

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-497
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v.

McDowell County
No. 09 CRS 51654

TIMOTHY GLEN MILLS

Appeal by defendant from judgment entered 11 October 2012
by Judge James U. Downs in McDowell County Superior Court.
Heard in the Court of Appeals 25 September 2013.

*Attorney General Roy Cooper, by Assistant Attorney General
David Gordon, for the State.*

Attorney Michael E. Casterline, for defendant.

Elmore, Judge.

On 11 October 2012, judgment was entered against Timothy
Glen Mills (defendant) for the offenses of statutory sexual
offense, sex offense by a substitute parent, indecent liberties
with a child, and sexual battery. Defendant was sentenced in
the presumptive range at a prior record level II to 288-355
months active incarceration. Defendant now appeals and raises

as error the trial court's admission of 404(b) evidence concerning prior alleged sexual acts perpetrated by defendant. After careful consideration, we dismiss the appeal because defendant failed to preserve this issue for our review.

I. Facts

The State alleged that between August 2008 and July 2009, defendant engaged in numerous unlawful sexual acts with the victim. Defendant filed three motions *in limine* to preclude the State from presenting 404(b) evidence under the North Carolina Rules of Evidence concerning prior sexual encounters between defendant and other individuals. The first motion *in limine* concerned sexual conduct with Travis Miller, defendant's nephew, that allegedly occurred in 1984 when Miller was 10 years old. The second and third motions *in limine* addressed two sexual encounters by defendant with Miranda Fender, his niece, that occurred sometime between 1986 and 1988 when Fender was 12 or 13 years old. These motions were heard by the trial court outside the presence of the jury when the State sought to call Fender and Miller as witnesses during its case-in-chief. The trial court denied all of defendant's motions *in limine*, and both Fender and Miller were permitted to testify for the purpose of establishing a common scheme or plan by defendant. At trial,

all of Fender's statements about defendant's prior sexual acts with her were admitted into evidence, without objection. Miller's testimony was also admitted without objection by defendant.

II. Analysis

Defendant argues that the trial court erred in admitting Miller and Fender's testimony under Rule 404(b) of the North Carolina Rules of Evidence. However, because defendant failed to preserve this issue for our review, we dismiss defendant's appeal.

"[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. Reaves*, 196 N.C. App. 683, 686, 676 S.E.2d 74, 77 (2009) (citation and quotations omitted). Thus, a defendant must object at trial to "evidence that was the subject of the motion *in limine*[" *Id.* at 686-87, 676 S.E.2d at 77 (citation and quotations omitted). Nevertheless, an issue not preserved by objection at trial can be reviewed on appeal under the plain error standard. *State v. Ortiz-Zape*, ___ N.C. ___, ___, 743 S.E.2d 156, 162 (2013). However, this Court will not review an appeal for plain error where the defendant does

not "specifically and distinctly contend that the alleged error constitutes plain error." *Id.* (citation and quotations omitted).

Here, both Fender and Miller testified as to the details of defendant's prior conduct with them. Fender stated that on two separate occasions while in a mutual relative's trailer, she performed oral sex on defendant at his request and then he engaged in vaginal intercourse with her. Similarly, Miller testified that he visited his grandmother's house and shared a bedroom with defendant. On one occasion, defendant had anal intercourse with Miller. Defendant neither raised any objections to this testimony at trial, nor did he assert plain error by the trial court on appeal. Thus, defendant waived his right to appellate review regarding the admitted testimony. See *Ortiz-Zape, supra*. Accordingly, we dismiss defendant's argument on appeal.

III. Conclusion

In sum, defendant did not object at trial to the testimony of Miller or Fender with regard to his prior sexual conduct. Furthermore, defendant failed to allege plain error in his brief on appeal. Thus, we dismiss defendant's appeal.

Dismissed.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).