, defendant was indicted for first degree murder. At trial, defendant presented the testimony of Charles R. Manning, Jr., Ph.D., a consultant and expert in the fields of engineering, physics, and accident reconstruction. Dr. Manning examined the evidence, viewed the scene, and created a model replica of the wall and screw as they were found at the scene. Dr. Manning believed that the physical evidence showed that weight had been placed on the screw at issue in this case. Dr. Manning was of the opinion that a cut in the electrical cord defendant claimed was used to hang Ms. Powers showed that the cord was cut by the threads of the screw. Dr. Manning also ran

an experiment that tended to show that a weight of 125 pounds could have hung from the drywall screw without bending the screw or damaging the drywall around the screw. Dr. Manning concluded that the screw could have held Ms. Powers and her feet "could have been touching" the floor or "not quite touching."

Defendant also presented the testimony of forensic pathologist Dr. Christena Lynn Roberts, who reviewed the evidence and agreed with Dr. Radisch that the cause of death was "asphyxiation due to ligature strangulation" but concluded, in contrast to Dr. Radisch, that the manner of death was "undetermined" since there was not "enough evidence to decide between accident and suicide and a partial suspension hanging or homicide." Dr. Roberts observed Ms. Powers' neck injuries and concluded there "was more than one ligature or more than one loop of the same ligature." Dr. Roberts further observed "petechia," tiny blood vessel ruptures, in Ms. Powers' eyes and face which "would not be consistent with a complete suspension hanging."

Dr. Roberts explained that partial suspension hanging occurs when part of the body weight is suspended such that the entire body weight is not on the ligature, such as where the feet are still somewhat touching the floor. Dr. Roberts concluded that the absence of certain internal injuries in Ms.

Powers' neck was "more consistent with a partial suspension hanging" than with "manual strangulation with a hand or manual strangulation with ligature." Dr. Roberts also observed that there were no fingernail scratch marks and no defensive wounds on Ms. Powers' body which are often present in homicide ligature strangulation cases.

The jury found defendant guilty of first degree murder. The trial court sentenced defendant to life imprisonment without the possibility of parole. Defendant timely appealed to this Court.

I

Defendant first argues that the trial court erred in allowing several officers to testify about matters that required medical expertise that the officers did not possess. First, defendant challenges Trooper Comer's, Detective Hanna's, and Detective Mann's testimony regarding the release of urine in a person's bladder at the time of death. Trooper Comer testified that "at the time of death your body -- you have bladder and bowel incontinence where you lose control of your bodily functions" such that "[y]our bladder will empty out and you lose control of your bowels." Detectives Hanna and Mann testified that had Ms. Powers died while hanging, the urine she released

would have run down her legs to the ground, but the urine did not do so in this case.

Second, defendant challenges testimony by Detectives Hanna and Mann regarding terminal seizures occurring during death by hangings. Detective Hanna testified that "[t]erminal seizures" are "violent conditions" that occur during hangings due to a lack of oxygen in the brain causing "[t]he body [to] convulse or seize." Detective Hanna further testified that he would have expected to see indications of terminal seizures had Ms. Powers died by hanging such as damage to the wall near the screw, but he saw nothing at the scene indicating Ms. Powers experienced terminal seizures. Detective Mann likewise testified that whenever a person is hanged, "the body will go through seizures," and, in this case, the lack of damage to the wall area near the screw indicated that Ms. Powers did not suffer terminal seizures while hanging from the screw.

Defendant points out that because the officers were not present when Ms. Powers died, they had no personal knowledge of what occurred at that time. Defendant then reasons that, under Rule 602 of the Rules of Evidence, since the officers had no personal knowledge regarding whether Ms. Powers actually experienced bladder voiding or seizures at the time of her death, their testimony amounted to the expression of opinions

that would only be admissible if the officers were properly qualified as medical experts under Rule 703 of the Rules of Evidence. *See* N.C.R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. . . . This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses."); N.C.R. Evid. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing."). Defendant concludes that because the officers were not qualified as experts on these medical issues, the trial court erred in admitting the testimony.

As an initial matter, defendant concedes that he did not properly preserve his argument regarding bladder voiding for appeal and that our review of that issue is, therefore, limited to plain error review. Additionally, although defendant adequately objected to Detective Hanna's testimony concerning terminal seizures occurring during hangings and to a portion of Detective Mann's similar testimony, defendant failed to object when Detective Mann subsequently testified, while explaining a photograph of the scene, to the following: "With this area (indicating) with the screw being up here (indicating), had Miss

Powers been hanging from this area (indicating), *talking about the terminal convulsions and seizures that she would have gone through if she was hanging*, her feet would have been here (indicating) and it would have been damaged in this area most likely (indicating)." (Emphasis added.) Defendant's challenge to both detectives' terminal seizures testimony is, accordingly, not properly preserved for appeal. *State v. Hargrave*, 198 N.C. App. 579, 582, 680 S.E.2d 254, 257-58 (2009) (holding argument that three officers' testimony constituted improper lay opinion was not preserved for appeal where defendant objected to one officer's testimony on pertinent grounds at trial but did not object to other two officers' testimony on pertinent grounds).

Defendant nonetheless cites *State v. Lawson*, 173 N.C. App. 270, 619 S.E.2d 410 (2005), in support of his contention that his argument regarding terminal seizures is preserved for appeal. In *Lawson*, the trial court overruled an objection to a question, the prosecutor asked two more questions, the defendant objected to the third question, the trial court overruled that objection, and the prosecutor then asked a fourth question that elicited some of the testimony challenged by the defendant on appeal. *Id.* at 274, 619 S.E.2d at 412-13. With respect to preservation, this Court held that the "defendant's pattern of objections to the hearsay testimony constituted a continuing

objection to the line of questioning and therefore all of the hearsay testimony may be considered on appeal, although only part of the testimony was objected to at trial." *Id.* at 275, 619 S.E.2d at 413. Here, however, Detective Mann's unchallenged terminal seizures testimony occurred roughly five transcript pages after defendant's earlier objection to similar testimony. Based on how the examination proceeded, we cannot conclude that there was a continuing objection in this case, as there was in *Lawson*.

Defendant alternatively argues that admission of the detectives' terminal seizures testimony, like admission of the bladder voiding testimony, constituted plain error. Our Supreme Court has explained:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

Our courts have held that testimony on certain medical subjects may only be given by experts in the relevant field. In *State v. King*, 366 N.C. 68, 78, 733 S.E.2d 535, 541 (2012), the Supreme Court held that "psychiatric theories of memory, and specifically of repressed and recovered memories, are arcane even to specialists and may not be presented without accompanying expert testimony to prevent juror confusion and to assist juror comprehension."

Similarly, in homicide cases, "[w]here the cause of death is obscure and beyond the experience and knowledge of the average layman, the prosecution must present expert medical testimony on the cause of death." *State v. Cherry*, 141 N.C. App. 642, 645, 541 S.E.2d 205, 207 (2000). With respect to the latter rule, our Supreme Court has held that a state trooper testifying in a murder case as a lay witness who had observed the victim's body, including visible bruises, was not qualified to testify that "'[t]here definitely were no signs to indicate a violent death.'" *State v. Porth*, 269 N.C. 329, 340, 153 S.E.2d 10, 18 (1967). The Court held that "only an autopsy by a medical expert could determine the cause of death." *Id.*

In this case, we similarly believe that the medical issues of bladder voiding at the time of death and terminal seizures were sufficiently removed from the ordinary experience of laymen

such that only expert witnesses could have given the testimony challenged on appeal. *See also Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (holding that "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury"); *Clark v. Perry*, 114 N.C. App. 297, 305-06, 442 S.E.2d 57, 62 (1994) ("The standard of care required of a health care provider in a particular case generally concerns specialized knowledge and is thus unfamiliar to most laypersons. Consequently, our courts have consistently held that in the usual medical malpractice or medical negligence case, testimony of a qualified expert is required to establish the standard of care." (internal citation omitted)). *Compare State v. Adams*, 299 N.C. 699, 703, 264 S.E.2d 46, 48 (1980) (rejecting defendant's argument that rape victim was not competent witness to testify that defendant's aggressive sexual acts caused soreness to her hips since Court did "not think the ailment was so complicated that only an expert witness could give testimony as to its cause").

None of the officers who provided the challenged testimony were tendered by the State, or expressly qualified by the trial

court, as experts in any field. However, our Supreme Court has held that

> [w]hile the better practice may be to make a formal tender of a witness as an expert, such a tender is not required. Further, absent a request by a party, the trial court is not required to make a formal finding as to a witness' qualification to testify as an expert witness. Such a finding has been held to be implicit in the court's admission of the testimony in question.

State v. White, 340 N.C. 264, 293-94, 457 S.E.2d 841, 858 (1995) (internal citations omitted).

Regarding his experience with bladder voiding at the time of death, Trooper Comer testified that he was certified as an emergency medicine technician ("EMT") in 1994, as an "EMT Intermediate" in 1995, and as a "paramedic" in 1996 and that his paramedic certification was current. He was a "Level I paramedic instructor," which allowed him to teach training courses, and a "paramedic two," which allowed him to "oversee and supervise instructors teaching those classes." To obtain his paramedic certification, Trooper Comer received 1,000 hours of instruction. Through his experience as a Highway Patrol trooper and a paramedic, Trooper Comer stated he had "viewed" a person whose bladder or bowel emptied during death approximately 100 or more times.

Given Trooper Comer's testimony as to his emergency medicine and law enforcement experience, we hold that the trial court implicitly qualified Trooper Comer as an expert witness competent to testify regarding bladder voiding at the time of death. *See State v. Armstrong*, 203 N.C. App. 399, 414-15, 691 S.E.2d 433, 443 (2010) (holding, "[b]ased on the testimony regarding [witness'] qualifications and on the substance of his opinion admitted over objection," that witness "provided expert testimony"); *State v. Applewhite*, 190 N.C. App. 132, 136-37, 660 S.E.2d 240, 243 (2008) (holding trial court implicitly qualified SBI agent as expert where agent testified regarding her law enforcement experience, gave opinion that there was no indication certain gun had been fired close in time to victim's death, and defense counsel made two general objections that court overruled).

Further, Trooper Comer's substantial EMT and law enforcement experience placed him in a better position than the jury to render an opinion regarding whether a person's bladder will empty out upon death. We, therefore, hold that the trial court did not err in implicitly qualifying Trooper Comer as an expert and admitting the challenged testimony. *See White*, 340 N.C. at 294, 457 S.E.2d at 858 (holding three nurses qualified to testify regarding "possibility that the victim accidentally

swallowed the piece of plastic on which he choked to death" since each witness had been licensed nurse for over 20 years); *State v. Hall*, 186 N.C. App. 267, 272, 650 S.E.2d 666, 669 (2007) ("In order to qualify as an expert, a witness need only be found 'better qualified than the jury as to the subject at hand, with the testimony being helpful to the jury.'" (quoting *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992))).

With respect to his knowledge of bladder voiding at the time of death, Detective Hanna testified that he was familiar with the subject through his personal involvement in "over a hundred investigations dealing with death." On the same matter, Detective Mann testified only that he had been involved in five to 10 homicide investigations. Given the lack of any evidence of any relevant training together with the sparseness and vagueness of their testimony regarding their experience with, and knowledge of, bladder voiding during death, we hold that any implicit qualification of Detectives Hanna and Mann as experts on this subject was in error. *See State v. Goodwin*, 320 N.C. 147, 150, 151, 357 S.E.2d 639, 640, 641 (1987) (holding trial court erred in allowing expert witness in field of clinical social work to testify that alleged victim "was suffering from post traumatic stress syndrome as a result of sexual abuse" when

State "failed to establish that the witness had any particularized training or experience relating to post traumatic stress disorder"). Further, since the detectives could not have testified as lay witnesses on this matter, the trial court erred in admitting their testimony. *See Porth*, 269 N.C. at 340, 153 S.E.2d at 18.

Turning to the challenged testimony regarding terminal seizures, Detectives Hanna and Mann testified that when the brain stops receiving oxygen, such as in a death by hanging, the body will seize and, in this case, there was no indication at the scene that Ms. Powers suffered terminal seizures while hanging. The detectives' relevant experience that might qualify them to render these opinions was the same as that previously discussed in regard to their testimony about bladder voiding at death. Based only on those qualifications, we hold that any implicit qualification of the detectives as experts on the subject of terminal seizures was erroneous. Since we have already held that the challenged testimony regarding terminal seizures could not properly be the subject of lay testimony, *see id.*, we hold the trial court also erred in admitting this testimony.

The question remains whether the errors had a probable impact on the jury's verdict. With respect to bladder voiding

at death, Trooper Comer provided proper expert testimony that upon death a person releases any urine held in the bladder and that the floor area beneath the screw upon which Ms. Powers allegedly hung herself was dry. In addition, defendant does not challenge on appeal similar testimony by Detective Riggs that "[i]n death you lose muscle control, bladder let's [sic] go, sometimes you urinate" and that the detective "noticed there was a wet spot right in [Ms. Powers'] crotch area," although the urine stain did not extend beyond that area. The State's evidence showed there was a wet spot of urine on the bed on which Ms. Powers was found. From this properly admitted evidence, the jury could infer that Ms. Powers died on the bed, rather than while hanging, since the released urine was on the bed, did not run down her pant legs, and was not on the floor beneath the screw.

Regarding terminal seizures, Dr. Radisch, a board certified expert in anatomical, clinical, and forensic pathology, provided unchallenged testimony that once a hanging victim goes unconscious, the victim "often" engages in "involuntary movements, jerking movements," during which the lack of oxygen to the brain "can cause a person's arms to just basically seize up and some people mistake that as somebody being conscious and trying to get the noose off, but it is just an involuntary

reflex." Defendant's expert, Dr. Roberts, also testified that "some hanging or generalized asphyxia cases" involve "terminal seizure activity."

Further, defendant has not challenged on appeal certain testimony by Detective Mann that Ms. Powers "would have gone through" terminal convulsions and seizures if she had died while hanging and that her feet would, therefore, have caused damage to a certain area. Given this expert testimony and unchallenged lay testimony, the jury could have concluded, even without the improper evidence, that Ms. Powers would likely have suffered terminal seizures, damaging the nearby wall, had she died as defendant claimed.

Dr. Radisch also explained how the injury marks on Ms. Powers' neck were not consistent with the extension cord, which was too wide and would have left a distinct groove, but were consistent with the thinner black cord necklace Ms. Powers was wearing. Dr. Radisch observed that Ms. Powers' neck injuries showed no evidence of a suspension point, indicating she did not die from a hanging. Based on her observations, Dr. Radisch concluded that Ms. Powers' injuries were consistent with strangulation, by means of the cord necklace, and she determined the manner of death to be homicide.

In addition, defendant's consistently repeated story regarding what happened at Ms. Powers' death was not medically viable. Trooper Comer and Dr. Radisch both presented uncontested testimony that if Ms. Powers had been able to tell defendant that she loved him, as he claimed, she would have been able to breathe and would not have died. Defendant repeatedly stated that Ms. Powers was fully suspended, with her feet off the ground, when he found her hanging. Yet, even defendant's own expert, Dr. Roberts, testified that the "petechia" in Ms. Powers' eyes and face were not consistent with a complete suspension hanging, and Dr. Roberts could only determine the manner of death was undecided and may have been a partial suspension hanging.

The evidence at the scene was likewise inconsistent with defendant's story. For Ms. Powers to have hung herself from a screw seven feet above the floor, the apparent method to access the screw would have been to stand on the nearby chair, but the chair was coated in a thin, undisturbed layer of dust. The screw was centered in its hole and the popcorn material and dry wall surrounding the screw were undamaged, evidence from which the jury could infer the screw never bore the weight of Ms. Powers' 124-pound body. The cord that defendant claimed was used in the hanging and that he ripped off the wall was located

partially underneath a board, and the slip knot tied in the cord was not pulled tight as it would have been had it borne Ms. Powers' weight.

Finally, the State presented evidence from five witnesses, including two law enforcement officers, that defendant had repeatedly threatened to kill Ms. Powers in the months leading up to her death. Ms. Powers' co-workers saw numerous injuries that Ms. Powers attributed to defendant. Defendant, however, following Ms. Powers' death, denied ever being physically violent with Ms. Powers. Defendant told an officer at the scene that he and Ms. Powers had been dating for over a year "without any troubles." He also repeatedly, without being asked to do so, produced a store receipt when giving statements at the scene -- an act that the jury could determine was a conspicuous effort to bolster an alibi.

Given the properly admitted testimony regarding bladder voiding at death and terminal seizures and the great weight of the evidence of defendant's guilt, we cannot conclude that the jury would probably have reached a different verdict in the absence of the detectives' improper testimony about bladder

voiding and terminal seizures. Consequently, defendant has failed to show plain error.[1]

II

Defendant next argues that the trial court erred in admitting lay opinion testimony by Trooper Comer, Detective Riggs, Detective Hanna, and Detective Mann regarding damage to the screw, drywall, and popcorn wall cover material that, according to those witnesses, would have occurred had Ms. Powers hung herself as claimed by defendant. Defendant contends that because the officers could not have had personal knowledge of what occurred when Ms. Powers died, they were expressing their opinions based on their perceptions of the scene.

Defendant argues first that only an expert in engineering and accident analysis could testify regarding these matters. If, however, lay opinion testimony was permissible, then defendant contends, somewhat inconsistently, that the testimony

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[1]Defendant additionally contends he received ineffective assistance of counsel because his trial counsel "failed to adequately object to lay opinion testimony such as that urine would have been released in the doorway had [Ms.] Powers died there." However, because admission of the testimony challenged by defendant was either not error or not plain error, defendant cannot establish the necessary prejudice to prevail on this ineffective assistance of counsel claim. *See State v. Pratt*, 161 N.C. App. 161, 165, 587 S.E.2d 437, 440 (2003) ("A successful ineffective assistance of counsel claim based on a failure to request a jury instruction requires the defendant to prove that without the requested jury instruction there was plain error in the charge.").

was inadmissible under Rule 701 of the Rules of Evidence because the jury was equally able to determine what happened. *See* N.C.R. Evid. 701 (providing lay opinion testimony admissible if testimony is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue"); *State v. Gobal*, 186 N.C. App. 308, 318, 319, 651 S.E.2d 279, 286 (2007) (holding trial court erred in admitting officer's lay opinion that "because [a witness] became less nervous he must have been telling the truth" since "the opinion as to [the witness'] credibility was not helpful to the jury's determination of a fact in issue"), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008).

We initially observe that although defendant objected to portions of the officers' testimony regarding damage to the screw, drywall, and popcorn material, defendant's argument is not preserved for appeal in light of his failure to either object in front of the jury or his failure to object to other testimony by the same witness on the same matter or testimony of another witness to the same effect. *See Hargrave*, 198 N.C. App. at 582, 680 S.E.2d at 257-58; *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (holding objection must be made in front of jury contemporaneous to time evidence is admitted in

order for objection to be preserved for appeal). Defendant nonetheless argues that admission of the evidence constituted plain error, and we limit our review to that issue.

Even assuming that admission of the officers' testimony regarding would-be damage to the screw, drywall, and popcorn wall cover material was erroneously admitted, any error did not rise to the level of plain error. Here, defendant's story required the jury to believe that Ms. Powers, weighing 124 pounds, hung herself on a two and one-half to three inch drywall screw, attached to a layer of drywall backed by a layer of plywood, with a popcorn material cover over the wall, without damaging the drywall or the popcorn material and leaving the screw centered in its hole even though, according to the Chief Medical Examiner for North Carolina, seizures "often" occur as a person dies from asphyxiation, such as in a hanging. Thus, even absent any improper opinion by the officers, the jury could readily have concluded that had Ms. Powers hanged herself as defendant claimed, there would have been apparent damage to the screw, drywall, or popcorn material.

Taking this properly admitted testimony together with the substantial other evidence of defendant's guilt already summarized, we cannot conclude that the jury would probably have found defendant not guilty absent the officers' opinions on

would-be damage to the screw, drywall, and popcorn material. Defendant has, accordingly, failed to show admission of this evidence constituted plain error.

III

Finally, defendant contends that he received ineffective assistance of counsel ("IAC") because of his counsel's failure to "(1) retain a pathologist who could not be impeached on the basis of her resume; (2) arrange a viewing of the evidence or at least provide the pathologist the dimensions of the electrical cord as she requested; (3) review the defense pathologist's report for obvious errors before introducing it into evidence; (4) ensure that the leading treatise cited in the pathologist's report was consulted on the disputed issue of terminal convulsions; and (5) refute the State's contentions [regarding terminal seizures] through direct and cross examination showing that most hanging deaths are gradual, subtle, and painless such that [i]t seems as though the individual had fallen asleep," as defendant claims is stated in a treatise that was cited in the pathologist's report. (Internal quotation marks omitted.)

In order to prevail on an IAC claim,

> "[f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant

> must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984)).

The United States Supreme Court has held that IAC claims should rarely be raised on direct appeal:

> When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. . . . The evidence introduced at trial . . . will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. . . . Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

Massaro v. United States, 538 U.S. 500, 504–05, 155 L. Ed. 2d 714, 720–21, 123 S. Ct. 1690, 1694 (2003) (internal citation omitted).

The North Carolina Supreme Court has similarly explained that

> ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (internal citation and quotation marks omitted).

Here, defendant's arguments implicate issues of strategy, his trial counsel's knowledge of certain matters, whether his counsel made any efforts to retain alternate experts, whether his counsel would have been able to obtain other experts who would have testified favorably for him, and other matters that do not appear on the cold record. Consequently, we dismiss these IAC claims without prejudice to defendant's raising them in a motion for appropriate relief.

No error.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

Report per Rule 30(e).