Case # 13-1022 District 4B

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA,	)	
	)	
Respondent-Appellee,	)	
	)	From: Onslow County
v.	)	Case # 10-CRS-52727
	)	
COREY DINAN,	)	
	)	
Defendant-Appellant.	)	

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BRIEF FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT IS REQUESTED

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ISSUES PRESENTED

1. Did the trial court err in allowing the evidence of prior uncharged crimes to unduly prejudice the Defendant-Appellant?

2. Was the Defendant-Appellant deprived of his fundamental right to a fair trial as a result of the improper cross-examination where the State repeatedly asked him whether prosecution witnesses were lying during their testimony?

3. Did trial counsel's combined failures to object to plain error, improper evidence of prior bad acts and misapprehension of law deprive Defendant-Appellant of his fundamental right to a fair trial and effective counsel?

STATEMENT OF THE CASE

This action was commenced by the filing of an indictment in Case # 10-CRS-52727 in the Onslow County Superior Court on November 16, 2010. Trial commenced on March 4, 2013 before the Honorable Jack W. Jenkins, Onslow County Superior Court Judge, and concluded on March 8, 2013 with verdicts of guilty on the charges of child abuse inflicting serious bodily injury and assault on a child under the age of twelve. The trial court entered consecutive judgments on the verdicts and committed Defendant-Appellant to the custody of the Department of Corrections for a minimum of 73 months to a maximum of 97 months, plus 60 days. Defendant-Appellant timely filed a notice of appeal on March 8, 2013. The record was settled by former counsel for Defendant-Appellant on August 23, 2013 and filed in the Court of Appeals on September 11, 2013 and docketed on or about the same day.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

This Court is called upon to determine whether Defendant-Appellant was deprived of his fundamental right to a fair trial where evidence of uncharged prior bad acts were introduced to establish criminal propensity, and where the trial court failed to make a determination that the probative value outweighed any prejudice. This Court is further called upon to determine whether Defendant-Appellant was deprived of his fundamental right to a fair trial where he was improperly cross-examined by the District Attorney as to whether each prosecution witness was lying. Finally, this Court is called upon to determine whether Defendant-Appellant received ineffective assistance of counsel where his trial attorney affirmatively damaged his case by eliciting prejudicial testimony from witnesses at trial, and grossly misapprehended the applicable law, which resulted in a legally unsound strategy.

STATEMENT OF FACTS[1]

Trial commenced before a jury on March 4, 2013. Dr. Coral Steffey testified as the sole medical expert. (T:37). She was employed at the Brody School of Medicine at ECU, and as a medical provider for the TEDI BEAR Child Advocacy Center where she evaluated abuse and neglect cases. (T:37, 43-44). The State offered the witness as an expert in the field of pediatrics and child abuse. (T:51).

Dr. Steffey explained that shaken baby syndrome could cause a variety of injuries, including bleeding on the brain and subconjunctive hemorrhage. (T:52-54). The subconjunctive hemorrhage injury is caused by pressure from the chest cavity such as squeezing a child too hard but heals over time and results in no long-term effects. (T:63). If left untreated, a subdural hematoma that caused a child to not eat could cause severe injury or even death. (T:61). According to Dr. Steffey, these symptoms begin immediately after the injury. (T:61-62). Dr. Steffey further testified that rib fractures are also common in shaken baby syndrome, which can result in a hemothorax, pain, shallow breathing, but not typically bruising. (T:72). Less than ten percent of kids have bruising with rib fractures. (T:72).

[1] Citations to the transcript of the trial will be designated herein as "T:" followed by the page number of the transcript.

On April 5, 2010, Dr. Steffey was called in to consult on Paulette Dinan, who was six weeks old. (T:76). The consultation first occurred at Pitt County Memorial Hospital. (T:78). She presented with subconjunctival hemorrhages (78), some redness, but no bruising of the chest or back. (T:78-79). Without any indication that the witness did not recall events, the State sought to admit the medical records to refresh the witness's recollection. (T:81).

The child had been doing fine up until the day before they brought her to Onslow Hospital on April 4, 2010, but began to act strangely on the morning of the third when she began to throw up during her feeding with the father, but then finished the feeding, and passed less than normal urine. (T:82-83). The mother described her breathing to the doctor as funny and grunting audibly and by the following day the child would not eat at all, gagged at feeding and so the parents decided to bring the child to the hospital. (T:83). In contrast, during her direct testimony, the mother then stated that Defendant-Appellant did not want to take the child to the hospital (319). Defendant-Appellant, in his testimony, stated that while it was the mother's idea, he agreed to take the child to the hospital. (T:467).

It was initially determined at Pitt County Hospital that the child had a hemothorax that was drained. (T:84-85). The doctor indicated that the child was born on time, exhibited grunting noises, had trouble breathing, was diagnosed with transient tachypnea and then got better without any indication as to the source of

that information. (T:86). Without objection, Dr. Steffey offered her expert opinion as to the injuries not being a result of birth trauma, despite the fact that it was clear that there were no x-rays associated with the birth of the child or ever reviewed by the doctor. (T:86, 103). Dr. Steffey did testify to bruising on the child's right ankle which was unequivocally caused by the mother. (T:89, 162).

The doctor consulted with other radiologists, reviewed x-rays, determined that the child had 18 healing rib fractures, and six new fractures (T:93, 134-135). Trial counsel objected, arguing that the radiologist who took the x-ray had to be called as a witness and that Dr. Steffey was not qualified to read the x-ray as an expert, despite the witness testifying that most doctors read x-rays. (T:98-99, 112-113).

Dr. Steffey then gave a medical opinion that an otherwise healthy child displaying these rib fractures absent a trauma had to be caused by a person and, without objection, opined that someone was trying to hide causing the injury. (T:137). Thus, Dr. Steffey, concluded that the child was abused, and had subjunctive hemorrhaging that was caused by very forceful squeezing. (T:140-143). She also stated that the child had a subdural hematoma which began on the morning of Saturday the third. (T:146-147). Dr. Steffey again gave opinion testimony that the subdural hematoma had to be caused by the child being deliberately shaken or injured. (T:148). The doctor concluded her direct

testimony by indicating that had the child not been brought in for treatment, she would have eventually died. (T:151). Of significance, Dr. Steffey testified on cross-examination that she could not form an opinion to a degree of medical certainty that Paulette had any permanent injuries. (T:154).

Trial counsel then asked the doctor if he could tell when the recent fractures occurred, which she indicated were on Saturday the third when the respiratory symptoms began when the child was in Defendant-Appellants custody. (T:160). Trial counsel then went on to question the doctor about notes indicating that the parents took turns caring for the child from the morning of April 3, 2010. (T:165). He raised a notation in the doctor's report about the mother noticing difficulty in breathing on Saturday evening, which was after Defendant-Appellant's feeding at 9:30 in the morning. (T:165). Inexplicably, counsel questioned the doctor about who had custody when the symptoms began and elicited the testimony that Defendant-Appellant was feeding the child when the symptoms began. (T:169).

Officer Timothy Sawyer arrived at Onslow Hospital. He took photographs of the child. (T:175, 183-184). Defendant-Appellant wrote a statement at the officer's request regarding what he thought may have caused the injuries to the child. (T:178). In this statement, Defendant-Appellant wrote that the child was his first, was fussy and that he may have he held her tight, would lean over to grab a bottle if sitting on the couch, that he did notice that she grunted and he didn't want

to drop her. (T:181). Defendant-Appellant's statement also indicated that the child was also fussy with the mother. (T:181). Officer Sawyer also had Sarah Dinan, the child's mother, write a statement as well. (T:188).

The State then called Detective Anthony Ramirez, the on-duty detective that was called to Onslow Hospital. (T:191, 194). After speaking to a few people he went to see the child and noted a spot of blood in the child's left eye. (T:196-197). The detective spoke with both parents and was initially told that they were uncertain as to how the injuries occurred. (T:206). He later spoke with Defendant-Appellant about the cause of the injury, who demonstrated to him that he held the child in a cradling manner and with his elbows almost locked. (T:200-202). Defendant-Appellant also told the detective that he believed he might have held the child too tight. (T:202). He also informed the detective that he did in fact have two children from outside of the marriage but asked that the information be kept from his ex-wife, Sara Fresquez. (T:203).

Detective Trudy Allen of the juvenile division initially reviewed various reports and spoke with Dt. Ramirez. (T:214-17). She was assigned to the case on April 13, 2010 at which time she interviewed both parents separately at the police station. (T:217-219). The interviews of both the mother and Defendant-Appellant were recorded on video and audio. (T:230). Despite the fact that the interviews

were actually recorded, and placed in the master case file, the recording was lost. (T:232, 236).

The detective described the mother as being frantic and distraught, but according to his testimony, Defendant-Appellant calm. (T:221). Det. Allen claimed that Defendant-Appellant's primary concern was his military career. (T:221). This was contradictory to Defendant-Appellant's testimony that he answered the detective's questions which were primarily about him and that his daughter barely came up. (T:478). Detective Allen claimed that Defendant-Appellant gave a demonstration of shaking the child like he was shaking the contents of a container. (T:222). Defendant-Appellant, on the other hand, testified that he never demonstrated anything for the detective. (T:465). At the end of the interview Defendant-Appellant was asked to write another statement for comparison with his original statement. (T:224-225). However, this statement went into significantly more detail about the night leading up to the arrival at the emergency room. (T:226-228). The prosecutor then asked if the detective charged the Defendant-Appellant (T:228). The prosecutor also specifically asked, without objection by trial counsel, if anyone else was charged, including the mother. (T:228). Inexplicably, trial counsel elicited testimony on cross-examination that the Department of Social Services prevented Defendant-Appellant from returning

to the home where the child was prior to even being charged by the police. (T:238).

The State then called Police Officer Jason Lagana who testified that at the time of his arrest, Defendant-Appellant spontaneously stated, "[Y]ou get charged for holding your kid too tight." (T:243). On cross-examination, trial counsel established that Officer Lagan had no information about the case other than what he read in the warrants. (T:245).

The next witness for the State was Elizabeth Pogroszewski, who was employed as the emergency duty social worker at Onslow County Department of Social Services on April 4, 2010. (T:249-250). After speaking with the nurse, she learned that the child would be airlifted to Pitt Memorial Hospital. (T:254). She related information that she obtained from Defendant-Appellant about the child's condition before coming to the hospital. (T:254). Without any objection by trial counsel, the prosecutor then had the witness add to her recollection, without any foundation of needing to refresh her recollection. (T:255). Later the prosecutor elicited testimony about the demeanor of both parents by asking questions about what Defendant-Appellant spoke about but then asking the witness if the mother "appeared concerned about her daughter." (T:257-258). Ms. Pogroszewski implemented a safety plan denying both parents access to the child. (T:260-261).

The State next called Elizabeth Blevins-White, another Onslow County Department of Social Services social worker. (T:277). The State posited that she would provide statements from Defendant-Appellant that were declarations against interest, to which trial counsel objected and a voir dire was held. (T:271). The State initially argued that it was admissible to impeach the Defendant-Appellant despite the fact that he had not testified and then conceded that the witness would provide 404(b) evidence intended to corroborate the testimony of other witnesses the state intended to call later. (T:272-273).

The State then elicited a series of statements attributed to the Defendant-Appellant that had nothing to do with corroboration of testimony from the mother (280-289). Trial counsel utterly failed to object as the witness testified that DSS substantiated physical abuse, neglect and injurious environment against Defendant-Appellant. (T:290-291). The witness testified that after DSS substantiated physical abuse against Defendant-Appellant, it was then sent to a court setting and physical custody of the child was given to the mother with the Defendant-Appellant being allowed no contact with the child. (T:292). The State never questioned the mother about these issues when she took the stand. Not only did defense counsel fail to object, but then elicited testimony that there was a district court finding against Defendant-Appellant, that at the least, was a finding of

neglect, if not an admission by Defendant-Appellant of neglect. (T:292-294). Specifically:

> Q. - - is that right? What was the conclusion, ma'am of the [district] court, in respect to Corey Dinan, as to whether he had physically abused Paulette or whether there was negligent care? What was the finding of the court over there?
> A. Paulette was adjudicated abused and neglected.
> * * *
> Q Are you sure, ma'am , that what you're showing there is correct?
> A That what is correct? I'm sorry.
> Q The judgment of the court over there, that he had inflicted injuries on Paulette.
> A What I recall, yes.
> * * *
> Q Even though the DSS - - did you say that y'all, you're department, substantiated abuse?
> A Right. We substantiated abuse, but that does not mean that the court would have found this child have been abused when we filed our 21-day petition. (T:293-294).

Trial counsel elicited testimony that both parents informed DSS that they leaned over the child while holding her and both denied that they intentionally caused injury. (T:299). Trial counsel also established through this witness that the mother had sole custody of the child for twelve hours during the day. (T:301).

However, trial counsel also elicited the fact that the child was returned to the home of the mother when released from the hospital and Defendant-Appellant "was not allowed to have any contact with Paulette." (T:297).

Sarah Fresquez, mother of the child, next testified for the State. (T:304). She testified extensively and without objection to issues of domestic violence between herself and the Defendant-Appellant, both before and during her pregnancy with the child. (T:309-314). Initially after birth the child did not cry and she described her as a calm baby. (T:315-316). However, the child eventually began to cry often and was diagnosed with colic. (T:317). She testified that on the night child went to the hospital, she awoke to hear her making the same sounds she had been making since the night before and the defendant-appellant indicated that she had been like that all morning. (T:318). According to the mother, the child was struggling to breathe and she insisted on taking the child to the hospital over objection from Defendant-Appellant. (T:319). Fresquez testified that she never saw bruising on the child except for once and that she was the cause of the bruise (324).

The 404(B) Evidence

The State sought to introduce evidence to prove intent, common plan or scheme, and identity. (T:337). The State specifically argued that Defendant-Appellant was "thought to be a suspect in this case, as well as in the previous cases" to establish identity. (T:337). The substance of the State's proffer was that Defendant-Appellant had two biological children with a prior wife and that both children had similar occurrences of injury. (T:339). They proffered "three very

similar circumstances and similar instances." (T:340). In the first instance where no charges were brought, the child was heard crying over a baby monitor, a change in crying and then the discovery of bruises. (T:341). The second instance involved a child being covered in bruises and taken to the hospital for testing and again no charges were filed with admission alleged to be from Defendant-Appellant. (T:343). After extensive voir dire, the State argued that the evidence would be presented for identity, opportunity, similar plan of assaultive acts when alone with crying children, knowledge that the actions would cause injury, intent and absence of mistake based upon his admissions to holding the child too tightly (392-393). Indeed, the court questioned the lack of similarity between the bruising in prior cases as well as lack of involvement of law enforcement, to which the state responded, "hindsight is 20/20." (T:396-399). The court ultimately allowed the evidence for the purpose of knowledge, absence of mistake and intent. (T:405).

Brent Cross then took the stand and testified that at some point in 2004 he visited Defendant-Appellant's house with their wives. (T:410-412). The wives went out, leaving the children home with a baby monitor turned on. (T:414). At some point he heard a child cry and saw the Defendant-Appellant tense up and go upstairs to the child. (T:416). The nature of the child's cry changed while the Defendant-Appellant was with the child and continued after he returned downstairs (T:418-420). Prior to testifying, the witness wrote a statement for Detective Allen

(T:423). The prosecution then had the witness read from the statement (not in evidence), without objection from trial counsel, to present additional facts that were not to refresh but to impeach by omission. (T:421-424). On cross-examination, trial counsel elicited testimony that he heard sounds of the child "being physically abused" and the change in crying was from a baby who was waking up wet to basically fear. (T:426).

Megan Dinan, ex-wife of Defendant-Appellant and mother of his two children testified that after returning home she found one son crying. (T:429-432). The next morning she found bruising on his arms, legs and chest and testified that Defendant-Appellant admitted to holding the child to tight to calm him down. (T:433). She then related that two years prior, when one son was 8 years old, she found bruising on him after Defendant-Appellant had attended to him at night. (T:434-435). The child was taken to two different medical facilities and it was determined that the bruising may have been the result of a virus. (T:436-437). A week later, when a bruise returned, the witness believed it looked like a thumb and three fingers on the child's leg. (T:437). According to the witness, Defendant-Appellant again stated that he may have held the child too tight. (T:438). The last story relayed was after the son had surgery and awoke from the anesthesia in a frantic manner, she observed Defendant-Appellant grab the child's arm and squeeze so hard that the intravenous line came out and the arm bled. (T:439-440).

The Defense Case

Defendant-Appellant testified on his own behalf. He testified that he had remarried and moved to Virginia. (T:449). Previously he had been married to Sarah Fresquez and resided in North Carolina where he served in the Marine Corps. (T:450). The marriage produced a child named Paulette, born February 17, 2010. (T:452). Although he wanted to let his wife sleep, she often got up during the night to help him care for the infant. (T:453-454). This was despite an irregular work schedule that ran from 6:00 a.m., until his job was done. (T:454).

While he worked, Sarah cared for the child, which included taking her to the doctor because she was "gassy, colicky and fussy." (T:455). When he returned home he would greet his wife and daughter with a kiss, change out of clothing that had buttons or pins so as not to injure the child and then hold her. (T:455). Defendant-Appellant believed his mood would occasionally cause the child to tighten up, get real red and fussy, so he would put her in the crib because she picked up on his stress. (T:455). Sometimes he would feed her in the evening or the mother would come out. (T:456). Nighttime feedings were done by whoever got up. (T:457).

On March 18, 2010, the mother took the child to the clinic and the child was x-rayed and diagnosed with colic. (T:457-458). When he returned home he noticed bruises on the child's ankles. (T:459). From that day on, he still treated

the child as normal but as if she was almost a year old baby instead of six week old. (T:460). Sarah did not like this and told him not to do it again and he complied. (T:461). He continued to hold her and feed her and make her comfortable. (T:461). He felt that having a daughter was different than having boys because girls were more dainty. (T:462). However, the mother constantly criticized his handling of the child, expressly stating that he was not holding the child right like in parenting class. (T:462).

On April 3, 2010, both parents were home, but Defendant-Appellant cared for the child for the majority of the day. (T:459). He had the child on a pillow on the floor, but she would not take her bottle and her diaper was dry. (T:466). Around 6 a.m. the mother came out and wanted to take the child to the hospital and he agreed. (T:467).

He never intentionally mistreated the child. (T:461). He felt frustration that the child was colicky and nothing could be done to console her. (T:464). He felt guilty as if he were the cause. (T:464). However, he never shook her violently. (T:465). He thought she was a healthy baby and didn't know if he was contributing to her injuries. (T:471).

On direct examination he admitted to telling a DSS worker that he may have been holding her too tightly stating "maybe picking her up, doing the airplane contributed to it. Just treating her, I guess like a year old baby, like I said. I know

she was only six weeks old . . . ." (T:472). He testified that he never saw Sarah do anything violent to the child. (T:473). Trial counsel elicited the following:

> Q Did you intentionally cause any of those injuries to her?
> A I could not do that, no I couldn't, intentionally. I didn't
> Q Do you think, Corey, that you may have caused some of them?
> A The way I handled her, probably. The fact that I treated her not as a six month old –or six week old but like a year old, like I said, probably contributed towards it
> Q Did those injuries to her ribs and her – to her head result from you being angry or losing your temper with her and mistreating her physically?
> A No, sir. I never mistreated her. I never got angry. The only time was, as a father being frustrated that there was something wrong with my daughter and I couldn't help her. (T:472-473).

By the time Defendant-Appellant went to speak with Detective Allen he had been denied any visitation with the child. (T:480). He was not allowed to go home and see his daughter but was instead ordered to stay on the military base. (T:481). Yet every day he would call to find out how his daughter was doing. (T:483). Eventually, the mother and child moved to New Mexico. (T:486). On January 2, 2011, Defendant-Appellant was able to live in the residence with the child again. (T:487).

Defendant-Appellant recalled the day described by Mr. Cross, but denied being angry with his child or injuring him. (T:487-490). He testified that he and

his ex-wife, Megan Dinan, argued over who caused the bruising to the child but denied causing injury. (T:491).

On cross-examination, Defendant-Appellant admitted to an inconsistency in his initial written statement to Detective Sawyer. (T:498). He also admitted that he had three biological children. (T:499). He testified that he terminated his parental rights to his sons and no longer has physical custody of his daughter. (T:500).

The prosecutor attempted to get Defendant-Appellant to admit that he did not believe Fresquez mistreated the child outside of his presence, without objection from trial counsel, which he could not. (T:501). The State continued to press the question despite repeated answers that he did not know until he finally said that he did not believe she caused the injuries. (T:512-513).

The Assistant District Attorney then asked Defendant-Appellant if "when Detective Allen got on the stand and said that you gave an explanation of holding your arms out and squeezing your child and shaking her back and forth, she lied about that, didn't she," which he denied saying. (T:516). The State then asked:

> Q Okay, So Detective Allen, then, is lying about you?
> A I wouldn't say lie, just changing facts about who said what.
> Q Okay, And what motive would she have to change facts about what you said?
> A I don't know . . . . (T:516)

The State then continued to question him about his belief that Detective Allen was out to get him, or had a personal vendetta against him:

> Q She wouldn't have any reason to come into court and lie, particularly about you, correct?
> A. Correct. I wouldn't know.
> Q. So why, out of all the defendants that she has, out of all the child abuse cases that she had open at the time, why would she choose to come in here and lie about you and say you did this demonstration that you say you didn't do?
> A I don't know. . . . .(T:517).

The State then moved on to question him about the veracity of its other witness, Megan Dinan:

> Q So Megan is lying about you, also?
> A The information has been distorted (T:519)
>
> * * *
>
> Q So Megan made that up, too, correct?
> A Possibility.
> Q. Okay. And Megan made up the fact that she confronted your about it?
> A. She confronted me about many different situations.
>
> * * *
>
> Q And so Megan is also lying about the fact that you've admitted you were trying to console Quinn, and that you had just held him too tightly in that process. She's lying about that, too, isn't she?
> A Quinn wasn't even there that night. (522-523)

The state ended cross-examination with the following:

> Q And this would be your fourth – I'm sorry. Is your wife currently pregnant?
> A Yes, ma'am.

MR. BAILEY: Objection
THE COURT: Overruled

Q And so this would be your fourth biological child, is that correct?

A Yes, ma'am.

* * *

Q Mr. Dinan, how long are you going to wait with that infant before you begin holding him or her too tightly?

THE COURT: Do you object, Mr. Bailey?
MR. BAILEY: I would, yes.
MS. THOMPSON: I'll withdraw it, Judge.
THE COURT: I'm going to sustain the objection and direct the jurors to disregard the question.
MS. THOMPSON: Nothing further (529-530).

The defense then called John Kerr and Leslie Kerr to the stand to testify that the Defendant-Appellant has a reputation for truthfulness. (T:533-535).

The Charge Conference

Trial counsel moved to dismiss one felony charge as duplicitous. (T:549). He also argued that the state did not prove an intent to cause serious bodily injury because the evidence was not clear that it could cause a substantial risk of death, which he believed to be the theory of the State. (T:565-566). The court attempted to clarify and asked if his argument was essentially a sufficiency of the evidence claim and ultimately made clear that trial counsel was focused on proof of the third element, serious bodily injury. (T:566-567, 570). The court granted a motion to dismiss the second count and left counsel to argue his point as to the serious bodily

injury to the jury. (T:574-575). The court also determined that the lesser included, serious physical injury would be charged. (T:576)

Finally, the State successfully requested that the charge mirror the indictment, specifically arguing that the element of intent applied to the assault, not to the injury. (T:580).

ARGUMENT

POINT I - THE ADMISSION OF UNCHARGED PRIOR BAD ACTS UNDER RULE 404(B) DEPRIVED DEFENDANT-APPELLANT'S FUNDAMENTAL RIGHT TO A FAIR TRIAL

A. The Trial Court Failed to Follow the Three Prong Test Prior to Allowing the Testimony of Prior Bad Acts into Evidence

Before admitting evidence of prior uncharged crimes against a criminal defendant, a trial court must determine if (a) the evidence sought to be introduced is relevant to a material element of the crimes charged; (b) the evidence is being offered for a purpose other than the propensity of the defendant to commit the type of offense; and, (c) that the probative value of the evidence outweighs the prejudice to the defendant. State v. Houseright, 725 S.E.2d 445, 448 (NC App 2012). Indeed, even after the trial court has determined that the evidence is both relevant and admissible for a non-propensity purpose, it is still required to make a finding that the probative value substantially outweighs the unfair prejudice that

will ensue. State v. May, __ S.E.3d __, 2013WL5912046 (NC App. November 5, 2013).

First the court allowed testimony from Sarah Fresquez about domestic violence that she suffered from the defendant both before and during her pregnancy. (T:309-314). Although this testimony went entirely without objection by trial counsel, the trial court is the gate keeper of relevance. There is nothing contained within this testimony that made it relevant to any material element of the crimes charged and had no probative value. Houseright, supra. Rather, it was part and parcel of vitriolic character assassination by the State against Defendant-Appellant.

Turning next to the 404(b) motion that was properly raised, the trial court still committed reversible error. While the trial court ruled that the evidence was relevant and material to the issue of "knowledge, absence of mistake and intent" the trial court failed to even address the third prong of probative versus prejudice value of the evidence. May, supra. This error was fatal, and requires reversal.

B. The Prejudicial Effect Outweighed Any Probative Value

Where the court admits evidence of prior bad acts, it is the defendant's burden to show prejudice. State v. Green. 746 S.E.2d 457 (NC App 2013). The defendant need only show that there was a reasonable possibility that but for the error the outcome of the trial would have been different. State v. Miles 730 S.E.2d

816 (NC App 2012). When evidence is admitted to show the mental state of the defendant, and the defendant presents a cognizable defense to his mental state, such a showing is made. Nagy v. United States, 519 Fed.Appx. 137 (4th Cir. 2012).

Even if the court met all three prongs as enunciated in Houseright, the prejudice far outweighed any probative value of the evidence. The evidence was focused on the mental state of the Defendant-Appellant, which was the core of both prosecution and defense (although on different elements as discussed, infra). The testimony of Brent Cross was admissible only to the extent that it framed one of the acts testified to by Megan Dinan. The incidents were in fact not similar to the case because the state's witness testified that they believed the child here suffered from shaken baby syndrome as if she had been squeezed and shaken like a canister, which does not cause bruising. Moreover, the State's own evidence established that Paulette had been bruised by the mother and not by Defendant-Appellant. (T:162). The evidence presented under 404(b) were allegations of squeezing individual limbs and in one case the speculation that injury was either caused by a virus or by squeezing. The acts, as argued by the State were not similar in nature but simply prejudicial and designed to denigrate Defendant-Appellant. Green, supra. Without this prejudicial evidence, the State would have

had unchallenged testimony from Defendant-Appellant that he had a cognizable defense to the intent/mistake element, necessitating a different outcome of the trial.

Based upon the foregoing, Defendant-Appellant was deprived of his fundamental right to a fair trial where evidence of uncharged prior bad acts were introduced for no other reason to show criminal propensity, and where the prejudicial effect outweighed any probative value.

POINT II - DEFENDANT-APPELLANT WAS DEPRIVED OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL AS A RESULT OF IMPROPER CROSS-EXAMINATION BY THE STATE

In People v. McDowell, 59 A.D.2d 948 (2d. Dept. 1977) the New York Supreme Court, Appellate Division, Second Department reviewed a conviction after trial where the prosecutor cross-examined the sole witness for the defense, the Defendant, and posed certain questions to the Defendant which required him to say whether a particular witness for the People had been lying or telling the truth. Addressing this particular line of questioning, that court held:

> We believe that such prosecutorial tactics were fundamentally unfair and prejudicial and should have been curtailed at their inception. The right of an accused to submit proof, by compulsion, if necessary, is constitutionally guaranteed, and an integral component of his right to justice (U.S.Const., 6th Amdt.; 787 Cent. Park Ave. v. State of New York, 5 A.D.2d 628, 174 N.Y.S.2d 592). Thus, no stigma should be attached to the testimony of a witness on a crucial issue solely because it is rendered for one side rather than the other. Cross-examination and summation may not be based upon fictitious assumptions which only confuse the fact-finders and impede the search for the truth (cf. Lowe v. State of Indiana, 260 Ind. 610, 298 N.E.2d 421)." Id. at 949.

This premise is soundly grounded in Federal Rules of Evidence, as is North Carolina law. Thus, in general, one witness should not be forced to comment on the truthfulness of another. United States v. Sullivan, 85 F.3d 743 (1st Cir. 1996). However, this error is heightened, and the prejudice greater, when the witness is called to question the veracity of a police officer who testified against him. See United States v. Boyd, 54 F.3d 868, 871 (D.C. Cir. 1995) ("It is ... error for a prosecutor to induce a witness to testify that another witness, and in particular a government agent, has lied on the stand."); United States v. Fernandez, 145 F.3d 59, 49 (1st Cir. 1998).

This issue was first dealt with by the United States Supreme Court in Doyle v. Ohio, 426 U.S. 610 (1976). In that case, the defendant and a co-defendant were charged with selling marijuana to a confidential informant. The defendant testified at trial that he and his co-defendant had been framed by the confidential informant, and that no drug sale had actually taken place, that the confidential informant was actually the seller and had thrown a sum of currency into defendant's car during their interaction, an aborted attempt to purchase marijuana from the informant. The prosecutor cross-examined the defendant as to why he had not told the arresting officer that he had been framed by the confidential informant, and had not explained to the arresting officer how the sum of money allegedly used in the drug sale had ended up in his car at the time of his arrest. The Supreme Court

condemned this line of questioning, explicitly holding that Due Process forbids a prosecutor from cross-examining a testifying defendant about his post-arrest silence. The Doyle Court also noted that there was little evidence, if any, to contradict the defendant's version of events, as the defense successfully showed that the other witnesses were not in a position to view the actual transaction. Rather, the contest was between the defendant and the confidential informant as to the events that took place during the alleged drug transaction.

This principal of law is well grounded in North Carolina state law as well, where the North Carolina Supreme Court upheld a trial court for striking such evidence and instructing the jury to disregard if even posed by defense counsel. State v. Campbell, 345 N.C. 647 (1997).

However, where trial counsel did not object to the improper questions and related comments, review is made under the plain error standard. Under this standard, the defendant must show that "(1) an error occurred; (2) the error was plain; (3) it affected [his] substantial rights; and (4) it seriously affected the fairness of the judicial proceedings." United States v. Schmitz, 634 F.3d 1247 (11th Cir. 2011)

Just as in Doyle v. Ohio, 426 U.S. 610 (1976), there was little, if any, evidence to contradict Defendant-Appellant's testimony. Defendant-Appellant was the only witness to give substantive evidence in his own defense. His cross-

examination began with the State trying to place him at odds with Sara Fresqez. The prosecutor repeatedly asked Defendant-Appellant to speculate to what she did outside of his presence until he acquiesced and stated that he did not believe she caused the injuries to the child. (T:513).

More troubling was the repeated questioning about the veracity of the State's witnesses. The prosecutor first challenged Defendant-Appellant to call the police officer a liar, which he attempted to avoid. (T:516). The prosecutor expressly asked him to explain not only if the detective was lying but what would her motive be to single him out and lie in court. (T:517). The Defendant-Appellant was highly prejudiced by this impossible questioning and could only reply that he did not know why the detective would lie

The clear intent to deprive Defendant-Appellant of a fair trial continued into the same line of questioning of the other substantive witness, Megan Dinan. (T:519-523). Again, the prosecution placed him in the untenable and prejudicial position of challenging the veracity of the state's witness. Sullivan, 85 F.3d 743; Campbell, 345 N.C. 647. This was not only intentional, but highly prejudicial.

It is apparent that the error occurred, and that the prosecution did not mince words but directly and plainly asked Defendant-Appellant if the State's witnesses were lying. The intention to prejudice Defendant-Appellant is most evident by the State's final cross-examination question that insinuated to the jury that he was only

waiting to harm his unborn child with his new wife. (T:529-530). Not even waiting for a ruling on the objection, the State withdrew the obviously improper question and ended the cross-examination. Id.

This improper line of questioning directly affected Defendant-Appellant's right to a fair trial. Moreover, it went to the heart of the defense. It was clear that the medical testimony went unchallenged; it was only the issue of intent, mistake and knowledge that was truly at issue. To so improperly attack and destroy the Defendant-Appellant's credibility plainly goes to an issue at the heart of the trial. Thus, defense counsel's failure to object is of no moment. Schmitz, 634 F.3d 1247.

POINT III – DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO OBJECT TO PLAIN ERROR, IMPROPER EVIDENCE OF PRIOR BAD ACTS, AND MISAPPREHENDED OF THE LAW DEPRIVED DEFENDANT-APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL AND EFFECTIVE COUNSEL

The United States guarantees each defendant in a criminal prosecution the right to the effective assistance of counsel. United States Constitution, Sixth Amendment. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive Due Process of Law in an adversarial system of justice. United States v. Cronic, 466 U.S. 648, 658 (1984). The Supreme Court has held that

"[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Strickland standard, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687.

A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690.

A. Trial Counsel Completely Misapprehended the Law With Respect to the Element of Intent and Presented an Unsound Defense

Defense counsel has the duty to fully understand the law prior and to not embark on a legally unsound and disastrous trial strategy. People v. Yagudayev, 937 N.Y.S.2d 279 (N.Y.A.D. 2d. Dept. 2012).

In People v. Yagudayev, the defendant was convicted of grand larceny where the defendant and a co-defendant attempted to steal merchandise from a store, but were stopped and apprehended by loss prevention employees. At trial, counsel's theory of defense was that since the defendant never personally took the merchandise outside the store, he was guilty only of a lesser-included offense of attempted grand larceny. Operating under the mistaken belief that the law supported this theory when, in fact, clearly-established precedent defined a larceny as complete upon the taking of property with intent to steal regardless of whether the defendant leaves a store or not, trial counsel called the defendant to the witness stand and elicited from him testimony that he did take merchandise with the intent to steal it, conceal it, and attempt to leave the store, and that but for his being apprehended, he would have exited the store without paying.

In reversing, the New York State Supreme Court, Appellate Division held that this was "an inexplicably prejudicial" and "legally indefensible" strategy which amounted to eliciting an admission of guilt on the stand. Yagudayev at 279. The court further held that given the fact that this strategy permeated counsel's

entire theory of the case, it could not be characterized as an isolated error, and even if it were, that error would be "sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial," and would suffice to establish ineffective assistance. Id. (internal citations omitted).

During the course of the trial, it was clear that trial counsel misapprehended the element of intent. Indeed, counsel strategy was to challenge Defendant-Appellant's intent to cause serious bodily injury to the child. This permeated the entire defense throughout the trial. At the outset, trial counsel cross-examined the medical witness to establish that she was unaware of any permanent injuries suffered by the child, despite testimony that the child would have died had she not been brought to the hospital. (T:151, 154). That testimony alone would be sufficient if believed to defeat trial counsels lack of sufficiency argument.

Trial counsel went on to consistently question witnesses about the Defendant-Appellant being cooperative and never indicating that he intended to harm the child. This culminated in the direct examination of the Defendant-Appellant where trial counsel elicited testimony admitting to unintentionally causing the child's injuries by handling her like an older child. (T:471-472). Indeed, trial counsel expressly asked Defendant-Appellant contributed to the child's injuries and if he did so because he was angry. (T:472-473). As a result of

the trial counsel's direct questions, Defendant-Appellant admitted to contributing to the child's injuries but not from mistreating or being angry at her. Id.

It was clear by trial counsel's motion to dismiss for failure to establish sufficient intent to cause injury and clear misapprehension of the charges as alleged in the indictment, that he committed the very harm Yagudayev holds to be error. (T:570, 580). Trial counsel served Defendant-Appellant up on a silver platter to the State by having him admit to intent to use force, however slight, in treating the child as a one year old instead of a six year old. This is irreparable harm that mandates reversal. Yagudayev, 937 N.Y.S.2d 279.

C. Trial Counsel's Affirmatively Eliciting Damaging Testimony Deprived Defendant-Appellant of Effective Assistance of Counsel

As a result of trial counsel's utter failure to apprehend a cognizable legal strategy, he introduced numerous admissions and damaging testimony from Defendant-Appellant. For example trial counsel elicited the following:

(i) he asked the doctor if he could tell when the recent fractures occurred, which she indicated were on Saturday the third when the respiratory symptoms began when the child was in Defendant-Appellants custody (T:160).

(ii) Defendant-Appellant was feeding the child when the symptoms began (T:169).

(iii) Defendant-Appellant also told the detective Ramirez that he believed he might have held the child too tight. (T:202).

(iv) Defendant-Appellant was prevented from going back to the house during investigation before he was arrested. (T:238).

(v) On cross-examination of Ms. Blevins-White, he brought out details of the underlying court determination and that he was denied access to the child.

(vi) On cross-examination of Mr. Cross, that he heard sounds of the child "being physically abused" and the change in crying was from waking up wet baby to basically fear. (T:426).

These multiple errors utterly undermined the adversarial process and made trial counsel into a second prosecutor against his own client. Strickland v. Washington, supra.

D. Trial Counsel Was Ineffective for Permitting Prosecutorial Misconduct Without Objection

The law is clear that a prosecutor may not force a defendant to question the veracity of the witnesses against him. State v. Campbell, 345 N.C. 647 (1997); United States v. Fernandez, 145 F.3d 59, 49 (1st Cir. 1998); United States v. Sullivan, 85 F.3d 743 (1st Cir. 1996); United States v. Boyd, 54 F.3d 868, 871 (D.C.Cir.1995); People v. McDowell, 399 N.Y.S.2d 475 (N.Y.A.D. 2d. Dept. 1977).

Here, counsel was so utterly remiss in his duties to zealously advocate for his client that he did so with not just a civilian witness, but with a police witness as well. Clearly, such conduct falls short of the constitutional requirement for effective representation. United States v. Cronic, 466 U.S. 648, 658 (1984).

E. The Net Effect of Trial Counsel's Combined Failures Deprived Defendant-Appellant of Effective Assistance

Here, the prejudice to Defendant-Appellant is readily apparent. Trial counsel affirmatively elicited damaging testimony, failed to object to inadmissible

testimony, and utterly failed to apprehend the most basic requirement; the charge levied against the defendant. As a result, the Government introduced damning evidence and destroyed Defendant-Appellant's credibility as a witness. As a consequence, this Court must reverse the convictions and grant a new trial.

CONCLUSION

The Defendant-Appellant's conviction should be reversed because (a) the trial court failed to follow the law in allowing evidence of prior bad acts; (b) the state deprived him of a fair trial subjecting him to improper cross-examination; and (c) trial counsel utterly failed to meet the constitutional standards for effective representation. It cannot be said that these errors are harmless and the state now bears the burden of showing that the cumulative errors were harmless beyond a reasonable doubt. State v. Wilson, 363 N.C. 478, 487, (2009). The matter should be remanded for a new trial.

Respectfully Submitted,

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I hereby certify pursuant to Rule 28(j)(2)(B) that the foregoing brief was prepared using Microsoft Word, utilizing Times New Roman 14-point font, and the brief contains 7,888 words, excluding the cover, index, table of authorities, certificate of service, certificate of compliance, and appendix.

/s/ James Goldsmith, Jr., Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Court and to the following counsel, via the United States Postal Service, this 12th day of November, 2013:

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