NO. COA14-547

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2015

STATE OF NORTH CAROLINA

v.

Cleveland County
Nos. 12 CRS 863-64
12 CRS 51181-83

RANDY CARTER DAVIS

Appeal by defendant from judgments entered 30 September 2013 by Judge Jeffery Hunt in Cleveland County Superior Court. Heard in the Court of Appeals 20 November 2014.

Attorney General Roy Cooper by Special Deputy Attorney General Robert M. Curran for the State.

Mark Montgomery for defendant-appellant.

STEELMAN, Judge.

Where the testimony of expert witnesses was restricted to their own observations and experiences, their testimony did not constitute expert opinions that the State was required to disclose prior to trial. The trial court did not err or abuse its discretion by allowing the witnesses to testify. Even assuming, *arguendo*, that the trial court erred by allowing witnesses to testify pursuant to Rule 404(b), defendant has failed to show prejudice.

The trial court did not err by using the word "victim" to refer to the prosecuting witness during its instructions to the jury.

I. Factual and Procedural Background

On 12 March 2012 Randy Carter Davis (defendant) was indicted for one count of first degree statutory rape of a child under 13, one count of sexual offense of a minor by a person in a parental role, and one count of first degree statutory sexual offense against a child under 13, with respect to G.S.; and for one count of indecent liberties and one count of sexual offense of a minor by a person in a parental role with respect to L.W. The charges against defendant came on for trial at the 23 September 2013 session of criminal superior court for Cleveland County.

A. State's Evidence

G.S. was born in 1976 and was thirty-seven years old at the time of trial. Her mother and defendant began living together when she was three or four years old, and married in 1981. She lived with defendant, her mother and her younger siblings until she was nine years old, when her mother and defendant separated. After defendant and her mother separated, G.S. had occasional weekend visits at defendant's residence until she was 13 years old.

From the time G.S. was three and a half to four years old until she was thirteen, defendant engaged G.S. in sexual activity "every chance he got." Defendant committed more than 100 sexual

offenses against her, including masturbation, oral sex and vaginal intercourse. Defendant's conduct ended when G.S. was thirteen and she stopped visiting defendant's residence. G.S. knew L.W., defendant's other step-daughter, but had no contact with L.W. after she was thirteen.

Defendant told G.S. not to reveal these sexual activities, but when G.S. was 16, she told her boyfriend, T.S., that defendant had sexually abused and raped her. She married T.S. when she was 17 and at the time of trial they were still married and had two children. T.S.'s testimony corroborated that of G.S. After 2006, G.S. and her husband attended the same church as defendant and, on one occasion in church, defendant gave G.S. a card stating that he was sorry. In 2011, G.S. told her pastor "a little bit of what happened" between her and defendant. She later reported defendant's sexual assaults to the Cleveland County Sheriff's Department.

In her teens and twenties, G.S. experienced nightmares and trouble sleeping, and in 2006 she was briefly hospitalized with suicidal thoughts. In the hospital she was treated by Dr. Vikram Shukla, who testified as an expert in child and adolescent psychology. Dr. Shukla treated G.S. with anti-depressant and anti-psychotic medication for alcohol abuse, depression, and psychotic depression. She responded well to treatment, and was no longer

psychotic when she was discharged. While G.S. was in the hospital, she told Dr. Shukla that she was sexually abused by her stepfather from age three and a half or four to age thirteen.

Sandra Chrysler testified as an expert in mental health counseling. She began counseling therapy with G.S. in March 2013. During counseling, G.S. described to her the sexual abuse by defendant.

L.W. was born in 1976 and was 6 months older than G.S. When she was eleven years old, her mother married defendant, and she lived with her mother and defendant until she was sixteen or seventeen. For several years, starting when L.W. was thirteen or fourteen years old and after G.S. had stopped visiting defendant's residence, defendant frequently talked to L.W. about sexual matters and attempted to engage her in sexual activity. Defendant told L.W. that he wanted to be her first sexual partner and asked her to perform oral sex on him. On a number of occasions defendant entered L.W.'s room at night and either masturbated by her bed or tried to physically force her to have sex. L.W. successfully rebuffed these attempts by kicking defendant. L.W. never reported these incidents until she was contacted by a detective in 2011. Once, when L.W. and G.S. were young, G.S. asked her "if anything had ever happened," but L.W. did not want to talk about it, and she was not aware of the sexual contact between defendant and G.S.

A.J., who was twenty-two years old at the time of trial, testified pursuant to Rule 404(b) of the North Carolina Rules of Evidence. When she was 12 or 13 she became acquainted with defendant. Their relationship was that of a "grandparent and grandchild." She knew L.W. from occasional family get-togethers, but did not know G.S. For several years, beginning when A.J. was about twelve, defendant frequently discussed sexual matters with her, made comments about her breasts, and offered advice on sexual subjects. Defendant also told A.J. that when L.W. was younger he discussed sex with her and took sexual pictures of L.W., and offered to do the same for A.J.

S.W., who was eighteen years old at the time of trial, also testified pursuant to Rule 404(b). When she was fourteen, defendant assisted with youth activities at her church. He frequently discussed sexual matters with S.W., asked to be her first sexual partner, and sent an explicit photo to her cell phone. Tracy Marlowe was married to S.W.'s aunt, and knew defendant through church. When S.W. was a teenager she confided to him that she had received suggestive phone messages from defendant.

Greg Neely was the pastor of the church attended by defendant, who was involved in youth activities in the church. In 2011 Pastor Neely met with defendant to discuss his concerns about defendant's conduct with teenage female members of the church, and asked

defendant to "back away" from involvement with the young people of the church. Pastor Neely testified that due to "an accumulated amount" of incidents involving defendant and "a gathering of things that brought us to the point to take action," the church later sent defendant a letter informing him that he was banned from the church premises. Defendant did not respond to the letter. S.W. told Pastor Neely about unwanted conversations and text messages from defendant. Pastor Neely also met with G.S., who told him about defendant's abuse, and he encouraged her to go to law enforcement.

Deputy Tracy Curry of the Cleveland County Sheriff's Department interviewed G.S. and L.W. in October 2011, and interviewed A.J. and S.W. in 2012. His account of these interviews corroborated the testimony of the witnesses.

B. Defendant's Evidence

Delores Davis had been married to defendant for over 25 years at the time of trial. Her daughter, L. W., was eleven years old when she and defendant were married. Ms. Davis never saw anything inappropriate about L.W.'s relationship with defendant. G.S. had visited their home and Ms. Davis recalled her as happy and normal. She never saw or heard anything suspicious regarding A.J and defendant. Ms. Davis testified that her husband was never alone with the female witnesses, other than to drive L.W. to school.

Following the presentation of the State's evidence, the charge of sexual offense against L.W. by a person in a parental role was reduced to a charge of attempted sexual offense against L.W. On 30 September 2013 the jury returned verdicts finding defendant guilty of all charges. Pursuant to the Fair Sentencing Act, which governed sentencing for felonies committed between 1 July 1981 and 1 October 1994, the trial court imposed active prison sentences of life in prison for first degree statutory sexual offense against G.S., life in prison for first degree statutory rape of G.S., and three years for attempted sexual offense against L.W., with these sentences to be served consecutively; and three years for indecent liberties against L.W., and four and a half years for sexual offense against G.S. by a person in a parental role, with the last two sentences to be served concurrently with the first set of offenses.

Defendant appeals.

II. Admission of Expert Testimony

In his first argument, defendant contends that the trial court erred in admitting portions of the expert testimony of Dr. Shukla and Ms. Chrysler. Defendant asserts that these witnesses offered "opinion testimony" that was erroneously admitted without a proper foundation and in violation of discovery statutes, and that the

testimony "amounted to expert vouching" for the veracity of the prosecuting witness. We disagree.

A. Standard of Review

Rule 702(a) of the North Carolina Rules of Evidence provides that: "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a) (2013).[1] In addition, N.C. Gen. Stat. § 15A-903(a)[2] provides that, upon motion from the defendant, the trial court must order

> (2) The prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's *curriculum vitae*, the expert's opinion, and

[1] The current version of Rule 702 became effective 1 October 2011, and applies "to actions commenced on or after that date." The date of indictment marks the commencement of a criminal proceeding. *State v. Gamez*, __ N.C. App. __, __, 745 S.E.2d 876, 878-79, *disc. rev. denied,* 367 N.C. 256, 749 S.E.2d 848 (2013) ("[W]e hold that a criminal action arises on the date that the bill of indictment was filed."). Although defendant was tried for offenses committed prior to 1992, he was indicted in March of 2012; thus, the current version of Rule 702 is applicable to his trial.

[2] The current version of N.C. Gen. Stat. § 15A-903 became effective 1 December 2011 and applies "to cases pending on that date and to cases filed on or after that date." It is applicable to defendant's trial, as defendant was indicted after 1 December 2011.

> the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court. . . .

"Expert opinion testimony is not admissible to establish the credibility of the victim as a witness." *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002) (citing *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986)). Thus, "'[o]ur appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence.'" *State v. Ryan*, __ N.C. App. __, __, 734 S.E.2d 598, 604 (2012) (quoting *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89 (1997) (internal quotation omitted), *disc. rev. denied,* 366 N.C. 433, 736 S.E.2d 189 (2013).

"When reviewing the ruling of a trial court concerning the admissibility of expert opinion testimony, the standard of review for an appellate court is whether the trial court committed an abuse of discretion. An '[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Ward*, 364 N.C. 133, 139-40, 694 S.E.2d 738, 742 (2010) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (internal citations omitted), and

quoting *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006) (internal citation omitted).

B. Analysis

At trial, Dr. Shukla testified as an expert in child and adolescent psychology, and Ms. Chrysler testified as an expert in mental health counseling. On appeal, defendant does not challenge the expert credentials of either witness or the admissibility of their testimony regarding their treatment of G.S., including the personal and medical history that she provided. Rather, defendant argues that both witnesses offered their expert opinions on the "symptoms" of sexual abuse, that their expert opinions lacked an adequate evidentiary foundation, and that their opinions were not disclosed to defendant prior to trial as required by N.C. Gen. Stat. § 15A-903(a)(2). Our review of the record and trial transcript does not support defendant's characterization of the testimony of these witnesses.

At trial, defendant argued that the State had not provided the defendant with Dr. Shukla's expert opinion prior to trial, and that Dr. Shukla should not be permitted to offer an expert opinion on the characteristics of sexual abuse or the reasons for delayed reporting of abuse. The trial court ruled that Dr. Shukla could testify to his own observations in these areas, but could not offer an expert opinion on these issues. The trial court thus sustained

defendant's objections to questions concerning Dr. Shukla's opinion on matters such as the characteristics of child sexual abuse victims. Defendant concedes on appeal that at trial the prosecutor couched her questions to Dr. Shukla in terms of his own observations.

Dr. Shukla testified that in treating more than 1000 patients who reported sexual abuse, he had observed a wide range of responses to sexual abuse. He testified that the responses of individuals to traumatic experiences such as sexual abuse or wartime atrocities varied greatly depending on the individual's genetic makeup and his or her personal experiences. He did not testify that there was any single set of "symptoms" of past sexual abuse, or a common "profile" of victims of sexual abuse. Dr. Shukla was not asked whether G.S. displayed "symptoms" or characteristics that, in his opinion, were consistent with a history of sexual abuse, and he did not volunteer testimony to this effect. We conclude that Dr. Shukla did not testify that there is a specific constellation of characteristics of sexual abuse victims, did not opine on whether G.S. met such a profile, and did not offer an expert opinion of the type that was required to be disclosed under N.C. Gen. Stat. § 15A-903. As a result, the trial court did not err or abuse its discretion by admitting Dr. Shukla's testimony.

At trial, defendant objected to Ms. Chrysler's testimony upon the same grounds as Dr. Shukla's. The trial court limited Ms. Chrysler's testimony, ruling that she could only testify about the characteristics of sexual abuse victims and delayed reporting of sexual abuse based on her own experience as a mental health counselor, but could not offer expert testimony "as to profiles" of sexual abuse victims. Ms. Chrysler testified in general terms that, in her observation and experience, victims of childhood sexual abuse might have difficulty trusting others, might experience anxiety, depression, or feelings of guilt or shame about the abuse, and that sexual abuse could be a "trigger" for various mental illnesses, including bipolar disorder, agoraphobia, and depression. In her observation and experience, victims of sexual abuse often delayed reporting the abuse. In addition to testifying about her general observations regarding victims of sexual abuse, Ms. Chrysler testified extensively about her treatment of G.S. However, she was not asked, and did not volunteer, testimony that G.S. exhibited characteristics that fit a "profile" of sexual abuse victims, or that her "symptoms" were consistent with a history of sexual abuse. We conclude that, because Ms. Chrysler's general testimony about sexual abuse victims was limited to her own observation and experience, it did not constitute an expert opinion that had to be disclosed in advance of trial, and that the trial

court did not err or abuse its discretion by admitting Ms. Chrysler's testimony.

Because we hold that neither Dr. Shukla nor Ms. Chrysler offered an expert opinion that there exists a "profile" of the victims of child sexual abuse, or whether G.S. had characteristics that were consistent with such a profile, we do not reach defendant's arguments regarding the proper foundation for such evidence, the degree to which experts disagree about the existence of "symptoms" of sexual abuse, or the foundation required for consideration of "unnamed studies of sexual abuse" upon which defendant contends that the witnesses relied in reaching their expert opinions.

We also reject defendant's argument that Dr. Shukla and Ms. Chrysler "vouched" for G.S.'s credibility. Regarding the specific testimony of Dr. Shukla, defendant contends that Dr. Shukla testified that he was "able to distinguish a true from a false belief," thus suggesting that Dr. Shukla testified to the veracity of G.S.'s reports of abuse. However, the testimony to which defendant refers occurred during his cross-examination of Dr. Shukla regarding G.S.'s sense that she had a shadow over one shoulder:

> Q. I believe you testified that she had a persistent fear, an imaginary perception that something was on her, physically on her, right? Isn't that what you said?

> A. . . . My understanding, objectively, professionally, is she had a paranoid sense of presence on her.
>
> Q. Something behind her left shoulder?
>
> A. That is correct.
>
> . . .
>
> Q. But that couldn't be true, right?
>
> A. By definition, I have already testified that paranoid delusion is a fixed false belief, and she had a paranoid form of psychotic sign during her depressed state over a long period of time. But paranoid delusion is not the same as hallucination.
>
> Q. So she had a paranoid delusion, which is what you described to the jury as a fixed yet false belief.
>
> A. Yes, that is correct.
>
> Q. And you can't, as a psychiatrist, distinguish between hallucinations and paranoid delusions, true beliefs, false beliefs. You can't make that distinction, can you?
>
> A. In fact, yes, I can.

As the context makes clear, Dr. Shukla was testifying to a distinction between hallucinations and paranoid delusions, and not testifying about G.S.'s credibility regarding her claim to have been sexually abused.

Defendant also argues that in their testimony about the treatment of G.S., both Dr. Shukla and Ms. Chrysler vouched for

G.S.'s credibility. We disagree. Dr. Shukla testified that G.S. told the health care providers in the hospital that she had been sexually abused, and that the treatment provided in the hospital improved G.S.'s ability to discuss her past. Dr. Shukla was not asked for an opinion regarding G.S.'s credibility. Similarly, Ms. Chrysler testified about G.S.'s account of sexual abuse by defendant. However, she was not asked for an opinion regarding either the credibility of sexual abuse victims in general or on G.S.'s credibility.

Defendant acknowledges that neither witness ever testified that he or she believed G.S. or that her behavior was consistent with credibility. Defendant's argument that Dr. Shukla and Ms. Chrysler vouched for G.S.'s credibility appears to be based primarily on the fact that they testified about the problems G.S. reported without qualifying each reported symptom or past experience with a legalistic term such as "alleged" or "unproven." For example, Dr. Shukla testified without objection that G.S. reported the following mental health issues:

> The problems she reported were inability to cope with her past, inability to cope with dysfunctional childhood, and inability to cope with approximately ten years of sexual molestation she went through with one person, and she was having difficulty coping with the nightmares that she was experiencing, and flashbacks she was experiencing as a product of the sexual molestation.

Similarly, Ms. Chrysler testified to G.S.'s account of sexual abuse by defendant over a period of many years. Defendant does not cite any authority for the proposition that a witness who testifies to what another witness reports is considered to be "vouching" for that person's credibility unless each disclosure by the witness includes a qualifier such as "alleged." We decline to impose such a requirement.

Defendant also contends that both Dr. Shukla and Ms. Chrysler testified that "patients they had treated over the years were in fact sexual abuse victims," and that G.S. "displayed [the] characteristics" of a typical victim of child sexual abuse. Defendant does not cite to a specific transcript reference for this assertion, and our review of the transcript indicates that neither expert testified that his or her patients "were in fact sexual abuse victims" or that G.S. matched a profile that was characteristic of sexual abuse victims.

Defendant also challenges the trial court's instruction to the jury that it could consider the testimony of Dr. Shukla and Ms. Chrysler to the extent that it corroborated or supported G.S.'s testimony. We conclude that the instruction was not improper.

For the reasons discussed above, we hold that the trial court did not err by admitting the testimony of the expert witnesses. This argument is without merit.

III. Admission of 404(b) Evidence

In defendant's second argument, he argues that the trial court erred by admitting the testimony of S.W. and A.J. pursuant to North Carolina Rule of Evidence 404(b). Defendant asserts that this testimony was evidence only of his propensity to commit the acts for which he was on trial, and thus was inadmissible. We conclude that even assuming, ***arguendo***, that this testimony was erroneously admitted, defendant has failed to show prejudice.

A. Standard of Review

N.C. Gen. Stat. § 8C-1, Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." "Rule 404(b) is 'a clear general rule of inclusion.' . . . [Rule 404(b) evidence] 'is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime.'" *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (quoting *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990), and *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995)). In addition, "if the trial court concludes the evidence is relevant to something other than

the defendant's propensity to commit the crime, as well as sufficiently similar and temporally related to the crime charged, the evidence may be excluded under Rule 403 if the trial court determines that admission of the evidence would result in unfair prejudice, confusion of the issues, or would mislead the jury. N.C. Gen. Stat. § 8C-1, Rule 403." *State v. Noble*, __ N.C. App. __, __, 741 S.E.2d 473, 480, *disc. review denied*, 367 N.C. 251, 749 S.E.2d 853 (2013).

"[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." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. "In addition, 'this Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant.'" *Id.* at 131, 726 S.E.2d at 159 (quoting *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987) (internal citation omitted).

B. Analysis

As discussed above, the trial court admitted the testimony of two witnesses pursuant to Rule 404(b). A.J. testified that for several years, beginning when she was about twelve, defendant frequently discussed sexual matters with her, made comments about her breasts, and offered advice on sexual subjects. S.W. testified that when she was fourteen, defendant frequently discussed sexual matters with her, asked to be her first sexual partner, and sent an explicit photo to her phone. In its ruling allowing the testimony of S.W. and A.J., the trial court found that:

> [1.] The Court finds the testimony of the witnesses [G.S. and L.W.] the alleged victims, covers a time period throughout the 1980's beginning in 1981. Further, that testimony of witness [A.J.] occurred in the year 2000[.] . . . Testimony of [S.W.] occurred over a period from 2009 through 2011, into 2011[.]
>
> [2.] [S]triking similarities exist in testimony of [the four witnesses], . . . [and] threads of commonality run through each of these witnesses' testimony;
>
> [3.] . . . [I]n each instance the alleged victims were young females from age eleven through sixteen[.] . . . [G.S.'s] victimization may have occurred, may have started at an earlier age. Nevertheless, successful intercourse, in her case, was alleged to have started at approximately age twelve.
>
> [4.] In each instance the victims were alone with the Defendant, either in a room or a vehicle. In each instance the Defendant used his position of authority, or perceived authority, to commit his acts upon the victims, witnesses, in [G.S. and L.W.] the

> position of stepfather, in [A.J.] the perceived position of grandfather, and in [S.W.] the position of youth director.
>
> [4.] In each instance the Defendant's acts and his discussions involved his sexual arousal or gratification, or his fascination with sex and his victims' sexuality.
>
> [5.] In each instance, the Defendant seemed obsessed with being the first to engage in vaginal intercourse with his victims, and in [G.S.] the victim at age twelve, and [L.W.] the attempts with the victim at age thirteen, and [A.J.] offers to engage in sex and teach about sex at ages thirteen and fourteen for the victim, that period, and in [S.W.] at age fourteen the Defendant allegedly told her he wanted to be the -- he wanted to take her virginity.
>
> [6.] Next, as to the testimony of [all four witnesses], in each instance the Defendant exploited his position of authority and trust to conduct a quote, "how-to," unquote, instruction involving sex to these young girls, either through actual physical violations or through discourse, or by both.
>
> [7.] Next, the Defendant used the subterfuge of the quote, "trusted instructor," unquote, role to engage in preparation of his victims in each instance, for his subsequent criminal sexual behavior with each victim and witness.

Defendant does not challenge the evidentiary support for the trial court's findings of fact. As a general rule, "[f]indings of fact which are not challenged 'are presumed to be correct and are binding on appeal. We [therefore] limit our review to whether [the unchallenged] facts support the trial court's conclusions.'" *State v. Labinski*, 188 N.C. App. 120, 124, 654 S.E.2d 740, 743 (2008)

(quoting *State v. Eliason*, 100 N.C. App. 313, 315, 395 S.E.2d 702, 703 (1990) (internal citations omitted). Moreover, our review shows that the trial court's findings were supported by competent evidence. Based on its findings, the trial court concluded:

> 1) That the evidence of [G.S., L.W., S.W., and A.J.] is strikingly similar;
>
> 2) That the – rather than being too remote in time from one another as to run afoul of Rule 403 analysis, in this case the temporal proximity analysis actually reveals a commonality connecting the Defendant's criminal sexual conduct stretching over a period of approximately thirty years, involving at least four young girls from the ages of eleven through sixteen;
>
> 3) That the Court in its discretion concludes that the probative value outweighs the possibility of prejudice to the Defendant, pursuant to Rule 403 and 404(b);
>
> 4) Finally, that this Court concludes that the evidence questioned is admissible under 404(b) and 403 to show the Defendant's possible state of mind as to identity, plan, design, preparation, intent, opportunity and motive if the jury so finds.

On appeal, defendant argues that the testimony of A.J. and S.W. described conduct that was not similar to the charged offenses, and that the number of years between the offenses with which he was charged and his interactions with A.J. and S.W. rendered their testimony inadmissible. We conclude that it is unnecessary for us to reach a definitive conclusion on defendant's arguments, given that defendant has failed to show the requisite prejudice.

N.C. Gen. Stat. § 15A-1443 provides that:

> (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when 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. The burden of showing such prejudice under this subsection is upon the defendant. . . .
>
> (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

Defendant argues on appeal that "admission of this testimony denied not only [defendant's] statutory rights, but his constitutional rights to a fair trial." This conclusory statement is unsupported by argument or citation to authority, or even any discussion of the specific nature of the "constitutional rights" at issue. N.C. Rule of Appellate Procedure 28(b)(6) states that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." *See Hackos v. Goodman*, __ N.C. App. __, __, 745 S.E.2d 336, 341 (2013) ("Plaintiff cites no authority in support of this conclusory statement, and fails to make any actual argument in her brief as required by N.C.R. App. P. 28(b)(6), resulting in abandonment of Plaintiff's argument.") (citing *Dogwood Dev. & Mgmt. Co., LLC v.*

White Oak Transp. Co., 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008)).

Because defendant does not articulate an argument in support of his contention that his "constitutional rights" were violated by admission of the challenged testimony, he has failed to preserve for review the issue of whether admission of the challenged testimony violated his constitutional rights. As a result, we do not reach the questions either of the existence of a constitutional violation or whether the alleged constitutional violation was harmless beyond a reasonable doubt. Instead, we apply the standard set forth in N.C. Gen. Stat. § 15A-1443(a), which requires defendant to demonstrate "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."

Defendant argues that under "the ordinary standard for prejudice, a new trial [is] required." This argument is supported by a single citation, with no discussion or analysis of the application of the standard, or of the language of the quote, to the specific facts of this case. Assuming, *arguendo*, that this issue is preserved for review, we conclude that defendant has failed to show that, in the absence of the testimony of A.J. and S.W., his trial would have had a different result.

In his appellate brief, defendant emphasizes the difference in degree between the charged offenses and the 404(b) testimony:

> "Mr. Davis was charged with repeatedly and forcibly rap[ing] G.S. and attempting to forcibly rape L.W. A.J. testified only that Mr. Davis would make sexual references to her; he never tried to have sex with her. S.W. testified only that Mr. Davis complimented her on her breasts, texted her about sex and asked to take her virginity. He never touched her except to hug her."

We agree that the behavior described by A.J. and S.W. was far less egregious than the offenses with which defendant was charged. For that reason, it seems unlikely that admission of this evidence changed the outcome of the trial.

Moreover, defendant fails to offer any appellate argument challenging the admission of testimony by Greg Neely, the pastor at the church attended by defendant, G.S., S.W., and A.J. As discussed above, Pastor Neely testified that (1) both G.S. and S.W. confided in him that they had experienced unwanted sexual interactions with defendant; (2) Pastor Neely discussed with defendant his concerns about defendant's behavior with the young women of the church, and; (3) ultimately Pastor Neely found it necessary to ban defendant from the church premises. In addition, Pastor Neely read to the jury the letter sent by the church to defendant, informing him that he was barred from the church. "'[W]hen, as here, evidence is admitted over objection, but the

same or similar evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.'" *State v. Davis*, 353 N.C. 1, 22, 539 S.E.2d 243, 258 (2000) (quoting *State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989)). In addition, Pastor Neely's testimony was at least as prejudicial as that of the 404(b) witnesses. Defendant does not argue on appeal that this evidence should have been excluded.[3] We also observe that the testimony of G.S. and L.W. was largely unimpeached and was corroborated by that of other witnesses. We conclude, given the strength of the State's evidence and the unchallenged admission of Pastor Neely's testimony, that defendant has failed to establish that he was prejudiced by the testimony of A.J. and S.W.

IV. Court's Use of the Word "Victim" in Jury Instructions

In his third argument, defendant contends that the trial court committed reversible error by referring to G.S. and L.W. by the word "victim" during its instructions to the jury. Defendant argues that "[t]his case is controlled by *State v. Walston*[, __ N.C. App. __, 747 S.E.2d 720 (2013)], in which this Court held that it was prejudicial error for the trial court to refer to the complaining

[3] Defendant notes that the "prosecution presented two additional witness[es] to corroborate S.W.," presumably referring to Lindsay Landers and Tracy Marlowe, who testified that S.W. had told them about receiving suggestive phone messages from defendant. Although Pastor Neely's testimony also included corroboration of S.W., it was not received subject to a limitation restricting its consideration to corroboration.

witness as the "victim" in its jury instructions. We agree that *Walston* is controlling, but observe that *Walston* was recently reversed by our Supreme Court. In *State v. Walston,* __ N.C. __, __ S.E.2d __ (2015) (2014 N.C. LEXIS 953), our Supreme Court held that:

> [W]e hold in this case that the trial court did not err in using the word "victim" in the pattern jury instructions to describe the complaining witnesses. We stress, however, when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase "alleged victim" or "prosecuting witness" instead of "victim."

Walston, __ N.C. at __, __ S.E.2d at __. Based on *Walston*, we hold that the trial court did not commit reversible error by using the term "victim" to describe the complaining witnesses.

V. Conclusion

For the reasons discussed above, we conclude that the defendant had a fair trial, free of reversible error.

NO ERROR.

Judges GEER and STEPHENS concur.