NO. COA14-571
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Davidson County
Nos. 11 CRS 5353, 54866

RANDALL EUGENE RACHELS

Appeal by Defendant from judgments entered 30 January 2014 by Judge Martin B. McGee in Davidson County Superior Court. Heard in the Court of Appeals 20 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra Gruber, for the State.

Mary March Exum for Defendant.

STEPHENS, Judge.

Evidence and Procedural Background

Defendant Randall Eugene Rachels appeals from the judgments entered upon his convictions of indecent exposure and taking indecent liberties with a minor. The evidence at trial tended to show the following: The charges against Defendant arose from events which occurred on 11 July 2011. In the early afternoon

of that day, a twelve-year-old girl, "Sally,"[1] was walking along a sidewalk on School Street in Lexington. She saw a man wearing an open-faced black helmet sitting on a red scooter or moped in the street. The man was yelling, but Sally did not think he was yelling at anyone in particular. As Sally passed by, the man revealed his penis and asked if Sally "liked it." Sally looked away and kept walking toward her nearby home.

Consuela Threadgill happened to be looking out her window and saw the man on the scooter speak to Sally. When Threadgill noticed the man was masturbating, she called her mother, Tawana Littlejohn, to the window. Littlejohn also saw the man masturbating and noticed that his scooter had the letters "VIP" on the back. Littlejohn called 911 as she went outside and asked the man what he was doing. In response, the man laughed, fastened his pants, and drove away. When police officers arrived at the scene, Threadgill told them what had happened and later gave a statement in which she described the man thusly: "The white male weighed approximately 220 pounds. He was wearing faded — he was wearing a faded gray tank top and blue jean shorts. He was wearing a black open face helmet. . . . The

[1] We use pseudonyms to protect the identities of the minor victims discussed in this case.

white male had short light brown hair and had fair skin that was sun burnt." Littlejohn later identified Defendant in a photo lineup and stated that she was 80% certain he was the man on the scooter. At trial, however, Littlejohn was not able to identify Defendant as the man on the scooter:

> Q This man sitting in front of me. Does this man look like the man that was sitting on that scooter that day?
>
> A No.
>
> Q How is his appearance different?
>
> A The guy on the scooter was thicker.
>
> Q You mean heavier?
>
> A He was heavier. His hair — he had a dirty blond hair on the top. It was shaped on the sides. He didn't have dark hair.
>
> Q Okay. All right. Thank you. Are you able to say whether or not that's the same man that you saw on the scooter today?
>
> A That's not the same guy.
>
> Q Doesn't look like the same guy?
>
> A No.

Over Defendant's objection, the trial court admitted evidence regarding Defendant's pending charges in connection with his alleged indecent exposure to another young girl, "Gina," in High Point in 2009. The court heard testimony on

voir dire from Gina, her father, and others connected to the 2009 incident, including Officer Petula Sellars, a lieutenant in the School Resource Officer Division of the High Point Police Department. Officer Sellars was the sole witness to testify before the jury regarding the 2009 incident. Officer Sellars explained that she was in charge of investigating sex offenses occurring at or near High Point schools. She then summarized her actions in Gina's case:

> A . . . . The allegations were there was a 11[-]year[-]old young lady, Miss [Gina], who was getting off the school bus. She had just gotten home from school. She got off the bus with her brother and she was walking home and this particular area, it is a deadend street. It is a main road which is West Fairfield. She lived off of a road called Henderson, which is a deadend. When she got off the bus, her and her brother were walking together to the residence when she was stopped by a white male. She described him as a heavy-set white male with a moustache. I believe she was stopped by him and directed to come over to where he was. He said, "Look at this." And she did. She went over and he exposed his penis and he was masturbating.
>
> Q Did you get other information after she saw this?
>
> A She ran home. Her father was working third shift and he was asleep. She ran home, alerted her father and told him what happened to her and her brother. Her father called the police and that's how the first initial patrol officer was involved.

Q The report indicates [Gina] had just gotten off the school bus. Did the report indicate what time this allegation occurred?

A I need to look at it. I want to say it was around 2:30, between 2:30 and 3:00, right around there. But I can give you an exact.

Q That's fine. Now, you mentioned a car. Can you go ahead and elaborate what information you received that caused you to make efforts or identify a car?

A When I got assigned the case, I had a registration plate. I had a vehicle description. It was described as a green sports-type vehicle and I had a registration, had a license plate.

Q Can you describe to this jury how you came by the vehicle description and the license plate number?

A Yes. [Gina] and her dad, the actual date that the offense occurred, two days after that she and her father were in a vehicle traveling down South Main Street when the suspect, and the suspect vehicle pulled up beside them and she was able to identify the suspect to her father. And her father got the license plate and called it into our dispatch and that's how I initially got the registration plate.

Q Just to be clear, is it based on your review of your file from back in 2009? This occurred on or about April 7th of 2009?

A Yes, ma'am.

Q Now, did you, in fact, meet with [Gina]?

A I did with her and her father.

Q Can you describe what you observed about [Gina], that type of thing?

A She was 11 years old, a couple months, [H]ispanic female, long dark hair, dark skin, very visibly shaken by the incident. A shy female. Articulate. She was able to explain clearly what happened.

Q All right. Ma'am, you also talked to [Gina's father]; is that correct?

A Yes, ma'am.

Q [Gina's father], did you talk to him about the way or the means by which the tag number was obtained?

A Yes, I did.

Q What did he tell you, ma'am?

A The exact same thing. He was on his way to Wal-Mart. He had been taking her — since the incident he wouldn't allow the children to ride the school bus anymore, so he had started taking them to school and picking them up, he and his wife. So this particular day they decided to go to Wal-Mart. And he said, as you know, he was traveling down Main Street. She saw the vehicle and I think she screamed out to him, "that's him" or "that's it." Something along those lines. He made her get in the back seat, lay down because he didn't want the suspect to see her and he followed the vehicle and called in the registration plate to our dispatch.

Q If you would then, please, explain to this jury what efforts you made at that

point to try to track down this vehicle with that tag number?

A Okay. I checked through D.M.V. and the registered owner was Mrs. Sharon Rachels, which is the suspect, [Defendant's] wife. I went to the residence in Lexington several times, actually, I think it was about three times, to make contact with her. And the third or fourth time no one was home but the next door neighbor was. The neighbor told me they didn't reside there any longer but that Mrs. Rachels, Mrs. Sharon Rachels, worked at a factory in Lexington. So I went to the factory, and made contact with her.

Q That turned out to be Kimberly Clark?

A Yes, ma'am, it was.

Q When you went to meet with Sharon Rachels can you describe for this jury the contact that you had with her, please?

A Yes. I explained to her that I was investigating an incident where her vehicle had been identified as being involved in it. And she explained that her husband, [Defendant], was the person that drove the vehicle and that he worked in High Point and that he had total access to the vehicle as well.

Q Did she indicate whether anybody else had access to the vehicle to her knowledge?

A She said it was just him.

Q Ma'am, were you also able to determine based on the information you received in your investigation where [D]efendant was working at the time this occurred?

A Yes. Miss Rachels, his wife, told me that he was working at I think it is Columbia — I need to look — it was a factory in High Point. I think it is the Columbia Panel, or something along those lines, off of East Fairfield.

Q You mentioned East Fairfield. Are you familiar with where that factory is or was at the time?

A Yes, ma'am.

Q Where is that factory or was related to where the incident allegedly occurred?

A Approximately five to seven minutes, very close proximity once you cross over Main Street where the factory is on East Fairfield. You cross over Main Street and on West Fairfield and close proximity to their residence, which was on Henderson Street.

Q As part of your investigation did you make efforts to determine whether or not [D]efendant actually was working sort of a set schedule around that time?

A Yes, ma'am. I actually met with his supervisor and obtained copies of his time cards.

Q Can you tell the jury what information you gathered about in particular April 7, 2009, about his work schedule?

A He got off work about 3:00 or right at 3:00. That was his set schedule. He worked third shift.

Q You testified earlier that the school bus would let out maybe between sometime between 2:30 or 3:00 or thereabouts?

> A Yes, ma'am. Right around that time.
>
> Q Ma'am, did you ultimately make contact with [Defendant]?
>
> A I did.

Officer Sellars then identified Defendant in open court. On cross-examination, Officer Sellars admitted that Gina had originally described the man who exposed himself as "Hispanic" and his car as aqua or "blue green," while Defendant is Caucasian and the car Gina and her father saw him driving was green. Defense counsel asked Officer Sellars about her investigation of "some other incidents regarding a man in a green car" exposing himself to children and then elicited the following testimony:

> Q And several children came in and viewed the [photo] line-up separately?
>
> A That is correct.
>
> Q And is it correct that, yes, [Gina] said "that's him" and identified the shot of [Defendant]?
>
> A That is correct.
>
> Q Is it also true that one other child wasn't sure if it was him or another person?
>
> A That is correct also.
>
> Q Isn't it true that two other witnesses identified somebody totally different?

A Yes, ma'am, that is correct.

Q So you ended up charging [Defendant] for everything in High Point?

A Yes.

Q That's from '09?

A Yes, ma'am.

Following the jury's return of guilty verdicts on both charges, the trial court sentenced Defendant to 10-12 months on the indecent exposure charge and 23-28 months on the indecent liberties with a minor charge. Defendant gave notice of appeal in open court.

Discussion

On appeal, Defendant argues that the trial court erred in (1) admitting evidence of the 2009 incident involving Gina under Rule of Evidence 404(b), (2) denying his motion to dismiss for insufficiency of the evidence, (3) instructing the jury regarding the Rule 404(b) evidence, and (4) "identifying [Defendant] to the jury as the defendant[.]" Defendant also argues that (5) he received ineffective assistance of council ("IAC") at trial. We find no error in part and no prejudicial error in part.

I. Evidence of the 2009 indecent exposure incident

Defendant argues that the trial court erred in admitting evidence of Defendant's involvement in a 2009 episode of indecent exposure. We disagree.

> [W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.
>
> Having explained the appropriate process and standards of review, we now review the admission of the 404(b) testimony *de novo*. 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.

State v. Beckelheimer, 366 N.C. 127, 130-31, 726 S.E.2d 156, 159 (2012) (citations and internal quotation marks omitted; italics added).

Here, the trial court admitted evidence of the 2009 indecent exposure for a proper purpose under Rule 404(b), to wit, "to show identity and to show a common scheme or plan." Defendant first contends that evidence of the 2009 incident was erroneously admitted because "[Gina] never identified [Defendant] as the perpetrator" who exposed himself to her. This is simply incorrect. As revealed in the testimony quoted *supra*, defense counsel elicited testimony on this very point by asking Officer Sellars, "And is it correct that, yes, [Gina] said 'that's him' and identified the shot of [Defendant]?" Officer Sellars responded affirmatively.[2]

[2] On direct examination, the State never asked Officer Sellars whether Defendant had been charged in connection with the 2009 incident or whether Gina had identified Defendant in any type of lineup. Rather, the testimony from Officer Sellars elicited by the State only showed that a car registered to Defendant's ex-wife and usually driven by Defendant was identified as the car in which Gina saw the man who exposed himself to her. Instead, it was defense counsel's cross-examination that produced the most damning testimony from Officer Sellars directly tying the 2009 incident to the case before the jury.

Defendant also argues that Gina's original description of the perpetrator as Hispanic when Defendant is actually Caucasian should have rendered evidence of the 2009 incident inadmissible under Rule 404(b). Such an inconsistency, like differences in the specific facts of the prior bad act, go to the weight of the evidence once presented to the jury, *see State v. Mobley*, 200 N.C. App. 570, 577-78, 684 S.E.2d 508, 513 (2009), *disc. review denied*, 363 N.C. 809, 692 S.E.2d 393 (2010), but it is irrelevant to the trial court's task in determining admissibility of the evidence under Rule 404(b), to wit, whether the *purpose* of admitting the evidence was proper. *See Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. Moreover, Defendant was free to cross-examine Officer Sellars about Gina's original description of the perpetrator in the 2009 incident.

Defendant next contends that the 2009 incident was insufficiently similar to the offense being tried, rendering evidence of the 2009 incident inadmissible under Rule 404(b). Defendant argues that the incidents involved different types of vehicles and that the 2009 incident involved a man "repeatedly going by schools and exposing himself to children." We first note that this description is only partially accurate. Officer Sellars linked Defendant to the 2009 incident involving Gina

which took place as Gina and her brother were walking home along a dead-end street. She did not link Defendant to a man "repeatedly . . . exposing himself to children" near schools.[3] In light of the evidence describing the 2011 charged offense, we find the similarities between the two instances striking. Both involved a man in or on a vehicle calling out to attract the attention of an Hispanic female aged eleven or twelve years old who was walking along a residential street, and then exposing himself to the young girl and masturbating. These similar "unusual facts present in both crimes" far outweigh the fact that a different type of vehicle was used in each incident, and the similarities are significant enough to "indicate that the same person committed them." *See id.* at 131, 726 S.E.2d at 159. We conclude that evidence of the 2009 incident was properly admitted under Rule 404(b).

Defendant also argues that the trial court abused its discretion by determining that the probative value of this

[3] For this reason, we also reject Defendant's contention that the trial court should not have admitted evidence about the incident involving Gina because the child victims in three other High Point indecent exposure cases could not identify Defendant as the perpetrator in their cases. Again, it was defense counsel who elicited testimony from Officer Sellars on cross examination about "other incidents" and about Defendant's pending charges in the other High Point cases.

evidence outweighed its prejudicial impact. Under Rule 403, "[n]otwithstanding its relevancy, evidence may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice, as used in Rule 403, means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (citations, internal quotation marks, and ellipsis omitted). "Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree." *State v. Mercer*, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986).

Defendant contends that admission of evidence about the 2009 incident was an attempt by law enforcement officials from "High Point to attempt have their case against [Defendant] heard" and that it "turned the table against" Defendant and deprived him of "a fair hearing." As discussed *supra*, the evidence was highly probative regarding the identity of the man exposing himself and his common scheme or plan to target young Hispanic girls walking along residential streets. However, while evidence suggesting Defendant's involvement in another sexual offense was certainly prejudicial, we note that the

evidence came in by way of Officer Sellars's testimony, rather than by putting Gina on the stand. The latter choice would almost certainly have led to a more emotional description of the incident and increased prejudice to Defendant. In contrast, our review of Officer Sellars's straightforward account of the 2009 incident and her investigation of it does not reveal any "undue tendency to suggest decision on an improper basis[,]" *DeLeonardo*, 315 N.C. at 772, 340 S.E.2d at 357, and we see no abuse of discretion by the trial court in its decision to admit the evidence. Accordingly, this argument is overruled.

II. Motion to dismiss

Defendant also argues that the trial court erred in denying his motions to dismiss the charges for lack of sufficient evidence that he was the perpetrator of the offenses. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

> Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied.

If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of [the] defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Both competent and incompetent evidence must be considered. In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. The defendant's evidence that does not conflict may be used to explain or clarify the evidence offered by the State. When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.

State v. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455-56 (citations, internal quotation marks, emphasis, and certain brackets omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Defendant moved to dismiss for insufficiency of the evidence at the close of the State's evidence and again at the close of all evidence. The trial court denied both motions. On appeal, Defendant urges that the State presented insufficient evidence that he was the man on the scooter who exposed himself to Sally, instead relying on (1) "inflammatory evidence" about the 2009 incident involving Gina in order to show Defendant had the type of character to commit the 2011 charged offenses and (2) a series of "mistaken identity" situations. Much of Defendant's appellate argument is inapposite, as he misperceives our task in reviewing the denial of a motion to dismiss for insufficiency of the evidence.

Regarding evidence of the 2009 incident, as we have previously explained, Officer Sellars's testimony was properly admitted under Rules 403 and 404(b). Taken in the light most favorable to the State, that evidence, particularly Gina's photo lineup identification of Defendant as the man who exposed himself to her, is evidence that Defendant had a common plan or

scheme to expose himself to young Hispanic girls on residential streets. Littlejohn's photo lineup identification of Defendant as the man who exposed himself to and masturbated in front of Sally, a young Hispanic girl walking along a residential street, is evidence that Defendant was the perpetrator of the charged offense. In addition, evidence before the jury revealed that Defendant had sole access to a red scooter very similar to the scooter used in the crime and that Defendant possessed a helmet like that worn by the perpetrator.

Defendant is entirely correct that there were inconsistencies and discrepancies in Littlejohn's testimony and between Gina's original description of the man who exposed himself to her and Defendant's actual ethnicity and appearance. Littlejohn was not able to identify Defendant in court, stating, "That's not the same guy." Gina first described the perpetrator in her case as a Hispanic man in a blue green car, while Defendant is a Caucasian man who drove a green car. However, "[c]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Id.* at 379, 526 S.E.2d at 455. Through cross-examination of the State's witnesses and presentation of his own evidence, Defendant had an opportunity at trial to persuade *the jury* that "[i]t is

inherently incredible that [Defendant] could have been the perpetrator of these crimes" in light of the contradictions and discrepancies in the State's case. This Court, however, does not have the authority to weigh and resolve the inconsistencies in the evidence.

In sum, taken in the light most favorable to the State, the evidence here was entirely sufficient to send the charges to the jury. Thus, the trial court did not err in denying Defendant's motions to dismiss. This argument is overruled.

III. Jury instruction on Rule 404(b) evidence

Defendant also argues that the trial court impermissibly commented on the evidence in its instruction regarding the Rule 404(b) evidence. We disagree.

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court. An instruction about a material matter must be based on sufficient evidence." *State v. Osorio*, 196 N.C.

App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). However, the particular form of an instruction or the exact wording a court employs to instruct the jury are "matter[s] within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002). Finally, "an error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation and internal quotation marks omitted).

At the charge conference, Defendant requested that the trial court instruct the jury that the Rule 404(b) evidence tended to show that "the defendant in this case is allegedly the same defendant who exposed himself" in the 2009 incident. The trial court, after listening to the arguments of Defendant and the State, opined that Defendant's requested wording was "awkward." The court exercised its discretion and addressed Defendant's concerns about the Rule 404(b) evidence by including

the words "tending" and "allegedly" in the instruction as follows:

> Evidence has been received tending to show that the defendant in this case allegedly exposed his penis to [Gina] on or about April 7, 2009, in Guilford County. This evidence was received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed.
>
> That the existence in the mind of the defendant — that there existed in the mind of the defendant a plan, scheme, system or design involving the crime charged in this case.
>
> If you believe this evidence, you may consider it but only for the limited purpose for which it was received. You may not consider it for any other purpose.

On appeal, Defendant contends that the instruction as given "presumed that [D]efendant was the perpetrator in the [2009] case, though it made allowance for exactly what he was the perpetrator of [sic]." We are not persuaded that the trial court's instruction can be reasonably interpreted in the manner urged by Defendant. Frankly, we cannot perceive any meaningful difference between "[Defendant was] allegedly the same defendant who exposed himself" and "[D]efendant in this case allegedly exposed" himself, much less any abuse of discretion in the trial

court's choice of wording. Accordingly, this argument is overruled.

IV. Identification of Defendant as the defendant

Defendant next argues that the trial court impermissibly expressed an opinion about Defendant's guilt in the presence of the jury. We disagree.

Our General Statutes strictly prohibit trial courts from expressing opinions about evidence and witnesses. N.C. Gen. Stat. §§ 15A-1222, -1232 (2013). "The statutory prohibitions against expressions of opinion by the trial court contained in [section] 15A-1222 and [section] 15A-1232 are mandatory. A defendant's failure to object to alleged expressions of opinion by the trial court in violation of those statutes does not preclude his raising the issue on appeal." *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989) (citations omitted).

Defendant asserts that the trial court erred when, in its opening remarks to the jury, it stated, "I inform you that the defendant in this case is Mr. Randall Eugene Rachels, who is seated at this table." Defendant contends that this remark, by identifying Defendant as "the defendant in this case," was an impermissible expression of the court's opinion that Defendant was guilty of the offenses for which he was being tried.

Defendant cites no case law in support of this extraordinary argument, and we know of none. We would merely observe that (1) "defendant" does not imply one is *guilty of* a crime but rather only that one has been *charged with* a crime, as was Defendant in this case;[4] (2) Defendant was, in fact, "the defendant" in the case being tried; and (3) we are unaware of another term which would more accurately define Defendant's role in the trial. This argument is without merit.

V. IAC claim

Defendant argues that he received ineffective assistance from his trial counsel. We are not persuaded.

> It is well established 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 [the] defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

---

[4] A "defendant" is defined as "[a] person being sued in a civil proceeding or being accused in a criminal proceeding." *Black's Law Dictionary* 450 (8th ed. 2004).

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and internal quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005).

> 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). "Decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court." *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002) (citation omitted), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003).

Here, Defendant suggests that this Court can resolve the merits of his IAC argument on the cold record, and we agree. *See Thompson*, 359 N.C. at 122-23, 604 S.E.2d at 881. Defendant contends that he received IAC in that his trial counsel agreed

to have Officer Sellars testify to a summary of the 2009 incident involving Gina, rather than to have Gina herself testify before the jury. Our careful review of the transcript reveals that this decision was a matter of trial strategy.

> [THE STATE]: I believe we are going to proceed. If we may, in chambers, [defense counsel] and I had spoken to you about a witness situation on the State's part. And [defense counsel] had asked about a situation with her and there was some discussion about trying to find someway to shortcut the 404(b) evidence and I don't know what [defense counsel]'s position is on that?
>
> [DEFENSE COUNSEL]: I would hate to see the little girl go through that again. If you think you need to put her on and her dad on and the officer, we are fine with that.
>
> [THE STATE]: Your Honor, what I had proposed to try to shortcut this, [Officer] Sellars, who is here and available, she was the lead investigator. She is thoroughly prepared in her review of her file. What the State would propose and, of course, we would [need] to have if the Court would accept this proposition and [D]efendant would be all right, I would ask to have [Officer] Sellars summarize, limited to the allegations involving [Gina] getting off the bus and just have her explain to the jury how she received information as part of the investigation, the things that [Gina] and her father testified to about seeing the car and a tag number and [Officer] Sellars following up with . . . Sharon Rachels. Any other issues I will leave to [defense counsel] and her strategy. I think the fact that merely the fact that [D]efendant has

been charged is probably inappropriate and I would like to give some background.

My whole purpose in seeking to introduce the 404(b) evidence from Guilford County is so the jury can hear the factual similarities because the key purpose of the case at bar is the identity of the perpetrator. That would be my proposal. If that would be satisfactory to the Court and to [D]efendant, that would be what I would seek to do if I can have a minute to speak with [Officer] Sellars and explain to her what that would be.

THE COURT: Let me ask, have you spoken to your client about that?

[DEFENSE COUNSEL]: I haven't spoken to him exactly before these other people testifying.

THE COURT: Sir, I will give you another opportunity to speak with your counsel. I want you after consulting with her, let me know what you both, let me know what you all want to do.

[]DEFENDANT: Thank you, your Honor.

THE COURT: The issue before the Court is whether those folks will be called and testify about the other incidents, basically the information he had or whether or not there can be an agreement to summarize what that evidence was. And I understand there's some issues about one particular witness being the father and the State is making efforts to get him here.

[THE STATE]: [H]e should be en route. I haven't checked lately in our office.

THE COURT: So that's the issue. If you want to speak with your client.

[]DEFENDANT: I would appreciate it, your Honor.

THE COURT: The other thing I want, I am not trying to rush you all. I am mindful we have had a jury here for an hour and 20 minutes sitting back in that room. I want to give you all the time you need but be mindful they are back there sitting.

[DEFENSE COUNSEL]: Will do.

(Defendant and [defense counsel] confer.)

THE COURT: While you are still talking about that, let me say one other thing I want to make clear. Sir, you have a right to confront witnesses against you. You have a right to confront them in the courtroom. You have the right to cross-examine them. You certainly have the right to have them here. If you object, they certainly can be brought here. I will ask some availability. You certainly don't have to stipulate to what the testimony would be and if you do, you would be giving up your right to directly confront them. So I want to ask both the State and [D]efendant do you all think that would be appropriate to do that under those circumstances?

[THE STATE]: Your Honor, I think because [D]efendant had the opportunity yesterday afternoon through counsel to confront these witnesses, I think there has been — certainly he has had that opportunity and I think that it is his judgment call.

THE COURT: That's the thing that concerns me. I think part of the right to confront them includes the right to confront

them in front of the jury, for them to make some sort of evaluation of that. I don't see any reason why he can't waive that. I want to make sure if he does waive that he knowingly waives that. The details are important what the person is going to testify to. I would say as part of this I wouldn't want the State to release those witnesses until the evidence has been taken in the event that either side would like to call one of the witnesses if possible.

[THE STATE]: Both the father and the daughter are still under subpoena. The State served them with a subpoena.

[DEFENSE COUNSEL]: I understand. I will explain that to him.

THE COURT: All right.

([Defense counsel] and [D]efendant conferring.)

[DEFENSE COUNSEL]: Your Honor, [Defendant] has agreed that [Officer] Sellars can testify and summarize the evidence. However, we would ask that the other witnesses remain here outside of the courtroom in case we do need to call them and again have our opportunity to confront those witnesses.

[THE STATE]: I will be happy — they are still under subpoena. I sent Sergeant Kirkwood up to see if they arrived. I am informed that they are en route. [Officer] Sellars has spoken to them this morning. Advised that they are coming. They have a number of other small children, so — what I would like to also put on the record is that as your Honor has recognized and seen fit to advise [D]efendant about potential issues, also would like to again reiterate on the

record that [defense counsel] and Mr. Ed Lewis are here and [D]efendant has had the benefit and advice of two counsel.

THE COURT: Sir, if you will please stand up, unless your counsel objects, I want to ask you a few questions about this.

[DEFENSE COUNSEL]: That's fine.

THE COURT: I sent the jury away. I want to make sure that you thoroughly talked this out with counsel.

[]DEFENDANT: One more thing that I want to address with her, then I will be fine.

THE COURT: Related to this issue?

[]DEFENDANT: Yes.

THE COURT: Have a seat and speak with her.

([Defense counsel] and [D]efendant conferring.)

[DEFENSE COUNSEL]: We are fine, your Honor.

THE COURT: Sir, let me advise you you don't have to say anything to me. You are welcome to not say anything to me. You have a right to remain silent. Do you understand that?

[]DEFENDANT: Yes, sir.

THE COURT: Do you mind my asking you some questions?

[]DEFENDANT: No.

THE COURT: If you don't want to answer, that would be fine. If you want to speak with your attorney, that would be fine. Have you had enough time to speak with your counsel?

[]DEFENDANT: Yes, sir.

THE COURT: As I understand it the State and you have agreed to allow, instead of having the young lady that testified and her father testify, instead of having them testify today in open court, you have agreed that the law enforcement officer involved in the case can get on the witness stand and testify, summarize the facts of the case; is that right?

[]DEFENDANT: I would agree, your Honor.

THE COURT: You understand that means they may tell me things that other folks have said outside of court as part of the investigation and you are not at this point, since the witnesses are not on the stand, you will not be able to confront them directly in front of the jury. Do you understand that?

[]DEFENDANT: I understand.

THE COURT: I understand they should be en route. There's a possibility you could call them back up or they could be called to testify. This doesn't limit anybody calling them in the future anticipation. This is a way to have this addressed in a more summary like fashion.

[]DEFENDANT: Yes, your Honor.

THE COURT: That is fine with you?

[]DEFENDANT: That is fine with me.

THE COURT: You do understand you have the right to have them sit up on the witness stand and cross-examine them and face the witnesses against you?

[]DEFENDANT: I understand.

THE COURT: Do you have any questions about that?

[]DEFENDANT: No, your Honor.

THE COURT: Anything, any concerns about doing it this way?

[]DEFENDANT: I do not, your Honor.

THE COURT: I take it you have thought about some of the benefits there may be in doing it this way?

[]DEFENDANT: I have, your Honor.

THE COURT: You have had an opportunity to consider that with counsel?

[]DEFENDANT: I have.

THE COURT: You have taken that into consideration in deciding this is in your best interest to do?

[]DEFENDANT: Yes, your Honor.

THE COURT: I take it you are doing this voluntarily, no one is forcing you to do this; is that right?

[]DEFENDANT: That is correct.

THE COURT: Any questions you have of me?

[]DEFENDANT: No, your Honor.

As Defendant points out, Gina had been very emotional and cried during *voir dire*. On appeal, Defendant contends that, if Gina herself had testified before the jury, Defendant could have cross-examined Gina about her original description of the man who exposed himself to her as "Hispanic" and who was driving an aqua colored car. Since the discrepancy between Gina's original description and Defendant's actual ethnicity and car color came out in Defendant's cross-examination of Officer Sellars, we see no prejudice in trial counsel's decision to have Officer Sellars summarize the incident and not to call Gina. Further, any benefit of the ability to cross-examine Gina would have to be weighed against the emotional impact on the jury of having a possibly tearful teenaged girl describe the trauma of having a stranger she identified as Defendant masturbate in her presence. The trial court alluded to this point when asking Defendant, "I take it you have thought about some of the benefits there may be in doing it this way?" Defendant agreed that he had considered the strategic benefits of having Officer Sellars, rather than Gina, testify before the jury. Finally, we note that, as discussed *supra*, Defendant himself elicited the only testimony about Gina's identification of him as the perpetrator of the

offense against her. Thus, the true prejudice in Officer Sellars' testimony was created by Defendant himself. In sum, we will not second-guess trial counsel's strategic decision to have Officer Sellars present a summary of the incident involving Gina, *see id.*, and even if Defendant could establish that this decision fell below an objective standard of reasonableness, he could not show prejudice. *See Allen*, 360 N.C. at 316, 626 S.E.2d at 286. Accordingly, Defendant's IAC claim must fail.

NO ERROR in part; NO PREJUDICIAL ERROR in part.

Chief Judge MCGEE and Judge DIETZ concur.

Report per Rule 30(e).