IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-454

Filed: 15 May 2018

New Hanover County, No. 13-E-901

IN THE MATTER OF THE ESTATE OF VIOLET P. WARD, Deceased.

Appeal by Caveators from judgment entered 5 October 2016 by Judge Anna Mills Wagoner in New Hanover County Superior Court. Heard in the Court of Appeals 13 November 2017.

Baker Law Firm, PLLC, by H. Mitchell Baker, III, for propounder-appellee.

Sherman & Rodgers, PLLC, by Scott G. Sherman, for caveators-appellants.

MURPHY, Judge.

This is a will contest. Cecil and Donnie Ward ("Caveators") filed a will caveat claiming that their brother, David Ward ("Propounder"), exercised undue influence over their mother, Violet Ward ("Ms. Ward"), to make a will that resulted in Propounder receiving the majority of her estate. At the conclusion of the trial, the jury found that Ms. Ward's will was not a product of undue influence.

Caveators appeal contending that the trial court committed multiple errors which entitle them to a new trial. Specifically, they argue that the trial court erred

in (1) limiting their cross-examination of Propounder, (2) limiting the scope of testimony of their expert witness John Huggard, and (3) instructing the jury on a theory of undue influence unsupported by the evidence. As to the first two issues, we find no abuse of discretion, and as to the third, we conclude that Caveators failed to properly preserve this issue for appellate review.

BACKGROUND

Testatrix Ms. Ward was the mother of four children; David Ward, Lisa Ward Canady, Cecil Ward, and Donnie Ward. During her life, Ms. Ward and her husband acquired a significant real estate portfolio comprised of at least 20 income-producing rental properties. Each of these properties passed through the 2013 will at issue in this appeal. After Ms. Ward's husband died in 2003, she moved in with Propounder and his family, and Propounder helped Ms. Ward manage her rental property business. On 1 May 2013, Ms. Ward executed a Durable Power of Attorney naming Propounder as her Attorney-in-Fact.

On 28 June 2013, a paper writing titled "LAST WILL AND TESTAMENT" was signed by Ms. Ward in the presence of attorneys Holt Moore and Richard Morgan. Moore and Morgan each signed the instrument and attested that Ms. Ward was of sound and disposing mind and memory. Moore also drafted the will. Twenty days later, on 18 July 2013, Ms. Ward passed away at the age of 78, survived by her four children and several grandchildren.

On 29 July 2013, Propounder submitted the paper writing for probate. It was admitted and adjudged to be the Last Will and Testament of Ms. Ward. Ms. Ward's purported will revoked her prior will from 1986 and named Propounder as Executor. On 14 October 2013, Caveators filed a verified caveat challenging the validity of Ms. Ward's purported 2013 will. The caveat alleged that the purported will was obtained by Propounder through the exercise of undue and improper influence upon decedent.[1] The caveat also alleged that Ms. Ward's prior will would have distributed her estate equally among her four surviving children. In contrast, the provisions of Ms. Ward's purported will resulted in an unequal distribution among her four children, with Propounder receiving $1,766,224.00 of Ms. Ward's real property which had a total value of $2,671,224.00.

A jury trial commenced on 28 September 2016. Propounder's counsel called several witnesses, including Propounder. During cross-examination, Caveators' counsel asked Propounder several questions about the reasons he was removed as Executor of Ms. Ward's estate by judicial order in March 2015 ("Removal Order"). The Removal Order made several findings of fact regarding Propounder's deficient performance as Executor and concluded that he was in breach of his fiduciary duties. Caveators also called a number of witnesses, including John Huggard, an experienced

[1] The verified caveat also alleged that Propounder exerted duress upon Ms. Ward to obtain the will. However, there was minimal evidence of duress presented during trial, and Caveators did not request a duress instruction.

estate lawyer and retired professor who was tendered as an expert witness. However, before Huggard provided any opinions, Propounder's counsel requested a *voir dire* outside of the presence of the jury and objected to several lines of Huggard's proffered testimony. The trial court ruled that Huggard would not be permitted to provide all of the testimony proffered during *voir dire*, and stood in recess over the weekend. Huggard did not return the following Monday to testify. However, the parties did agree to a stipulation related to Huggard's opinion. That stipulation was read to the jury prior to deliberations. We also note that although Huggard did inform the trial court about the opinions he would provide, Caveators did not make any formal offer of proof after the trial court announced its ruling regarding Huggard's testimony.

After the parties rested, the trial court instructed the jury that it could find either the entire will or specific bequests and devises were procured by Propounder's undue influence. The jury ultimately found that the entire will was not procured by undue influence and returned a verdict finding that: (1) the paper writing dated 28 June 2013 purported to be the will of Ms. Ward was a duly executed attested will; (2) Ms. Ward did not lack the mental capacity to make and execute said will; (3) the will was not procured by undue influence, nor were any of its bequests or devises; and (4) the purported 2013 will was the will of Ms. Ward. Judgment was entered on 5 October 2016 in accordance with the verdict, and Caveators timely appealed.

UNDUE INFLUENCE AND CAVEATS TO A WILL

"In a caveat proceeding, the burden of proof is upon the propounder[] to prove that the instrument[] in question [was] executed with the proper formalities required by law." *In re Andrews*, 299 N.C. 52, 54, 261 S.E.2d 198, 199 (1980). "Once this has been established, the burden shifts to the caveator[s] to show by the greater weight of the evidence that the execution of the will was procured by undue influence." *Id.* "The four general elements of undue influence are: (1) decedent is subject to influence, (2) beneficiary has an opportunity to exert influence, (3) beneficiary has a disposition to exert influence, and (4) the resulting will indicates undue influence." *In re Will of Smith*, 158 N.C. App. 722, 726, 582 S.E.2d 356, 359 (2003). Our Supreme Court has identified several relevant factors that may support a finding of undue influence:

> 1. Old age and physical and mental weakness;
> 2. that the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision;
> 3. that others have little or no opportunity to see him;
> 4. that the will is different from and revokes a prior will;
> 5. that it is made in favor of one with whom there are no ties of blood;
> 6. that it disinherits the natural objects of his bounty;
> 7. that the beneficiary has procured its execution.

In re Andrews, 299 N.C. at 54, 261 S.E.2d at 200 (citations omitted). "A caveator need not demonstrate every factor named in *Andrews* to prove undue influence," and undue influence is generally proved "by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence[.]" *In re Will of Jones*, 362 N.C. 569, 576, 669 S.E.2d 572, 578 (2008).

Additionally, "[w]hen a fiduciary relationship exists between a propounder and testator, a presumption of undue influence arises[.]" *In re Estate of Ferguson*, 135 N.C. App. 102, 105, 518 S.E.2d 796, 799 (1999) (citing *In re Will of Atkinson*, 225 N.C. 526, 530, 35 S.E.2d 638, 640 (1945)); *see also Albert v. Cowart*, 219 N.C. App. 546, 554, 727 S.E.2d 564, 570 (2012) ("The relationship created by a power of attorney between the principal and the attorney-in-fact is fiduciary in nature[.]"). A propounder can rebut this presumption with evidence of "equal weight" that no undue influence was exerted in the execution of the challenged will. *In re Will of Atkinson*, 225 N.C. at 530, 35 S.E.2d at 640.

ANALYSIS

Caveators argue that the trial court erred by (1) limiting the cross-examination of Propounder, (2) limiting the direct testimony of Caveators' expert witness, Huggard, and (3) erroneously instructing the jury that it may find that specific bequests or devises made in Ms. Ward's 2013 will were procured by undue influence. We disagree.

I. Limitation of Cross-Examination

Caveators first argue that the trial court improperly prevented a line of cross-examination, the purpose of which was to elicit testimony about the reasons Propounder was removed as Executor of Ms. Ward's estate in March 2015. The

Removal Order contained several findings of fact to support its conclusion that Propounder breached his "fiduciary duties" as Executor.

A. Preservation of Issue for Appellate Review

"In order to establish error in the exclusion of evidence, there must be a showing of what the excluded testimony would have been." *State v. Foust*, 220 N.C. App. 63, 71, 724 S.E.2d 154, 160 (2012) (citing *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) ("It is well-established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness's testimony would have been had he been permitted to testify.")). Typically, "[t]here must be a specific offer of proof unless the significance of the evidence is obvious from the record." *Foust*, 220 N.C. App. at 71, 724 S.E.2d at 160; *see also* N.C. R. Evid. 103 (a)(2) ("Offer of proof. -- In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.").

Here, Caveators made no offer of proof concerning what Propounder's cross-examination testimony would have been regarding the reasons he was removed as Executor of Ms. Ward's estate. However, the record on appeal contains the Removal Order, and this order includes a number of factual findings that explain the Clerk's

decision to remove Propounder as Executor.[2] The record also demonstrates that Caveators' counsel expressly referenced these factual findings during Propounder's cross-examination. Therefore, it is possible for us to still review this issue, even without an offer of proof, because the alleged substance of the excluded testimony is "obvious from the record." *Foust*, 220 N.C. App. at 71, 724 S.E.2d at 160.

B. Standard of Review

The scope of cross-examination is broad and not confined to the subject matter of direct examination; it may extend to any matter relevant to issues in the case, including credibility. *See Winston-Salem Joint Venture v. City of Winston-Salem*, 65 N.C. App. 532, 536, 310 S.E.2d 58, 61 (1983); *State v. Ziglar*, 308 N.C. 747, 757, 304 S.E.2d 206, 214 (1983); N.C. R. Evid. 611(b). "[T]he scope of cross-examination rests largely within the trial court's discretion and is not ground for reversal unless the cross-examination is shown to have improperly influenced the verdict." *State v. Woods*, 345 N.C. 294, 307, 480 S.E.2d 647, 653 (1997). We review a trial court's decisions regarding the scope of cross-examination for abuse of discretion, and will only find error upon a showing "that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 336, 626 S.E.2d 716, 723 (2006) (citation omitted).

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[2] Propounder was first removed as Executor through a 25 March 2015 order entered by the Assistant Clerk of New Hanover County Superior Court. A second order was subsequently entered on 3 June 2015 by the Honorable Phyllis M. Gorham, affirming Propounder's removal and concluding that he was in breach of his fiduciary duties.

After careful review, we conclude that Caveators have failed to show that the trial court erroneously limited the scope of Propounder's cross-examination. Propounder's cross-examination shows that Caveators' counsel had the opportunity to question Propounder regarding his removal as the Executor of his mother's estate.

> *Caveators' Counsel*: The order that was -- do you remember being in that hearing on March 19, 2015, before Ms. Lunsford?
>
> *Propounder*: Yes. This was two years, almost, after my mother's passing. . . .

The Removal Order contained seven findings of fact, all of which Caveators' counsel questioned Propounder about during his cross-examination.

Finding of Fact 23(a) of the Removal Order states that the "inventory submitted and filed with the Clerk of Superior Court was improper, and that all assets that were listed in the Last Will and Testament of Violet P. Ward were not listed on the inventory." The record shows that Propounder was asked about this specific finding:

> *Caveators' Counsel*: . . . I'm reading from the order here . . . Number one, "The inventory submitted and filed with the clerk was improper, and that all assets that were listed in the last will and testament were not listed on the inventory."
>
> *Propounder*: Yeah, that was accounting, yes.
>
> *Caveators' Counsel*: And what items were not on the inventory that were in the will?

> *Propounder*: I believe it had to do with the heavy equipment.

Propounder was also asked about Finding of Fact 23(b) which states that "[t]he values listed on the inventory [were] not listed at fair market value and do not track the values provided by the New Hanover County Tax Office."

> *Caveators' Counsel*: She also said that the values listed were not at fair market value and do not track the values provided by the tax office?
>
> *Propounder*: Every one of those, if you go back and look them up, every one of them pinpoints exact tax value what it was at that time. I spent a lot of time doing that accounting. It was a pain.

Finding of Fact 23(c) states, "[i]n that a caveat has been filed, the assets need to be preserved as provided by a Stand Still Order . . . and that it is in the estate's best interest to have an impartial Executor appointed." Propounder was asked about this finding:

> *Caveators' Counsel*: She also said that a caveat has been filed, the assets need to be preserved as provided by a stand still order signed by the Court?
>
> *Propounder*: Yes.

Findings of Fact 23(d) and 23(e) of the Removal Order state respectively that on "the same day [Propounder] received a Stand Still Order . . . to suspend all action for the estate of Violet P. Ward, he knowingly paid himself an inheritance in the amount of $18,000.00[,]" and that "[Propounder] paid Lisa Canady an inheritance on

August 22, 2013 in the amount of $25,000." Propounder was questioned about these allegedly improper distributions:

> *Caveators' Counsel*: You made a distribution to Lisa Canady for $25,000?
>
> *Propounder*: Yes. These are things that were done after my mother was dead and I was executor.
>
> . . . .
>
> *Caveators' Counsel*: And she said that on October 17, the same day that you received the stand still order to suspend all action, you paid yourself an inheritance amount of $18,000?
>
> *Propounder*: I received that money before I received that notice.

Propounder was also questioned about Findings of Fact 23(f) and 23(g) which state respectively that an approved accounting was not filed after Ms. Ward's death, and Propounder contended that Ms. Ward gave him "heavy equipment" prior to her death.

> *Propounder*: Yeah, that was accounting, yes.
>
> *Caveators' Counsel*: And what items were not on the inventory that were in the will?
>
> *Propounder*: I believe it had to do with the heavy equipment.
>
> *Caveators' Counsel*: And you testified, I believe, that your mother had given you the tractor, the bulldozer, and the backhoe three years before she made her will?

The above excerpts demonstrate that the trial court permitted cross-examination regarding the circumstances and actions which led to Propounder's removal as Executor.[3] Caveators' argument regarding this issue is without merit. To the extent that Caveators are referring to other circumstances not addressed by the seven findings of the Removal Order discussed above, Caveators do not point this Court to any specific adverse rulings by the trial court nor did they make any specific offers of proof. We are therefore unable to determine what additional testimony may have been improperly excluded and whether this exclusion of evidence was prejudicial. *See Currence v. Hardin*, 296 N.C. 95, 100, 249 S.E.2d 387, 390 (1978) ("A showing of the essential content or substance of the witness's testimony is required before this Court can determine whether the error in excluding evidence is prejudicial."); *see also Estate of Hurst v. Jones*, 230 N.C. App. 162, 178, 750 S.E.2d 14, 25 (2013) ("It is not the role of this Court to construct arguments for the parties, or to flush out incomplete arguments.").

We find no abuse of discretion.

II. Expert Testimony

Caveators next argue the trial court erred in limiting the testimony of their expert witness, attorney John Huggard, "because his testimony would have assisted

[3] The trial court expressly permitted Caveators to ask Propounder questions about the Removal Order: "*Caveators' Counsel*: Your Honor, he has said that he was removed as executor because of the accounting, but that's not what the order says. *Trial Court*: You can question him about that."

the trier of fact to understand the evidence and determine a fact in issue." We disagree.

A. Preservation of Issue for Appellate Review

On the Friday of trial, Caveators tendered Huggard "as a qualified expert in the field of estate planning and probate law." Propounder's counsel objected and requested a *voir dire* outside the presence of the jury. Huggard's *voir dire* testimony informed the trial court that he would provide opinions on the "red flags of undue influence" and whether he believed that Moore followed the guidance set forth in professional ethics opinions when he prepared Ms. Ward's 2013 will. At the conclusion of the *voir dire*, the trial court ruled that Huggard would be allowed to testify as an expert, but limited the scope of his testimony as follows:

> *Trial Court*: I will allow [Huggard] to testify, not as to the ultimate issue; just as I said before, we're not going to go down that path. . . He can go through his -- I'm not going to get into ethics opinions. If Mr. Holt was here being on trial I would, but he's not, and I think that's a red herring.
> . . . .
>
> *Trial Court*: . . . So that's where we are basically going to go. [Huggard] can testify that it was sloppy, messy, not the way he would have done it, not according to what he teaches.

When the trial resumed the following Monday, Caveators did not recall Huggard to testify. Instead, the parties agreed to the following stipulation, which was consistent with the court's ruling at the conclusion of *voir dire*:

> *Trial Court*: Good morning, ladies and gentlemen of the

> jury. . . When we left off Friday you were dismissed early. I heard the proposed testimony of Mr. John Huggard, and with the consent of the parties, I'm going to read this stipulation to you: John Huggard is an expert in estate planning and probate law. . . The parties stipulate and agree to the following conclusions regarding his testimony: That based on the testimony that Mr. Huggard gave in this courtroom, that he would not have used the process and procedures used by Holt Moore in drawing the will at issue.

Propounder argues that Caveators waived any objections they may have had to the trial court's ruling on Huggard's testimony because they failed to recall him as a witness after *voir dire*. Propounder cites an unpublished opinion of this court, *In re Will of Aiken*, No. COA09-913, 2010 WL 2162840 (N.C. Ct. App. June 1, 2010). However, Propounder's reliance on *In re Will of Aiken* is misplaced, not only due to the lack of precedential value of that opinion, but also because the facts of *Aiken* are distinguishable and therefore the opinion is not at all persuasive.[4] Although no formal offer of proof was made by Caveators, the "essential content" and "substance" of Huggard's proffered testimony was made clear to the trial court through the *voir dire*. *See Currence*, 296 N.C. at 100, 249 S.E.2d at 390 ("A showing of the essential content or substance of the witness's testimony is required before this Court can determine whether the error in excluding the evidence is prejudicial."). Furthermore,

[4] *In re Will of Aiken* held that the caveator-appellants waived appellate review of a claim that the trial court improperly excluded evidence because "caveators made no offers of proof, submitted no evidence, and failed to make a single statement in the transcript preserving for appeal these remaining claims." *In re Will of Aiken*, No. COA09-913, 2010 WL 2162840, at *8 (N.C. Ct. App. June 1, 2010).

in *State v. Owen,* we concluded that the trial court's evidentiary rulings were reviewable because "[a]lthough no formal offer of proof was made by defense counsel regarding the answers he expected to receive . . . the content of the [witness's] testimony was nonetheless revealed during his voir dire examination." *State v. Owen*, 130 N.C. App. 505, 514, 503 S.E.2d 426, 432 (1998). Therefore, the trial court's ruling to exclude certain portions of Huggard's expert opinion testimony was preserved for appellate review.

B. Standard of Review

A trial court's decision to admit or exclude expert testimony "will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). The improper exclusion of evidence constitutes reversible error only if the appellant shows that the error was "*prejudicial error*, i.e., that a different result would have likely ensued had the error not occurred." *Responsible Citizens v. Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983).

To admit expert testimony, the trial court must determine "whether the proffered expert testimony meets Rule 702(a)'s requirements of qualification, relevance, and reliability." *See McGrady*, 368 N.C. at 893, 787 S.E.2d at 11; N.C. R. Evid. 702. To meet Rule 702(a)'s relevance standard, expert opinion testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue[.]" N.C. R. Evid. 702 (a).

C. Analysis

Caveators first contend that the trial court should have allowed Huggard to testify about the "red flags" of undue influence:

> *Propounder's Counsel*: What other opinions would you be asking?
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> *Caveators' Counsel*: I think we would talk about *red flags of undue influence*, for example . . . Like attorney shopping.
>
> *Trial Court*: I think we're getting real close to the *ultimate issue* for the jury. You can argue that, but I don't think it would be appropriate for [Huggard] to testify to that. That's in the jury charge.

We conclude that the trial court did not abuse its discretion in excluding this "red flags of undue influence" opinion testimony because such testimony could have invaded the province of the trial court to determine the applicable law and instruct the jury on the law of undue influence.

Caveators' brief focuses on the trial court's use of the term "ultimate issue" in its ruling and cites Rule 704 which provides that:

> Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

N.C. R. Evid. 704. However, Caveators' reliance on Rule 704 is misplaced because this rule is not an independent avenue of admissibility for expert opinion testimony. In *HAJMM Co. v. House of Raeford Farms, Inc.*, our Supreme Court noted that the so-called "ultimate issue rule" was abrogated by Rule 704, but also declared that

"[t]here are, nevertheless, limits on the admissibility of expert opinion testimony[,]" particularly when that opinion "would merely tell the jury what result to reach." *HAJMM Co. v. House of Raeford Farms, Inc.,* 328 N.C. 578, 585, 403 S.E.2d 483, 488 (1991) (citing N.C.G.S. § 8C-1, Rule 704 advisory committee's note). Likewise, when the proposed scope of an expert's opinion pertains to an issue of law or amounts to a legal conclusion, a trial court may properly consider whether such testimony invades "the province of the court to determine the applicable law and to instruct the jury as to that law." *See Raeford Farms*, 328 N.C. at 585, 403 S.E.2d. at 489. *Raeford Farms* also identified a critical distinction between opinions that state "legal standards and conclusions," *which are inadmissible*, and opinions that state "ultimate facts" which are admissible. *Id.* at 586, 403 S.E.2d at 488.

The distinction between legal standards and conclusions about which testimony may not be admitted, and ultimate facts about which testimony is admissible, is often difficult to draw. The advisory committee's note to Rule 704 gives a helpful example of the difference:

> The question, "Did the testator have capacity to make a will?" would be excluded, while the question, "Did the testator have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

See id. at 586, 403 S.E.2d. at 489 (internal citations and alterations omitted); *see also Smith v. Childs*, 112 N.C. App. 672, 680, 437 S.E.2d 500, 506 (1993) (holding that

"while the legal expert may testify regarding the factual issues facing the jury, he is *not allowed* to either *interpret the law* or *to testify as to the legal effect of particular facts*.").

Applying the foregoing principles to Huggard's proffered "red flags" testimony, the trial court could have reasonably concluded that an opinion on the "red flags of undue influence" would have amounted to nothing more than an inadmissible opinion on whether legal standards have been satisfied or a comment on the legal effect of particular facts. *See Smith*, 112 N.C. at 679, 437 S.E.2d at 505. Moreover, Huggard's red flags of undue influence testimony would have invaded "the province of the court to determine the applicable law and to instruct the jury as to that law." *See Raeford Farms*, 328 N.C. at 585, 403 S.E.2d. at 488. For example, it is the trial court's role to instruct the jury on the four elements of undue influence, the *Andrews* factors, or "any other relevant factor[] supported by the evidence." *See* N.C.P.I. Civil 820.20 Wills—Issue of Undue Influence (2017) (permitting the trial court to "state any other relevant factors supported by the evidence").[5] In fact, the trial court did instruct the jury that it could consider "any other relevant factor supported by the evidence." The *voir dire* record does not reveal any meaningful legal difference between the "red flags of undue influence," and the four elements of undue influence or the *Andrews* undue influence factors cited *supra*.

[5] Indeed, during *voir dire*, the trial court indicated that the red flags of undue influence is subject matter best left "in the jury charge."

Huggard's opinions on the "red flags of undue influence" would also not be helpful and assist the jury as required by Rule 702(a). *See McGrady*, 368 N.C. at 889, 787 S.E.2d at 8; N.C. R. Evid. 702(a). To be helpful, the expert's testimony "must do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case for its own." *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (alterations and internal quotation marks omitted); *see also Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 461, 597 S.E.2d 674, 688 (2004), *superseded by statute*, Act of June 17, 2011, ch. 283, sec. 1.3, 2011 N.C. Sess. Laws 1048, 1049 (codified at N.C.G.S. § 8C-1, Rule 702(a)(1)-(3)) ("It is enough that the expert witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.").

After closing arguments, the trial court instructed the jurors that it was their "duty to consider all of the evidence" introduced and that they could determine the existence of undue influence from "all of the facts and circumstances." The jury was also instructed on the law of undue influence.

> The existence of undue influence is for you to determine from all the facts and circumstances. You may consider, together with all of the other relevant facts and circumstances, the deceased's age; physical condition; mental condition; dependence upon, association with, relationship with the propounder's; the opportunity of the deceased to associate with, have a relationship with persons other than the propounder's; the relationship by blood to the beneficiaries of the will; and any another other relevant factors supported by the evidence.

Thus, Huggard, by virtue of his expertise, was not "in a better position to have an opinion on the subject" of undue influence in this case than any member of the jury. *See Howerton*, 358 N.C. at 461, 597 S.E.2d at 688. Similarly, Huggard's "red flags" testimony would have merely told the jury whether he believed any of the relevant factors of undue influence were present and invited jurors to substitute his judgment for their own. Therefore, the trial court did not abuse its discretion by excluding this testimony. *See Raeford Farms*, 328 N.C. at 585, 403 S.E.2d at 488 (stating that the rules of evidence "afford ample assurance against the admission of opinions which would merely tell the jury what result to reach[]").

Caveators also contend that Huggard should have been allowed to provide an opinion about whether Propounder was "attorney shopping" when he contacted Holt Moore to draft Ms. Ward's will, and whether he believed that "Holt Moore was a tool" used by Propounder.

> *Caveators' Counsel*: [O]ne of the things we're trying to argue here . . . is not necessarily that Holt [Moore] is a bad person, but that he was a tool that [Propounder] used to accomplish what he wanted to accomplish[.]
>
> *Huggard*: I think that's true. . . We have somebody out there that's attorney shopping, trying to find somebody that will write the will.
>
> . . . .
>
> *Caveators' Counsel*: So they couldn't get Kurt Fryar to do it, and then found Holt Moore?

> *Huggard*: It's what we call attorney shopping in the business.

These opinions are not proper subjects of expert testimony because the opinions could not provide the jurors with any insight beyond the conclusions they could "readily draw from their ordinary experience" based on the evidence before them. *See McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (providing that "expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience").

During the trial, Propounder testified that he had asked Kurt Fryar, an attorney who had previously represented Ms. Ward in other matters, to draft a new will for Ms. Ward. In response, Fryar told Propounder that if Ms. Ward wanted a new will that resulted in an unequal distribution among her four children, he would have speak with her alone before drafting it.

> *Caveators' Counsel*: Did [Propounder] ask you to prepare a new will for her?
>
> *Fryar*: [Propounder] spoke to me about preparing a new will for her, and I told [Propounder], "If you want – if your mother wants an unequal distribution to her children, I am going to have to sit down with your mother alone and talk to her about it."

Fryar did not take on the matter, and Propounder never contacted him again about the will. Propounder then contacted another attorney, Moore, who agreed to draft

the will. Moore testified that he never had a one-on-one conversation with Ms. Ward about her will.

> *Caveators' Counsel*: I believe your testimony was that [Propounder] contacted you by phone to make an appointment for his mother; is that correct?
>
> *Moore*: That's my recollection.
>
> . . . .
>
> *Caveators' Counsel*: And did you ever take Ms. Ward into a conference room or an office where [Propounder] and Lisa were not present and speak with her about her will?
>
> *Moore*: I did not pull her aside and speak with her.

In light of this evidence, we fail to see how an expert opinion from Huggard about whether Propounder was attorney shopping would provide the jurors with any insight beyond the conclusions they could readily draw based on their "ordinary experience." *See McGrady*, 368 N.C. at 889, 787 S.E.2d at 8. Stated differently, Huggard's expert testimony was not necessary in this instance because the concept of attorney shopping is not "so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion." *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965). *Contra Davis v. City of Mebane*, 132 N.C. App. 500, 504-05, 512 S.E.2d 450, 453 (1999) (holding that landowners were required to present expert testimony to support their claim that flooding was proximately caused by the negligent design of

a city-owned dam since the cause of flooding is a complex issue, and lay testimony would be insufficient to explain it). Here, based on Fryar's and Moore's testimony, along with all of the other facts and circumstances a juror could have formed an opinion as to whether Propounder was "attorney shopping" when he contacted attorney Moore to draft the will shortly after Fryar told him he would not draft it unless he first had private meeting with Ms. Ward. The trial court did not abuse its discretion in excluding Huggard's anticipated testimony about "attorney shopping."

Finally, the trial court did not abuse its discretion by excluding Huggard's opinion testimony on whether Moore followed the guidance set forth in certain professional ethics opinions when he prepared Ms. Ward's will.

> *Trial Court*: I will allow him to testify . . . I'm not going to get into ethics opinions. If Mr. Holt [Moore] was here being on trial, I would, but he's not, and I think that's a red herring.

The record reveals that the trial court had relevance concerns regarding these ethics opinions. "Evidence is relevant if it has a tendency to make a fact of consequence more probable than it would be without such evidence." *In re Will of Jones*, 114 N.C. App. 782, 786, 443 S.E.2d 363, 365 (1994) (citations omitted). The trial court suggested these ethics opinions might be relevant in a trial against Moore, but ultimately ruled that these opinions would be inadmissible in the proceeding before it, a caveat to determine whether a will was procured by undue influence. The trial court is "entitled to great deference in ruling on questions of relevancy," *id.*, and it

did not abuse its discretion in excluding Huggard's proposed testimony regarding professional ethics opinions.

III. Jury Instructions

Caveators' final argument maintains that the trial court erred by providing an additional jury instruction related to partial undue influence.

> *Trial Court*: (to the jury) Issue 3B reads: Were any specific bequests or devises of the Propounder's Exhibit 5 procured by undue influence? If you find that the Caveators have failed to prove to you that by the greater weight of the evidence that the will, Exhibit –that the entire will, Exhibit 5, was not procured by undue influence, *you may still find that specific gift or gifts or bequest or bequests were procured by undue influence*[.]

Propounder requested the additional instruction, which permitted the jury to find that specific bequests and devises were procured by undue influence. Caveators objected during the charge conference.

> *Caveators' Counsel*: Your Honor, I would just object to that instruction. It gives the jury a way out. But I don't care to be heard further on that. I actually think what he says makes sense. . .

We conclude that this objection was insufficient to preserve the issue for appellate review because Caveators failed to distinctly state the specific grounds for their objection.

"The first major category of default, known as the waiver rule, arises out of a party's failure to properly preserve an issue for appellate review." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194-95, 657 S.E.2d 361, 363

(2008). Regarding instructional errors, Rule 10(a)(2) of Appellate Procedure provides that:

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, *stating distinctly that to which objection is made and the grounds of the objection*; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(a)(2) (emphasis added). The requirement expressed in Rule 10(a) that litigants raise an issue in the trial court before presenting it on appeal "goes to the heart of the common law tradition and [our] adversary system." *See Dogwood*, 362 N.C. at 195, 657 S.E.2d at 363 (internal citations and quotations omitted). "The purpose of Rule 10[a](2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Rule 10(a)(2) thus plays an integral role in preserving the efficacy and integrity of the appellate process. *Dogwood*, 362 N.C. at 195, 657 S.E.2d at 363. In *Powell v. Omli*, the plaintiff generally objected to a proposed jury instruction without noting the specific grounds, stating only "[y]our Honor, we object and except the instructions." *Powell v. Omli*, 110 N.C. App. 336, 346, 429 S.E.2d 774, 778 (1993). We held that "[b]y failing to call

the trial court's attention to the specific alleged errors in the jury charge, plaintiffs . . . waived their right to appellate review." *Id.*

Here, like the plaintiff in *Powell*, Caveators' general objection to the proposed jury instruction failed to call the trial court's attention to the specific instructional errors that are now alleged on appeal. Caveators' brief argues that there was no evidence to support such a charge, and that the additional instruction confused the jury into believing that the trial court believed that a portion of the will was valid. However, neither of these arguments, nor any similar ones, were ever made at trial.

Caveators also argue that the additional instruction improperly changed the burden to the Caveators, who had obtained an instruction of presumed undue influence due to the fiduciary relationship that existed between Propounder and Ms. Ward. However, this argument was not made during trial, and aside from the general objection to the instruction, the only other related statement made by Caveators' counsel was that the instruction "gives the jury a way out." This is not a distinct statement of the grounds for an objection because it is insufficient to call the trial court's attention to a specific legal error.

In light of the practical considerations promoted by the waiver rule, we conclude that Caveators' failure to distinctly state the grounds for objection to the instruction justifies our refusal to consider this issue on appeal. *See Dogwood*, 362 N.C. at 195-96, 657 S.E.2d at 364 (stating that "a party's failure to properly preserve

an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal"). This argument is dismissed.

CONCLUSION

Regarding Caveators' arguments that the trial court improperly limited the scope of cross-examination of Propounder and the direct testimony of expert witness John Huggard, we find no abuse of discretion. Caveators' remaining argument that the trial court erred in providing a jury instruction which permitted the jury to find that specific bequests and devises were procured by undue influence is dismissed as the issue was not preserved for appellate review.

NO ERROR IN PART; DISMISSED IN PART.

Chief Judge McGEE and Judge ELMORE concur.

Report per Rule 30(e).