NO. COA12-415

NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v. Brunswick County
Nos. 08 CRS 6413, 53383-84

WILLIAM STEVENSON PHILLIPS

Appeal by Defendant from judgments entered 1 September 2011 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 11 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Paul M. Green, for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

On 17 November 2008, Defendant William Stevenson Phillips was indicted for various sexual offenses committed against two minors: one count of rape, two counts of sexual offense, and

one count of indecent liberties with the minor "Erin[1]"; and one count of sexual offense and one count of indecent liberties with Erin's older sister, "Beth." The matter was tried before a jury at the 15 August 2011 criminal session of superior court in Brunswick County.

The evidence at trial tended to show the following: Beth was born in December 1994 and Erin in July 1997. The girls' biological father or fathers are unknown, and they spent their early years living with their mother and stepfather, "Ron." After the girls' mother died in 2002, they continued to reside with Ron, and eventually with "Kim," Ron's live-in girlfriend whom the girls called "Mom." Ron's mother, "Mary," lived nearby and was viewed by Erin and Beth as a grandmother. Defendant was in the Navy and was often away from Brunswick County, but when he was home in the summer or on weekends, he lived with Mary. Erin and Beth called Defendant "Uncle Stevie." Erin and Beth spent a great deal of time at Mary's house, including sleeping over on Mary's living room couches.

Erin testified that, beginning in about 2005 when she was seven years old, Defendant began touching and penetrating her

---

[1]To protect the identities of the child victims in this case, pseudonyms are used for the victims and for some other persons mentioned in this opinion. The first use of each pseudonym appears in quotation marks.

vagina with his fingers during these sleepovers. Erin also testified that Defendant put his fingers into her vagina more than once when she was seven and once after she turned eight. Defendant also asked Erin to touch his penis and tried to insert his penis into her vagina, but after only slight penetration Erin was able to get away from Defendant and run to her own home.

Around the time of Erin's eighth birthday, Defendant showed her a video which she described as two girls "messing" with some boys' penises. At about the same time, Defendant approached Erin as she lay face down on Mary's couch so Defendant could not touch her vagina. Defendant pulled down Erin's panties and pushed his penis into her "butt." This hurt Erin and she spun around, causing Defendant to leave. Defendant exposed himself to Erin on multiple occasions. Defendant told Erin that if she told anyone what he was doing, he would claim Erin was lying or had asked Defendant to do these things. Erin did not mention the abuse to anyone.

Beth testified that, in 2005 when she was about ten years old, she awoke on the couch in Mary's house to find Defendant tugging at her shorts. Defendant began touching her vagina both over and under her shorts. Defendant told Beth to take off her

shorts, but he retreated to his room when Beth threatened to scream. Leaving his bedroom door open so Beth could see him, Defendant completely undressed. Beth testified that Defendant asked her to take off her panties on at least two other occasions and asked Beth to touch his penis multiple times. Defendant also played a pornographic video for Beth, called her into the bathroom while he was masturbating on numerous occasions, and told Beth he would hurt her if she told anyone about his actions. Beth and Erin were both unaware of Defendant's sexual advances toward the other.

Beth did later tell her aunts about Defendant's actions, but the aunts only told Mary of Beth's report and never contacted the police. Mary denied that Defendant would do such a thing. In early 2008, Beth told Kim about Defendant's sexual abuse. The same year, Erin reported Defendant's abuse to Kim as well. Kim reported the girls' claims to their stepfather, Ron, who in turn contacted law enforcement.

Sergeant Laurie Watson of the Brunswick County Sheriff's Department interviewed Beth and Erin in February 2008. Dr. Victor Shukla, a psychiatrist, treated Beth from June 2009 to November 2010, and testified that she exhibited characteristics consistent with those of a child victim of sexual abuse. Shukla

diagnosed Beth with bipolar disorder, mixed type severe predominant depression with psychotic features, and various behavioral problems. Dr. Amy Sifford, a licensed professional counselor, treated Beth from August 2009 to December 2010 and also testified that Beth exhibited characteristics consistent with those of a child victim of sexual abuse. Sifford diagnosed Beth with bipolar disorder and various behavioral problems. Sifford also treated Erin and found that Erin also exhibited characteristics consistent with those of a child victim of sexual abuse. Sifford noted that Erin was anxious, withdrawn, and struggling academically. She diagnosed Erin with depressive disorder.

The State also presented testimony from "Jane" and "Kate." Defendant is Kate's biological uncle, and he moved in with Kate and her mother when Kate was thirteen. Kate testified that, one night in their home, Defendant began talking to her about sex and asked her if she was a virgin. A few nights later, Defendant entered Kate's bedroom, sat on her bed, began touching her, and then had vaginal intercourse with her. Kate testified that Defendant put his fingers in her vagina and had vaginal intercourse with her, but never had anal sex with her. Defendant continued to have sex with Kate two or three times a

week for about six months at a time when Kate was thirteen or fourteen years old. Defendant told Kate not to tell anyone about the abuse. Defendant's abuse of Kate occurred about six to seven years before the crimes charged in this case.

Jane is Mary's granddaughter. She described Defendant as her "adopted uncle" because of Defendant's close relationship with Mary. As a child, Jane sometimes spent the night with Mary. Defendant, who was about four years older than Jane, was living with Mary at that time. Jane testified that when she was ten or eleven years old, she awoke in the living room where she had been sleeping to find Defendant's "hands . . . all over me." Defendant put his fingers inside her vagina. Jane also testified about another incident that occurred when she was in ninth grade and Defendant had graduated from high school. Jane and Defendant were walking together near his truck. Defendant suddenly pushed Jane down halfway into the truck and raped her. Defendant's abuse of Jane began about fifteen to sixteen years before the crimes charged in this case.

The sex offense charge involving Beth was dismissed, and the jury acquitted Defendant of raping Erin. Defendant was convicted of the remaining charges, and the trial court imposed

consecutive presumptive-range sentences totaling 512 to 634 months in prison. Defendant appeals.

Discussion

On appeal, Defendant brings forward eight issues: whether the trial court erred by (1) failing to instruct on lesser included offenses, (2) allowing lay witnesses to vouch for the complainants, (3) allowing certain expert testimony, (4) allowing expert testimony with inadequate foundation, (5) allowing hearsay testimony, (6) excluding evidence of the complainants' prior sexual abuse, and (7) admitting uncharged misconduct evidence. Defendant also argues that (8) his trial counsel provided ineffective assistance. We dismiss Defendant's arguments 2 (in part), 3 (in part), 4, and 5. As to the remainder of argument 3, we find no prejudicial error. As to Defendant's remaining arguments, we find no error.

I. Jury Instructions

Defendant first argues that the trial court erred by failing to instruct on attempted rape and attempted first-degree sexual offense of Erin as lesser included offenses of those with which Defendant was charged. Specifically, Defendant contends that the instruction was required because the evidence of penetration was doubtful and conflicting. We disagree.

Defendant did not request an instruction on attempted first-degree sexual offense, nor did he object to the jury instructions as given. Accordingly, we review only for plain error. *State v. Lawrence*, __ N.C. __, __, 723 S.E.2d 326, 333 (2012).

> The plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.
>
> This Court and the United States Supreme Court have emphasized that plain error review should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error.

Id. (citations, quotation marks, and brackets omitted).

We only address Defendant's argument as to the first-degree sexual offense charges. Because Defendant was acquitted of rape, any alleged error in the jury charge on that count cannot

have been prejudicial to him, and thus cannot have constituted plain error. *See id.* As to the substance of Defendant's argument,

> [t]he law is well settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense. However, when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense. The determining factor is the presence of evidence to support a conviction of the lesser included offense.

State v. Boykin, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984) (citations omitted). Here, Defendant was charged with two counts of first-degree sexual offense against Erin. One count was based upon anal intercourse and the other on digital penetration of Erin's vagina. "Instructions on the lesser included offenses of first degree rape [and sexual offense] are warranted only when there is some doubt or conflict concerning the crucial element of penetration." *State v. Wright*, 304 N.C. 349, 353, 283 S.E.2d 502, 505 (1981).

The trial transcript reveals that Erin's reports were not inconsistent or doubtful as to penetration. Rather, she

consistently stated that Defendant had penetrated her anally with his penis and vaginally with his fingers. Erin further testified that on some occasions Defendant had *also* touched her vagina over her panties and inside her panties without penetrating her. Erin's testimony about the latter incidents merely suggests that, in addition to at least two instances of first-degree sexual offense against Erin, Defendant had also sexually abused her in other ways. Such evidence does not constitute "doubt or conflict concerning the crucial element of penetration." *See id.* at 353, 283 S.E.2d at 505. Accordingly, Defendant has not shown that the trial court's failure to instruct on attempted first-degree sexual offense was error, let alone plain error. This argument is overruled.

II. Lay Witness Testimony

Defendant next argues that the trial court erred by allowing lay witnesses to vouch for the credibility of the complainants in this case. We disagree.

Generally, "[t]he admissibility of evidence at trial is a question of law and is reviewed *de novo*. [However, w]hen a defendant fails to object at trial to the improper admission of evidence, the reviewing court determines if the erroneously admitted evidence constitutes plain error." *State v. McLean*,

205 N.C. App. 247, 249, 695 S.E.2d 813, 815 (2010) (citations omitted). "Our case law has long held that a witness may not vouch for the credibility of a victim." *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *affirmed per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010).

Defendant first asserts that the trial court erred in allowing certain testimony from Watson about her experiences handling sexual offense cases involving children. Specifically, Defendant challenges the following testimony:

> Q. Sergeant Watson, have you ever investigated children who have made allegations and you weren't certain that they were telling the truth?
>
> A. Yes, I have.
>
> [Defense counsel]: Objection.
>
> THE COURT: Noted for the record. She can testify.
>
> A. Yes, I have.
>
> Q. And during any of those investigations, have you ever actually closed out any investigations because you determined that the children were not telling the truth?
>
> A. Yes, I have.

Defendant contends that Watson was thus permitted to "testif[y], in effect, that she filed charges in this case because she determined the complainants were telling the truth." We find

this assertion utterly meritless. We begin by noting that Defendant only objected to the first question quoted above, and even then made only a general objection. "[A] general objection, if overruled, is ordinarily not effective on appeal." *State v. Parker*, 140 N.C. App. 169, 183, 539 S.E.2d 656, 665 (2000) (citation and quotation marks omitted); *see also* N.C.R. App. P. 10(a)(1) (requiring that a party seeking review must have made "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"). We do not believe the specific ground for exclusion that Defendant argues on appeal was apparent from the context of the questioning before the trial court. Accordingly, Defendant is entitled only to plain error review of this question.

We conclude that asking a detective who handles sex offense cases whether she has ever been uncertain about a supposed victim's allegations in no way suggests anything about Watson's opinion of the credibility of the complainants in this case. Rather, the question and response reveal only that the detective has sometimes encountered cases in which she had doubts about the complainants. The court did not err in permitting Watson to

answer the question, let alone likely alter the outcome of the trial by so doing.

As to the State's follow-up question, which in the absence of an objection from Defendant we also review only for plain error, we again see no vouching for the complainants whatsoever. The question and response merely establish that, at least once in the past, Watson had closed out an investigation after determining a complainant's allegations were not true. Watson was not asked whether she ***always*** or even ***usually*** closed out such investigations, and thus we are not persuaded that this testimony somehow could lead the jury to the inference of vouching suggested by Defendant. Indeed, rather than prejudicing Defendant, testimony acknowledging that some children fabricate claims of sexual abuse would appear to bolster Defendant's theory of the case, namely, that Erin and Beth made up the allegations against him.

Defendant also notes that a Department of Social Services ("DSS") social worker testified, without objection, about her job duties as a DSS investigator:

> Q. And is this what you have been doing the entire seventeen years you have been with D.S.S. or have you had different roles while you were there?

> A. No, I had different roles. I started as an in-home worker back when it was called treatment. I guess it's probably best to explain those investigations; now they are called family assessments but we still have an investigative route, but back then it was investigations and that's when a report is being made, it's to determine whether or not this is true. They call it substantiated or unsubstantiated. Unsubstantiated is when they find it's not true. Once it's found to be true, if it is true, then they determine whether or not there is a need for continued services. Some cases are found to be true but it may have been a one[-]time offense. It may have been corrected in the process. It may have been due to other circumstances that have been resolved in some way and they don't need additional services but if additional services are needed, then it's sent to in-home treatment. And that's what I did for the first five years I worked at D.S.S. was treatment.
>
> Treatment also did our — in second complaints, so if a client complaint came in, or a report came in on a new case, on a case is already open with me, I would then complete the investigation. So I would investigate those cases that came in as second complaints.

We flatly reject Defendant's contention that this testimony was, "in effect, that the girls' allegations 'of physical and sexual abuse' had been found true by investigators." Nor did this testimony "cast the light of 'substantiation'" on earlier testimony by Sifford that she had learned from a DSS social worker about "allegations [by Erin] and that there had been an

investigation and that there were charges filed and the court hearing was coming up." Neither the social worker's testimony alone nor in conjunction with Sifford's remark bear the slightest resemblance to vouching for the complainants' credibility.

We likewise reject Defendant's assertion that admission of the following testimony from Watson was error:

> Q. Based on your training and experience, Sergeant Watson, what is the likelihood of a child making up an allegation of sexual abuse and then keeping up that lie through the legal proceedings?
>
> [Defense counsel]: Objection.
>
> THE COURT: Overruled, she may answer if she knows.
>
> A. Based on my training and experience, it is very unlikely that they would be able to keep up the lie over so many years.
>
> . . . .
>
> Q. Based on your training and experience, why is that?
>
> A. Because children, based on my training and experience of working with children in just that unit for six years, children normally do not lie unless they are told to lie or they are coached to lie about, especially about sexual abuse or physical abuse, and if you — if children are asked repeatedly and they are being untruthful, they are unable to keep up the same lie that

> they told initially through different people and over the amount of years.

Again, Defendant's general objection to the first question quoted above was ineffective, and Defendant failed to make any objection at all to the second question he now challenges on appeal. Thus, he would be entitled only to plain error review. *Parker*, 140 N.C. App. at 183, 539 S.E.2d at 665. However, Defendant does not explain how these statements prejudiced him. "Such a bare assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule." *State v. Whitted*, __ N.C. App. __, __, 705 S.E.2d 787, 793 (2011) (citation and quotation marks omitted). Accordingly, we dismiss these arguments.

Defendant next contends that it was plain error for the trial court to permit impermissible vouching and hearsay testimony by Kim and Sifford.[2] Specifically, Defendant challenges Kim's statement that, after Beth told Kim about Defendant forcing her to watch a pornographic movie, Beth "just

---

[2]Sifford testified as an expert witness; it is unclear why Defendant discusses her testimony along with other lay witnesses, particularly since other portions of Sifford's testimony are addressed by Defendant in his third argument. In any event, Defendant has failed to present a proper argument of plain error for this Court to address on appellate review.

wanted to know if I [Kim] believed her" and that Kim had told Beth she did believe her. Sifford was permitted to testify as follows:

> Q. Did [Beth] talk to you — do you recall if she talked to you on that day about interactions with her father and her grandmother about the court hearing?
>
> A. Yes, her [step-]father believed her and was quite angry with the uncle, but her [step-]grandmother did not believe her and that created a lot of anxiety about whether or not she would be believed by other people.

Again, Defendant fails to explain how the brief and passing comments of either witness had a probable impact on the outcome of his trial. Defendant further contends that the trial court committed plain error in permitting Watson and a DSS investigator to testify that Erin had described "actual penetration[.]" However, a plain reading of the transcript excerpts cited by Defendant reveals that the two witnesses were not vouching for Erin's credibility as to penetration, but rather were merely explaining the terms Erin used to refer to her and Defendant's various body parts. Further, as to all of these instances of challenged testimony, Defendant makes only a "bare assertion of plain error, without supporting argument or analysis of prejudicial impact," and accordingly, we do not

address his contentions. *Whitted*, __ N.C. App. at __, 705 S.E.2d at 793 (citation and quotation marks omitted).

Likewise, we do not address Defendant's "argument" that it was "misleading" for the State and its witnesses to use the term "disclosure" when referring to the pretrial statements of Erin and Beth. Defendant asserts that the term "disclosure" can only refer to a truthful statement, but fails to cite any authority for this proposition. Accordingly, we deem this argument abandoned pursuant to N.C.R. App. P. 28(b)(6).

In sum, all of Defendant's arguments regarding lay witness testimony are without merit and/or unpreserved for appellate review.

III. Expert Witness Testimony

Defendant next argues that the trial court committed plain error in allowing certain expert testimony by Sifford and Shukla which he contends was impermissible vouching.[3] We disagree.

---

[3]Defendant argues error in the admission of Shukla's treatment notes as well. Those notes were admitted into evidence over Defendant's general objection. We observe that, because Shukla's testimony as to the same facts and opinions came in without objection, Defendant has waived that objection (assuming it was effective in the first place). *See Nunnery v. Baucom*, 135 N.C. App. 556, 564, 521 S.E.2d 479, 485 (1999) ("Having once allowed the evidence to come in without objection, the defendants waived their objections to the evidence and lost the benefit of later objections to the same evidence.") (citation and quotation marks omitted). In addition, on the single

Because Defendant did not object to the admission of the testimony he now challenges on appeal, we review for plain error only. *Lawrence*, __ N.C. at __, 723 S.E.2d at 333. As Defendant notes, expert witness testimony that the child victim in a sexual abuse case is "believable" is inadmissible credibility evidence under Rules of Evidence 608 and 405, and constitutes prejudicial error. *State v. Aguallo*, 318 N.C. 590, 597-600, 350 S.E.2d 76, 81-82 (1986). Further,

> [i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam) (citations and quotation marks omitted).

Defendant first makes a bare assertion of plain error in the admission of testimony by Shukla which Defendant contends constituted vouching that Beth actually had been sexually abused

---

occasion Defendant objected to expert testimony discussed herein, he did so only via general objection and thus failed to preserve the admission of the testimony for anything other than plain error review.

by Defendant. Defendant has failed to properly argue plain error, and we do not address this argument. *Whitted*, __ N.C. App. at __, 705 S.E.2d at 793.

Defendant next challenges the following testimony from Shukla about Beth, which he characterizes as impermissible vouching for Beth's credibility:

> Q. Okay, Doctor Shukla, are there any, you said it was originally for a different purpose, but are there any specific problems that [Beth] did mention to you during your sessions with her that she felt she was having difficulty as a result of the sexual abuse with [Defendant]?
>
> A. Yes, there are profound effects on a child who goes through this type of experience. And, unfortunately, she went through a difficult time, she said. The effects were visible as she described to me by different staff and [Beth], herself. She had a lot of anger problems. . . . It became a very disturbed child who also experienced sleep disturbances. She was hallucinating. She was also having flashbacks of [Defendant] and his sexual advances towards her . . . . So she had been, yes, profoundly [a]ffected by the events as she had stated a number of times.

Defendant also challenges Shukla's testimony that, by the age of seven to eleven, children can recall accurately what has happened to them. We believe that all of this testimony falls squarely into the "consistent with characteristics" testimony permitted by our case law. *See Stancil*, 355 N.C. at 266-67, 559

S.E.2d at 789. Shukla never testified that Beth *was* sexually abused, and further, he *did* testify that Beth's symptoms could also have been caused by bipolar disorder.

Defendant asserts plain error in the admission of testimony from Sifford that "everyone" she treats is a victim of abuse and that "nine out of ten" had suffered sexual abuse. Sifford also stated that she believed it was "highly unlikely" that a child would be untruthful about sexual abuse. Defendant contends that this testimony was "in effect, that [Sifford] was 'sure' that [Beth] and [Erin] were being truthful." We disagree. This testimony was not about Erin and Beth and their credibility specifically, but about Sifford's patients and child sexual abuse victims in general. Further, Defendant does not explain how these portions of testimony probably altered the jury's verdict, particularly in light of the significant evidence against him, including the consistent statements from Beth and Erin about their abuse by Defendant. *Cf. State v. Towe*, __ N.C. __, __, __ S.E.2d __, __ (2012) (finding plain error in expert witness vouching where the victim's reports about the alleged sexual abuse were inconsistent). Accordingly, Defendant has failed to show plain error, and this argument is overruled.

IV. Foundation for Expert Testimony

In a related argument, Defendant asserts the trial court erred in admitting expert testimony about the "characteristics consistent with those of sexually abused children" without an adequate foundation. We disagree.

"Our Courts have long held that a motion ***in limine*** is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." ***State v. Patterson***, 194 N.C. App. 608, 615, 671 S.E.2d 357, 361 (citation, quotation marks, and brackets omitted), ***disc. review denied***, 363 N.C. 587, 683 S.E.2d 383 (2009). Here, Defendant made a motion ***in limine*** to exclude expert testimony that Erin and Beth had been sexually abused. However, the motion did not assert an inadequate foundation as the basis for exclusion. An appellant "may not swap horses after trial in order to obtain a thoroughbred upon appeal." ***State v. Benson***, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (citation omitted). In addition, at trial, Defendant did not object to any expert testimony on the basis of inadequate foundation. Thus, Defendant did not preserve this argument for our review. Further, Defendant has failed to argue plain error as to this issue. ***Whitted***, __ N.C. App. at __, 705 S.E.2d at 793. Accordingly, we must dismiss.

V. Hearsay Testimony

Defendant also argues that the trial court erred in allowing hearsay testimony from Shukla and Sifford about Beth's and Erin's psychological symptoms. Defendant did not object to any of this testimony at trial on hearsay grounds, and he does not explain how admission of the testimony constitutes plain error. *Id.* Accordingly, we dismiss this argument.

VI. Exclusion of Evidence About Erin's Prior Allegations of Sexual Abuse

Defendant next argues that the trial court erred in excluding evidence of Erin's prior allegations of sexual abuse by her stepfather and a family friend pursuant to Rule of Evidence 412. We disagree.

> Rule 412 prohibits the introduction of evidence concerning the previous sexual activity of a complainant in a rape or sex offense case. Any sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial . . . is deemed irrelevant unless an exception applies. . . . [P]rior abuse . . . [may be] sexual activity within the ambit of Rule 412.
>
> . . . .
>
> [P]rior accusations of abuse [a]re inadmissible under Rule 412 unless there [i]s evidence that the prior accusations were false. Where the prior accusations [a]re false, the defendant has a fundamental right to cross-examine the witness on such

> subject matter relevant to the witness' credibility.

State v. Bass, 121 N.C. App. 306, 309-10, 465 S.E.2d 334, 336 (1996) (citations and quotation marks omitted).

At trial, the State moved to exclude evidence of prior allegations of sexual abuse made by both Beth and Erin. The State cited Rule 412 and argued there was no evidence the allegations were false. At trial, Defendant argued only that the prior allegations bore on Erin's credibility whether false or not. Defendant having failed to show that Erin's prior allegations of sexual abuse were false, the trial court properly excluded this evidence. Further, we reject Defendant's attempt to "swap horses" and argue on appeal that this evidence should have been admitted for the purpose of providing an alternative explanation for Erin's exhibiting characteristics consistent with being a child sexual abuse victim. *See Benson*, 323 N.C. at 322, 372 S.E.2d at 519. This argument is overruled.

VII. Evidence of Prior Sexual Abuse by Defendant

Defendant also argues that the trial court erred by admitting evidence about Defendant's prior sexual abuse of other minors under Rules of Evidence 403 and 404(b). We disagree.

We review a trial court's conclusion of law that evidence is admissible under Rule 404(b) *de novo*, and its subsequent

determination balancing the probative value and possible prejudicial impact of the evidence for abuse of discretion. *State v. Beckelheimer*, __ N.C. __, __, 726 S.E.2d 156, 159 (2012).

> Rule 404(b) is a clear general rule of *inclusion*. The rule lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. This list is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime. In addition, this Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant. . . .
>
> Though it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity. Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them. We do not require that the similarities rise to the level of the unique and bizarre.

Id. at __, 726 S.E.2d at 159 (citations and quotation marks omitted).

> [R]emoteness for purposes of 404(b) must be considered in light of the specific facts of each case. The purpose underlying the evidence also affects the analysis. Remoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried

> as to permit a reasonable inference that the same person committed both crimes. In such cases, remoteness in time goes to the weight of the evidence rather than its admissibility.

Id. at __, 726 S.E.2d at 160 (citations and quotation marks omitted). Ultimately, "[t]he test for determining whether such evidence is admissible is whether the incidents establishing the common plan or scheme are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of . . . Rule 403." *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 299 (1996).

Here, Defendant contends that his past sexual abuse of minors Jane and Kate was neither sufficiently similar nor temporally proximate for admission under Rules 404(b) and 403. Following *voir dire* and arguments of counsel, the trial court permitted Jane and Kate to testify about Defendant's sexual abuse of them when they were minors. The court concluded that the evidence was relevant to show Defendant's "plan, scheme, system[,] or design involving the crime charged in [the instant] case[,]" determined that its prejudicial impact did not outweigh its probative value, and gave the jury an accordant limiting instruction.

After careful review, we see no error in the trial court's admission of Jane's and Kate's testimony. The incidents involving Jane and Kate were sufficiently similar to those involving Beth and Erin. Most importantly, all four victims testified that Defendant was an older uncle, an "adopted uncle," or "like an uncle" when he abused them. Defendant initiated the abuse of each victim in the home where he was living at the time and where the victim was either living permanently or spending the night (Mary's home for Jane, Beth, and Erin; Kate's own home in her case). In each case, the abuse began with Defendant touching the victim's vagina and then escalated to digital penetration and, eventually, to attempted or actual intercourse. In addition, the abuse of Jane and Kate was not too remote in time from the crimes charged here. "When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan." *Id.* at 613-16, 476 S.E.2d at 298-300 (citation and quotation marks omitted) (holding prior incidents occurring over a period of approximately twenty-six years "were not too remote to be considered as evidence of [the] defendant's common plan or scheme to sexually abuse female family members"). We see no error in the trial court's determination that Jane's and Kate's

testimony was relevant for a permitted purpose under Rule 404(b) and no abuse of discretion in its ruling that their testimony was admissible under Rule 403. This argument is overruled.

VIII. Ineffective Assistance of Counsel

Finally, Defendant argues his trial counsel provided ineffective assistance. We disagree.

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

Defendant's entire "argument" on this point consists of a single sentence: "In the event this Court finds any of the foregoing issues to have been inadequately preserved to warrant appellate relief, then trial counsel was ineffective in failing to adequately preserve the issue by motion, objection, proffer

and/or argument." Defendant fails to argue or explain how his trial counsel's decisions about what motions and objections to make at trial fell below an objective standard of reasonableness, and more importantly, does not even attempt to establish prejudice, as required by *Allen* and its progeny. "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein[.]" *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *supersedeas and disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005); *see also* N.C.R. App. P. 28(a). Accordingly, we overrule this issue on appeal.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART; DISMISSED IN PART.

Judges GEER and MCCULLOUGH concur.

Report per Rule 30(e).