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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REPLY BRIEF FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT IS REQUESTED

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POINT I - THE ADMISSION OF UNCHARGED PRIOR BAD ACTS UNDER RULE 404(B) WAS PLAIN ERROR THAT WAS PRESERVED BY TIMELY OBJECTION

At the outset, Defendant-Appellant's position in this appeal is that the admission of uncharged bad acts was plain error committed by the trial court. First, the error in admitting the uncharged crimes evidence was fundamental because it "had a probable impact on the jury's finding that the defendant was guilty." See State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

"[A]ll evidence favorable to the [State] will be, by definition, prejudicial to defendants." State v. Summers, 177 N.C.App. 691, 697, 629 S.E.2d 92, 97 (N.C.App. 2006). The North Carolina Supreme Court has held that

> [E]vidence admitted under Rule 404(b) "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." State v. Al–Bayyinah, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002). When evidence of a prior crime is introduced, the "'natural and inevitable tendency' " for a judge or jury "'is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.'" Id. at 154, 567 S.E.2d at 122–23 (quoting IA John Henry Wigmore, Evidence § 58.2, at 1212 (Peter Tillers ed., 1983)). Indeed, "[t]he dangerous tendency of [Rule 404(b)] evidence to mislead and raise a legally spurious presumption of guilt requires that its

> admissibility should be subjected to strict scrutiny by the courts." State v. Johnson, 317 N.C. 417, 430, 347 S.E.2d 7, 15 (1986).

State v. Carpenter, 361 N.C. 382, 387-388, 646 S.E.2d 105, 109-110 (2007).

The term "unfair prejudice" means "an undue tendency to suggest decision on an improper basis." State v. DeLeonardo, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986). It is axiomatic that Rule 404(b) evidence may not be used to establish a defendant's propensity to commit a crime, and that admission or use of such evidence on that basis would be improper. Yet, that is precisely what the State used the evidence to establish in this case:

> I submit to you that the more often a person performs a certain type of act, the further away and the less likely it becomes that they didn't intend to do it, that they didn't intend to perform that act. They perform it once. They perform it again. They perform it again. The more often that that act is done, the less likely it is that it was unintentional or not purposeful or innocent or accidental, as the case may be. Why is that important here? Because you haven't only heard evidence that Corey Dinan physically assaulted and physically harmed his daughter, Paulette, you also heard evidence that he did it to two of his biological children, previously.

(T:626-627).

The State then devoted a significant part of its summation going through Defendant-Appellant's prior uncharged crimes in painstaking detail in an effort to establish that because Defendant-Appellant had previously assaulted his other children (and his ex-wife), he was guilty of the instant crime. (T:627-630).

The State further claims in its Brief that because trial counsel did not object to the admission of the Rule 404(b) evidence at trial that the issue is waived. However, as established above, the admission of this evidence is subject to plain error review, excusing it from the timely objection requirement.

Contrary to the State's argument, trial counsel did object to the admission of the evidence complained of herein, as is plainly evident in the trial transcript. (T:273, 388-392). Accordingly, the argument has been preserved for appeal.

Additionally, and in the alternative, it is respectfully submitted that to the extent that trial counsel failed to lodge a timely objection to the Rule 404(b) evidence, any failure to object was the product of ineffective assistance of counsel.

Accordingly, this Court should hold that the admission of the uncharged crimes evidence pursuant to Rule 404(b) was error that requires a new trial. Defendant-Appellant further relies upon the arguments made in his initial Brief.

POINT II - THE IMPROPER CROSS-EXAMINATION OF DEFENDANT-APPELLANT BY THE STATE WAS PLAIN ERROR

In its Brief, the State fails to justify the cross-examination of Defendant-Appellant as proper. This is because the case law is clear that the questions posed by the State were fundamentally unfair.

To be clear, Defendant-Appellant specifically argues that his improper cross-examination constitutes plain error. Additionally, and in the alternative, it is

respectfully submitted that to the extent that trial counsel failed to object to the clearly improper cross-examination, any failure to object was the product of ineffective assistance of counsel. Defendant-Appellant specifically incorporates the arguments made in his initial Brief, and submits that this Court should grant him a new trial based upon the arguments raised herein.

POINT III – BECAUSE INEFFECTIVE ASSISTANCE OF COUNSEL IS CLEAR FROM THE FACE OF THE RECORD, THIS COURT SHOULD REVIEW DEFENDANT-APPELLANT'S CLAIMS ON THE MERITS AND FIND THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The State claims the issues contained in Point III of the Defendant-Appellant's Brief that concern claims of ineffective assistance of counsel are unripe and that the record is insufficient to permit this Court to determine Defendant-Appellant's claims of ineffective assistance of counsel. Taking this position, the State then demands this Court reject a substantial portion of Defendant-Appellant's claims on direct appeal but cites no authority for its bright-line conclusion that ineffective assistance claims cannot be raised on direct appeal and must be reserved for some collateral review. The State cannot cite to authority because none exists.

In fact, there is no categorical rule that precludes direct appellate review of ineffective assistance of counsel claims. Contrary to the State's position, the law is

clear that claims of ineffective assistance of counsel may be properly raised on direct appeal. As the United States Supreme Court has conclusively held:

> We do not hold that ineffective-assistance claims must be reserved for collateral review. There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court sua sponte.

Massaro v. United States, 538 U.S. 500, 508 (2003), see also United States v. Abney, 267 Fed.Appx. 199 (4th Cir. 2008); United States v. James, 337 F.3d 387, 391 (4th Cir. 2003).

Additionally, North Carolina courts have held that where it is readily apparent from the record, ineffective assistance of counsel can be raised on direct appeal. See State v. Thompson, 359 N.C. 77, 122–23 (2004); State v. Fair, 354 N.C. 131, 166 (2001).

The State also argues that Defendant-Appellant's claims of ineffective assistance are unripe because trial counsel has not had an opportunity to explain the reasoning for his actions or lack thereof. This position is legally flawed. It is not for trial counsel to decide whether his or her actions did or did not constitute effective assistance, nor may a court simply rubber-stamp counsel's self-serving explanations for why he or she took or failed to take certain action. This Court decides whether counsel's actions were objectively reasonable, rather than rely upon the subjective

belief of trial counsel or counsel for the State. Strickland v. Washington, 466 U.S. 668 (1984).

The State's position is also factually flawed. Contrary to the State's claim, a fair reading of Defendant-Appellant's Brief and myriad portions of the record cited therein, demonstrate that each claim of ineffective assistance is fully supported by facts within the record, and do not rely upon any facts dehors the record, thus making determination ripe for this Court's review. The State focuses on acts of trial counsel that it believes were prudent. However, just because trial counsel may have done something right at one or more points during the trial does not automatically shield him from ineffective assistance; even a single, isolated act may constitute ineffective assistance of counsel. See Elmore v. Ozmint, 661 F.3d 783 (4th Cir. 2011) (failure to investigate state's forensic evidence held ineffective).

Defendant-Appellant further submits that to the extent any objection was not preserved, such failure was a result of trial counsel's ineffectiveness, as there was no reasonably justifiable, strategic or tactical reason to permit any damaging evidence without objection.

CONCLUSION

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.

The State has failed to show that the cumulative errors were harmless beyond a reasonable doubt. As a consequence, this Court must reverse the convictions and grant 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 Reply Brief contains 1,851 words, is 8 pages in length, 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 8th day of January, 2013:

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