No. COA 21-665 FIFTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

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 v. ) **From New Hanover**

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TITUS NAFIS LEE )

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DEFENDANT-APPELLANT’S BRIEF

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DEFENDANT-APPELLANT’S BRIEF

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**QUESTIONS PRESENTED**

1. **WHETHER THE COURT ERRED BY DENYING DEFENDANT’S MOTION TO PRECLUDE THE TESTIMONY OF THE STATE’S EXPERT WHEN SHE TESTIFIED ON PROFFER SHE WOULD NOT RELATE HER TESTIMONY TO ANY FACT IN THE CASE?**
2. **WHETHER THE COURT ERRED BY DENYING DEFENDANT’S MOTION FOR A MISTRIAL WHEN THE PROSECUTOR REPEATEDLY ASKED A QUESTION AFTER THE COURT HAD SUSTAINED OBJECTIONS TO THE QUESTION AND THE QUESTION WAS DESIGNED TO BRING INADMISSIBLE TESTIMONY BEFORE THE JURY**

**PROCEDURAL HISTORY**

 On January 9, 2017, Titus Lee, was indicted on the following charges: two counts of first-degree kidnapping and one count of first-degree forcible rape (16 CRS 59540); one count of first-degree burglary, one count of robbery with a dangerous weapon and one count of first-degree forcible rape (16 CRS 5954)1; two counts of first-degree sexual offense and one count of robbery with a dangerous weapon (17 CRS 102); two counts of sexual offense (17 CRS 103). The case came on for trial at the April 19, 2021 Session of the New Hanover County Superior Court, the Honorable G. Frank Jones presiding. On May 12, 2021, the jury found Mr. Lee guilty on all counts.

 The court arrested judgment on the first-degree kidnapping of H.B.[[1]](#footnote-1) as defendant had also been convicted of the first-degree rape of H.B. The court entered judgment on that charge to second-degree kidnapping. The court found the defendant to be a prior record level I based on zero points and imposed a sentence in each judgment in the presumptive range, with credit given for time in custody before trial. All sentences were ordered to be served consecutively. In Counts I and II of 16 CRS 59540, the second-degree kidnapping of H.B. and first-degree kidnapping of Jacob Hedgecock, the court consolidated the charges for the purpose of a single judgment Class C and imposed a sentence of a minimum of 73 months and a maximum of 100 months. For 16 CRS 59540, Count III, first degree rape, a B1 felony, the court imposed a sentence of a minimum 240 months, maximum 348 months. In 16 CRS 59541, Count I, first degree burglary, Count II, robbery with a dangerous weapon of Heather Barber and Count III, first degree forcible rape, all three counts were consolidated for the purpose of a single judgment. The sentence imposed was a minimum of 240 months to a maximum of 348 months. In 17 CRS 102, Count I, first degree sexual offense the court sentenced the defendant to a minimum of 240 months and a maximum of 348 months. The court consolidated Count III, the robbery with a dangerous weapon of Jacob Hedgecock, with Count I. In 17 CRS 102, Count II, first degree sexual offense, the court sentenced the defendant to a minimum 240 months and maximum of 348 months. In 17 CRS 103 Count I, first degree forcible sexual offense, B1, the court sentenced the defendant to a minimum of 240 months and a maximum of 348 months. In 17 CRS 103 Count II, first degree forcible sexual offense, B1, the court sentenced the defendant to 240 months minimum and 348 months maximum.

 The court found that the defendant has been convicted of a reportable conviction under North Carolina General Statute 14-208.6. The court ordered that upon release from imprisonment, the defendant shall register as a sex offender for his natural life and enroll in satellite-based monitoring for his natural life, unless monitoring is terminated as by law provided.

**GROUNDS FOR APPELLATE REVIEW**

 This is an appeal of right pursuant to the provisions of N.C. Gen. Stats. §§ 7A-27(b) and 15A-1444(a) and Rule 4(a) N.C.R.App.P. from final judgments of conviction by a defendant who pled not guilty and was found guilty of non-capital crimes.

**STATEMENT OF THE FACTS**

 Two college students were taking a study break on the patio of the woman’s first floor condo in Wilmington on the evening of November 21, 2016, when an intruder climbed over the gated area of the railing, forced the two students inside at gunpoint and demanded cash. When he learned the students had no cash, the intruder sexually assaulted the young woman. He beat the young man and tied him up in a bathroom. The intruder forced the woman to drive to an ATM machine to withdraw money from her account. Before he left, the intruder stole items including iPhones, laptops and clothes.

A. The Intruder Sexually Assaulted H.B., Pistol Whipped Jacob And Forced H.B. To Withdraw Cash From An ATM

 H.B. enrolled at Cape Fear Community College when Jacob began his freshman year at UNC Wilmington. (Tpp. 791, 793) H.B.’s father purchased a condominium for her. Jacob had a dorm room at UNCW but also stayed with H.B. in her condo. Around 11:45 p.m on the evening of Monday, November 21, 2016, the students took a break from studies and were drinking wine on the patio when they heard rustling in the bushes. H.B. looked to her side and saw a man standing on the patio with a gun in his hand. The man was masked and wearing a hoodie, so the students could only see his eye area. (Tpp. 800, 970) He ordered them inside to hand over cash. When he learned the students did not have cash, he threatened to kill them. (Tp. 803) The intruder forced Jacob into the shower in the guest bathroom and ordered H.B. to perform oral sex in the bedroom. (Tpp. 805, 971) He then moved Jacob at gun point to the walk-in closet in the master bathroom. (Tp. 972) Jacob was able to free himself. The two men fought, knocking the toilet off its base, breaking the shower door, and slicing the intruder’s right index finger.[[2]](#footnote-2) Jacob pulled some dreads out of the intruder’s head. The intruder repeatedly pistol-whipped Jacob and told him he was going to kill him. (Tpp. 805-807, 973-974) The intruder threatened Jacob with a gun. He told Jacob to say goodbye. Jacob thought he was going to die. He was in and out of consciousness. (Tpp. 974, 977) Pointing a gun at H.B.’s head, the intruder ordered her back to the bed where he committed additional rape and sexual offenses. (Tp. 810)

 The intruder forced H.B. and Jacob to walk to Jacob’s Range Rover. H.B. was ordered to put Jacob in the back of the Range Rover. The intruder took H.B. back to the apartment and forced oral sex. (Tpp. 814, 816, 978) While the intruder was in the apartment, Jacob was able to climb over the back seat and open the rear passenger door, setting off the car alarm. No one responded to the alarm. (Tpp. 817, 979) The intruder directed H.B. to drive Jacob’s car to an ATM. (Tp. 819) On the way the intruder ordered H.B. to stop the car to allow a heavily tattooed, blonde woman to get into the car. The woman was later identified as Treddia Sullivan. (Tp. 1089) Ms. Sullivan made a joke about how Jacob must have owed the intruder money. Ms. Sullivan asked the intruder about H.B. He responded that H.B. was his girlfriend. (Tpp. 819-820, 981) On the way to the ATM, H.B. ran a red light which was recorded by a traffic camera at 2:24 a.m. on November 22. (Tpp. 822, 895, 1676, 1679) At first H.B. was unable to make either Jacob’s or her own debit card work at the ATM machine. After Ms. Sullivan gave H.B. instructions, $1500 was disbursed from H.B.’s account. (Tpp. 821, 912, 1409)

 When the group, including Ms. Sullivan, returned to the apartment, H.B. was ordered to put Jacob back in the closet. The intruder and Ms. Sullivan had sex. Then the intruder forced H.B. to perform oral sex on Ms. Sullivan. He assaulted H.B. vaginally and anally. (Tpp. 823-826) The intruder stole three cell phones, Jacob’s Xbox, controllers, games, an Amazon Fire stick, two televisions, a ring, some lamps, a vacuum, Jacob’s clothes, a MacBook Pro, a MacBook Air, computer chargers and food. (Tp. 1346) He walked in and out of the apartment removing the property, leaving the students unsure of when the intruder was gone for good. (Tpp. 834, 938, 996, 999)

 When H.B. thought it was safe, she freed Jacob and helped him get dressed. They ran out to H.B.’s car. Ms. Sullivan took food and some of H.B.’s clothing. She left the apartment with the students and directed H.B. to a crack house to drop her off. The students drove to Jacob’s parents’ beach house in the North Myrtle Beach community of Cherry Grove. (Tpp. 838, 991)

B. H.B. And Jacob Chose A Different Man From The Photographic Line-Up With 90% And 100% Confidence

 H.B. and Jacob were frightened as they drove to South Carolina, because they thought they might be followed. They arrived at Jacob’s parents’ house at around 7:00 a.m. and went to his parents’ bedroom. When Jacob’s mother saw Jacob was bloody and bruised, she jumped out of bed. The couple told Jacob’s parents what had happened. (Tpp. 840, 1002) H.B. and Jacob were afraid to call the police because they thought the intruder would find them and kill them. (Tpp. 844, 1002) Jacob’s parents called the local police. H.B. was taken to the hospital for sexual assault evidence collection and examination. (Tp. 844) An emergency room physician treated Jacob for lacerations on the right and left sides of his scalp. The cut on the right side required eight staples, the left side cut required five staples. The head injury qualified as a concussion. Jacob was treated for cuts and abrasion on his hands and knees. (Tpp. 1079-1080, 1087-1088)

 After the hospital examinations, Jacob’s father drove them to the police department in Wilmington. (Tp. 846) H.B. was shown line-ups of females. She picked out the blonde woman from one of the line-ups, Treddia Sullivan. (Tpp. 863, 2095) On December 5th, she was shown a photographic line-up of possible male suspects, including a photograph of Titus Lee. The man she identified with a confidence level of 90% was not Mr. Lee. (Tpp. 863, 879) H.B. picked out number four, Antonio Beatty, an inmate in the New Hanover jail. (Tpp. 1380-1382, 1398) Later H.B. saw a video of Mr. Lee after his arrest. (Tp. 942) In-court, H.B. identified Mr. Lee as the intruder. (Tpp. 865-866) Jacob also picked out Ms. Sullivan and Mr. Beatty from the line-up. His confidence in his choice was 100% for Mr. Beatty and 90% for Ms. Sullivan. (Tpp. 1006, 1038, 1386, 1395, 2088) In court, Jacob identified Mr. Lee as the offender. (Tp. 1010)

C. The DNA Extracted From 69 Collected Items And Swabs Did Not Match Titus Lee’s DNA Profile

 Joseph Ovaska, a detective with the Wilmington Police Department went to H.B.’s condo after talking to the North Myrtle Beach Police Department. (Tp. 1337) The door was unlocked and barely shut. The investigators saw enormous amounts of blood on the bed, and on the rug area that led to the bathroom. The shower door was broken off, unhinged, and laying on the ground. (Tp. 1339) Michele Mahamadou and Jaclyn Smith, crime scene investigators, took photos and videos of the scene, dusted for fingerprints and collected items including: a towel with bloodstains, a condom, cigarette butts, tennis shoes with bloodstains, bloody towels from a towel hamper, a bloody shirt, a roll of duct tape, pieces of duct tape, and DNA swabs. (Tpp. 1562 – 1578) Ms. Smith took additional photos and collected items including: provisional drivers licenses for H.B. and Jacob, cigarette butts, a Voss water bottle, and swabs from the master bedroom and bathroom. (Tpp. 1703-1721, 1725)

 Sarah Ellis conducted DNA examinations of the collected evidence. The lab items went up to Item 69. (Tp. 1974) All the items tested from the apartment excluded Titus Lee. (Tpp. 2007-2008) Mr. Lee’s DNA profile was excluded as a match from the cigarette butts, blood, Voss water bottle, sperm cells, duct tape and swabs taken from the Range Rover. (Tpp. 1836-1909) He was excluded not just from the category of major contributors, but from all the interpretable profiles. (Tp. 1976) Lindsey D’Amour, accepted as an expert in fingerprint identification, did not find Mr. Lee’s fingerprints on any of the latent lifts. (Tp. 2103)

D. Phone Calls To 911 Led The Detectives To The Apartment Where Mr. Lee Lived With His Mother

 Two 911 calls caused the detectives to go to a different apartment in the same complex as H.B.’s condo. Tahitsha Fennell-Lee lived in the apartment with her son Titus Lee. (Tp. 2328) Stolen items were found in the apartment, including a black Nike jacket and iMac cords. (Tp. 2374) Chad Grant, a U.S. Marshall, was informed by a Wilmington officer that Mr. Lee might be in Philadelphia. He was requested to locate Mr. Lee and take him into custody. (Tp. 1746) U. S. Marshalls went to the home of Ronald Johnson, a cousin of Titus Lee, on December 7, 2016. They located Mr. Lee hiding in the basement. Officers collected two guns and a white iPhone from the house. (Tpp. 1758, 1760-1764) DNA matching Mr. Lee’s profile was found on one spot on one of the guns. (Tp. 1934)

 Facebook posts indicated that Mr. Lee drove with family to Philadelphia, where Ms. Fennel-Lee’s family lived, for Thanksgiving on November 23, 2020. (Tp. 2350, 2729) A Facebook Live video showed that Mr. Lee’s finger bandaged. He was holding a money-filled Vera Bradley bag that appeared to match a laptop bag H.B. had in her apartment. (Tpp. 2354-2356)

 Scott Hettinger, a police detective, was received as an expert in the forensic examination and extraction of digital devices. (Tp. 2533) He examined the Apple iPhone 7 seized in Philadelphia. The examination showed iCloud and iTunes accounts synced with Jacob’s Mac Book, as well as a Game Center. (Tpp. 2546, 2603) The phone had emails to and from Jacob. (Tp. 2602) The Instagram app on the phone was registered to Titus Lee. (Tp. 2605) Someone had searched for Wilmington police officer, Kelvin Hargrove. An article from the StarNews was accessed reporting on a violent kidnapping. A text read that he needed to tell his mom to call the police and find out why they keep coming to her house. She texted “You must left blood or something there.” (Tpp. 2558, 2560, 2565, 2569) On December 6, he texted his plan was to change his identity. (Tp. 2575) Messages seemed to be between Titus Lee and his mother, his girlfriend and his father. In one of the messages, his mother asked if he has her car. He responded he did not have the car, but the phones he stole were in there. (Tp. 2582) Facebook showed a photo of Titus Lee holding cash totaling $460 on November 28. (Tp. 2607) One message was to a bail bondsman asking if there were any outstanding warrants for him. (Tp. 2611) A video and a still shot taken on December 5 showed Mr. Lee at a train station in Philadelphia. (Tp. 2617) Another video showed Mr. Lee pointing a gun. (Tp. 2621) The extraction report included location data. On November 22, 2016 the iPhone was in the apartment complex.

E. The State Was Allowed To Introduce Testimony From A Psychologist Concerning Generalized Impact Of Trauma On Memory

 Defendant moved pre-trial to exclude the testimony of Mindy Mechanic, a clinical psychologist. (Tp. 1214; Rpp. 38-45) A hearing was held. The State told the court the purpose in calling Dr. Mechanic was to educate the jury on what trauma does to the brain and to memory. (Tp. 1215) Dr. Mechanic’s report affirmed her testimony was not directed to the facts of this case, even though she was provided victim interviews and police reports. (Tp. 1232) Defendant objected based on Daubert and Rule 702 as the proffered testimony was not related to case facts. (Tp. 1218)

 On *voir dire*, Dr. Mechanic testified her work focused on the psychological consequences of trauma and victimization. (Tp. 1220) Her study of trauma included natural disasters, crimes, airplane disasters and accidents. (Tp. 1228) She testified that the part of the brain which controls memory goes fully or partially offline during a traumatic event. (Tp. 1233) Dr. Mechanic asserted, without supporting citations, that laypersons cannot accurately judge the credibility of trauma victims. (Tpp. 1255,1257)

 The court ruled: the proffered testimony of Dr. Mechanic passed the Rule 702 three-prong reliability test. Under Rule 403 the Court found the probative value was not substantially outweighed by the danger of unfair prejudice. (Tp. 1282)

 Dr. Mechanic told the jurors that trauma victims in general give statements to various interrogators which contain different or contrary details. (Tpp. 1301, 1306-1310) She asserted: victims of sexual assault do not want to talk about what happened; time perception can be warped by a traumatic experience; and the common understanding about how a victim should behave after the trauma does not always occur. (Tpp. 1311-1313) She agreed she had no diagnosis of the parties to the case or anything to do with the facts of the case. (Tp. 1317)

F. Titus Lee Denied Being The Perpetrator Of The Crimes

 Titus Lee denied that he raped, robbed or kidnapped H.B. and denied robbing, kidnapping or assaulting Jacob Hedgecock. (Tpp. 2832-2833) Mr. Lee was nineteen in November of 2016 and lived with his mother and eight-year-old sister in the same apartment complex as H.B. (Tp. 2835) On the evening of November 21, 2016, Titus and his girlfriend argued. She left the apartment around 11:00 p.m. He went back to his room and smoked marijuana. (Tp. 2839) His mother, Tahitsha Fennell-Lee testified that after the argument, Titus went into the bathroom or his bedroom. She did not hear anyone come in or out of the apartment after she went to bed. (Tp. 2740)

 The next morning Titus cut his finger while preparing cucumbers for his little sister’s snack. (Tp. 2841) When he took the trash out, he spotted a blue jacket hanging out of a bag in the bin. He grabbed the entire bag. (Tp. 2844) The trash bag contained three phones, a jacket and some wires. (Tp. 2852) Later that morning his girlfriend drove Mr. Lee to an emergency room to have his finger examined. (Tp. 2845) He gave the hospital his correct name and birthdate. He made no attempt to hide his identity. (Tp. 2877) Mr. Lee, his mother and others drove to Philadelphia for a family Thanksgiving. (Tp. 2836) The next week he rode back to Wilmington with his father. (Tp. 2851)

 When Mr. Lee arrived back home, his mother told him police had come to their apartment. He tried to find out if the police had warrants for him. (Tp. 2851) Mr. Lee returned to Philadelphia to stay with his aunt’s two stepsons, Chris and Ronald Johnson. Mr. Lee had taken the iPhone he found in the trash bag to a cell phone store, had service established and linked to his iPad accounts. (Tpp. 2854, 2856)

 Some of the property that the State alleged to be stolen from H.B. and Jacob belonged to the Lee family. Mr. Lee identified photographs taken in his room in September 2016 showing the two TV’s he had for at least five years. (Tpp. 2849-2850) His mother, Tahitsha Fennell-Lee testified that the TV in Titus’s bedroom belonged to his grandmother. (Tp. 2717) The Under Armour pullover was a present from his grandmother. Defense counsel introduced a photo of Mr. Lee wearing the shirt in 2014. (Tp. 2859) Mr. Lee bought the Makarov gun that was seized from him in Philadelphia in 2015. (Tp. 2879)

 Mr. Lee’s prior convictions included: February 2015, reckless driving and misdemeanor fleeing arrest with a motor vehicle; September 2014, misdemeanor possession of paraphernalia; March 2015, no operator’s license; and September 2014, possession of ¼ ounce of marijuana. (Tp. 2889) He testified he did not know H.B., Jacob or Treddia Sullivan. (Tp. 2890)

**ARGUMENT**

1. **THE COURT ERRED WHEN IT ADMITTED EXPERT TESTIMONY WITHOUT ADDRESING RULE 703(a)(3) WHEN THE PROFFERED PURPOSE WAS TO INFORM THE JURORS THAT VICTIMS OF TRAUMATIC EVENTS IN GENERAL GIVE INCONSISTENT STATEMENTS AND EXPERIENCE MEMORY LAPSES**

Defendant filed a motion to exclude the proffered testimony of Mindy Mechanic based on failure to meet the standards of N.C.G.S. § 8C-1, Rule 702(a). (Rp. 45) The State told the court its purpose in introducing the testimony of Mindy Mechanic, a clinical psychologist, was to inform the jurors that in general victims who have experienced trauma will have difficulty giving coherent statements and testimony. Dr. Mechanic explained her testimony would educate the jurors because “laypersons” have an “adherence to myths and stereotypes” concerning “real victims”, without providing any data supporting the thesis that lay persons misunderstood reactions to trauma. (Tp. 1255) The prosecutor explained to the court she needed Dr. Mechanic’s testimony to counter Defendant’s cross-examination of the State’s witnesses. (Tp. 1215 Dr. Mechanic had read the victim statements and police reports. Despite her review of the file, the prosecutor stated she would not ask Dr. Mechanic about the facts of this case. While Dr. Mechanic’s proffer did not include the impact of trauma on either H.B. or Jacob, the court failed to analyze the Rule 702(a)(3) requirement that the expert must apply the research principles and methods reliably to the facts of the case (Tp. 1217) The court ruled the probative value of the expert’s proffered testimony outweighed the prejudice to the defendant under N.C.G.S. § 8 C-1 403. The court reached this conclusion even though Dr. Mechanic’s proffered testimony had no direct relationship to the facts of the case.

The State’s use of this expert was to bolster the credibility of its witnesses, by framing as a scientific fact that any trauma victim cannot be expected to give consistent statements over time or retain an accurate memory of the details of what occurred. If this purpose is found to be an acceptable use of an expert, precedent will be established that the State may introduce similar expert testimony—that victims in general are held to a lesser standard of credibility—in every case in which a victim testifies. Rule 702(a)(3) would be held to not apply to adult victims of traumatic events. Allowing the State to introduce the testimony of Dr. Mechanic violated the Rules of Evidence and Defendant’s constitutional rights to confrontation, due process and a fair trial. N.C. Gen. Stat. § 8C-1, Ruled of Evidence 702 and 403; U.S. Const. Amends. V, VI and XIV; N.C. Const. Art. I, Secs. 19, 23 and 35. A new trial is required.

standard of review

 A court’s ruling on the admission or exclusion of expert testimony is typically reviewed for abuse of discretion. *N.C. DOT v. Mission Battleground Park, DST,* 370 N.C. 477, 480, 810 S.E.2d 217, 220 (2018). When the admissibility of evidence is a question of law, it is reviewed *de novo*. *State v. Wilkerson*, 363 N.C. 382, 434, 683 S.E.2d 174, 205 (2009).

 **discussion**

A. Precedent Requires Experts To Apply The Principles And Methods Relied Upon Reliably To The Facts Of The Case

 Our Supreme Court has explained in detail the history and requirements of Rule 702 and admission of expert testimony in North Carolina. *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016). *McGrady* held the 2011 amendment to Rule 702(a) adopted “the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases.” *Id*. at 884, 787 S.E.2d at 5. The opinion cited to a line of United States Supreme Court cases which set forth the standards for admission of expert evidence. First, *Daubert* instructed that before expert testimony is admitted the court must determine “that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579 (1993). The *Daubert* standard was further clarified in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In 2000, the Supreme Court adopted an amendment to Federal Rule 702. The amendment added three requirements: “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” *Id*. at 1195, citing to, Amendments to Federal Rules of Evidence, 529 U.S. 1189, 1191, 1195 (2000).

*McGrady* outlined the history of Rule 702. While North Carolina had earlier held North Carolina was not a *Daubert* jurisdiction, the 2011 North Carolina amendment changed this by adding language that was virtually identical to the 2000 federal amendment. The 2011 amendment instructed courts to allow qualified experts to testify to an opinion only if three requirements had been met:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

 N.C.G.S. § 8C-1-702; *McGrady* at 887, 787 S.E.2d at 7, quoting Act of June 17, 2011, ch. 283, sec. 1.3, 2011 N.C. Sess. Laws (2011 Reg. Sess.) 1048, 1049 (codified at N.C. Gen. Stat. § 8C-1, Rule 702(a).

The *McGrady* Court outlined what is required under the amended Rule 702(a): “First, the area of proposed testimony must be based on ‘scientific, technical or other specialized knowledge’ that ‘will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id*. at 889, 787 S.E.2d at 8. The testimony “must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience.” *Id*. Second, the witness must be qualified as an expert: “Whatever the source of the witness’s knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?” *Id*., citing to *Howerton v. Arai Helmet, Ltd.,* 358 N.C. 440, 461-62, 597 S.E.2d 674, 688 (2004). Third, the testimony must meet the new three-pronged reliability test enacted in the amendment to the rule. *Id*., citing to *G.E. v. Joiner*, 522 U.S. 136, 146 (1997).

B. Allowing Expert Testimony Which Was Not Based Upon A Review Of The Case And Which Depended Upon The Psychologist’s Unsupported Theory That Lay Persons Cannot Correctly Judge The Credibility Of Trauma Victims Violates Rule 702

1. The Expert Failed To Apply The Principles And Methods To The Facts Of The Case

The proffered testimony of Dr. Mechanic did not: 1) apply the principles and methods reliably to the facts of the case; 2) support its thesis concerning the ignorance of lay persons with sufficient facts or data; or 3) provide insight beyond the conclusions that jurors could draw from their own experiences. First, Dr. Mechanic admitted she had not applied her research to the facts of the case:

Q. And you have not, and you put in caps not, interviewed any parties involved in this case, correct?

A. I’ve never met them.

Q. So you have no opinion that relates to the facts of this case or the parties to this case, correct?

A. Correct.

Q. And you have no diagnosis of the parties to the case or anything to do with the facts of the case?

A. That’s right.

(Tp. 1317) Neither the witness nor the State offered an explanation on proffer as to why Dr. Mechanic intended to draw no connection between her research and the facts of the case. Her failure to consider the case was especially inexplicable as Dr. Mechanic told the court she had been provided interviews H.B. and Jacob had done with investigators and parts of the case file including police reports. (Tp. 1231) She explained that type of information would typically aid her in explaining how her research applied to the case on trial: “Where I do know the facts of the case, then I’m able to identify relevant issues that my testimony might be helpful in explicating.” (Tp. 1232) As Dr. Mechanc testified that she reviewed statements and police reports, she did know the facts of the case. According to her own testimony, relating these facts to her research would have been helpful to the jury.

The prosecutor argued it was not necessary for a witness admitted as an expert to have reviewed the facts of the case but did not explain why it made this argument when it was aware that Dr. Mechanic had reviewed the facts. The prosecutor did not attempt to explain why it believed 702(a)(3) did not apply. Precedent has held failure to meet the 702(a)(3) requirement is error. In *State v. McPhaul*, 256 N.C. App. 303, 808 S.E.2d 294 (2017), this Court found the expert’s testimony failed to meet the requirements of Rule 702(a)(3):

[the expert] previously testified that during an examination, she compares the pattern type and minutia points of the latent print and known impressions until she is satisfied that there are ‘sufficient characteristics and sequence of the similarities’ to conclude that the prints match. However, [the expert] provided no such detail in testifying how she arrived at their actual conclusions in this case. Without further explanation for her conclusions, [the expert] implicitly asked the jury to accept her expert opinion that the prints matched.

*Id*. at 316, 808 S.E.2d at 305. *McPhaul* emphasized Rule 702’s requirement that “an expert witness must be able to explain not only the abstract methodology underlying the witness’s opinion, but also that the witness reliably applied that methodology to the facts of the case.” *Id*. This Court held the trial court abused its discretion as ‘[the expert] failed to demonstrate that she ‘applied the principles and methods reliably to the facts of the case,’ as required by Rule 702(a)(3)[.]”. *Id*.

In this case adhering to 702(a)(3) was especially critical as Dr. Mechanic’s research included a remarkably broad list of types of trauma without differentiating the effects of each type on victims. Her research included airplane disasters, bank robberies, mass casualties, relatives of homicide victims and victims of domestic and stranger sexual assaults. (Tpp. 1229-1229) The need to adhere to Rule 702(a)(3) in this case was shown by her testimony that trauma victims react differently, and the reaction of an individual cannot be predicted:

Q. Is it fair to say that people react differently to traumatic events?

A. Yes.

Q. Is it fair to say that no one can predict how a person’s going to react to a traumatic event?

A. That’s right. Even that person themselves think they react to a certain way and are surprised.

(Tp. 1263) Given that different people react differently to traumatic events, Dr. Mechanic needed to tie her research to the reactions of H.B. and Jacob. Without any explanation of how her exposition on trauma correlated with the reactions of the victims in this case, the generalized research results are not sufficiently relevant to the case to pass the Rule 702 relevancy test. H.B. and Jacob, according to Dr. Mechanic’s answers on proffer, could have reacted in ways which differed from her research.

Despite this failure to adhere to 702(a)(3), which failure appeared to be intentional since the expert had read the victim’s interview and parts of the file, the court concluded the testimony was reliable and relevant:

One, the evidence, the proffered testimony of Dr. Mechanic, does pass the Rule 702 relevancy test; secondly, Dr. Mechanic is qualified as an expert by knowledge, skill, experience, training, or education; third, that the proffered testimony of Dr. Mechanic does pass rule 702’s three-prong reliability test.

(Tp. 1282). This is incorrect as a matter of law, as her proffered testimony violated Rule 702(a)(3).

2. The Expert Did Not Support Her Assertion That Lay People Cannot Judge The Credibility Of Trauma Victims

While the State introduced a lengthy CV for Dr. Mechanic, it contained no study she identified as supporting the State’s rationale for needing the expert—lay witnesses have no ability to assess the credibility of a trauma victim. Dr. Mechanic’s report asserted, without supporting data: “laypersons misunderstand due to adherence to myths and stereotypes or other misconceptions about how real victims behave or ought to behave in response to victimization.” (Tp. 1255) Asked what study she depended on for this assertion, Dr. Mechanic replied:

A. Well, there’s not one I could pull off the top of my head, but I believe I cited one there, and there’s others that document people’s lack of understanding of the nuances of trauma and victimization.

Q. I’m asking you to tell us about one.

A. I’m not able to cite any one offhand. I would have to look at the proffer.

(Tp. 1256)

In re-direct the prosecutor went over studies in Dr. Mechanic’s CV but did not point to any study which supported the thesis that lay persons are unable to judge the credibility of victims of trauma. Without any support for the thesis that the jurors, as lay persons, needed expert advice on how to evaluate the credibility of a trauma victim, expert testimony on credibility was inadmissible. *State v. Hall*, 98 N.C. App. 1, 11, 390 S.E.2d 169, 174 (1990), rev’d on other grounds, 330 N.C. 808, 412 S.E.2d 883 (1992) also see, *See Burris v. Shumate,* 77 N.C. App. 209, 212, 334 S.E.2d 514, 516 (1985) ("[C]redibility of the testimony is for the jury to decide."); *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784, *cert. denied* , 516 U.S. 996, 133 L. Ed. 2d 438, 116 S. Ct. 533 (1995) (The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone.");  *Henry v. Knudsen*, 203 N.C. App. 510, 518, 692 S.E.23 878, 885 (2010).

3. Dr. Mechanic’s Testimony Invaded The Province Of The Jury

The lack of any support for the thesis that lay persons are incapable of correctly judging the credibility of trauma victims, also runs afoul of the tenet that expert testimony on weighing credibility invades the province of the jury. [I]n North Carolina[,] expert testimony on the credibility of a witness is inadmissible. *State v. Davis*, 106 N.C. App. 596, 602, 418 S.E.2d 263, 267 (1992); see also*, State v. Kim*, 318 N.C. 614, 620-621, 350 S.E.2d 347, 351 (1986). Additionally, expert testimony is inadmissible if the jurors are in as good a position as the expert to determine an issue. “When the jury is in as good a position as the expert to determine an issue, the expert’s testimony is properly excludable because it is not helpful to the jury.” *Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991); see also *State v. Marshall*, 92 N.C. App. 398, 404, 374 S.E.2d 874, 877 (1988). Testimony on inconsistencies in the victim’s versions of events is within the province of the jury. *State v. Martin*, 222 N.C. App. 213, 217, 729 S.E.2d 717, 721 (2012). Dr. Mechanic’s testimony was aimed at convincing the jurors that victims of trauma are prone to given inconsistent statements and improperly encode events in their memories. She was allowed to testify victims give different accounts “from disclosure to disclosure on different occasions.” (Tp. 1301) Dr. Mechanic was allowed to testify to a list of reasons why not just victims of trauma, but people in general give inconsistent statements. (Tpp. 1305-1311) For example, Dr. Mechanic asserted discrepancies over time “[are] not the product of trauma, it’s just that we are not machines, and if we tell the same story over and over again and it’s exactly the same, in the same order with the same words, that’s problematic.” (Tp. 1310) She told the jury memories of traumatic events are impaired because the part of the brain which records memories shuts down during an emergency: “One consequence of the prefrontal cortex shutting down is memories are not often encoded with chronology, linearity, and structure”. (Tpp. 1293-1294) Without tying this to any of the statements Dr. Mechanic read in the police file, her testimony left the jury to assume that the memories of H.B. and Jacob were impacted by this phenomenon and any lapses should not be attributed to the credibility of the witnesses.

C. As The Expert Made No Connection Between The Facts Of This Case And Her Research, Her Testimony Lacked Probative Value

 The trial court concluded as a matter of law that under Rule 403 the probative value was not substantially outweighed by the danger of unfair prejudice. (Tp. 1282) Under Rule 401 evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable. N.C.G.S. § 8C-1, Rule 401. Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403. The proffered testimony of Dr. Mechanic failed to meet the relevancy test as she did not tie her research to any fact in the case.

D. Failing To Require Dr. Mechanic To Testify To What Relationship The Facts Of The Case Had With Her Research Violated Defendant’s Constitutional Rights

 A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The State bears the burden of showing the error was harmless. N.C.G.S. § 15A-1443(b). Admission of Dr. Mechanic’s testimony violated constitutional guarantees of confrontation, due process and a fair trial. U.S. Const. Amends. V, VI and XIV; N.C. Const. Art. I, Secs. 19, 23 and 35. Because the court had not limited the jury’s use of her testimony, the jurors were allowed to assume H.B. and Jacob suffered from the worst effects in the range testified to by Dr. Mechanic. Dr. Mechanic’s testimony included alarmingly serious consequences from trauma, including total loss of ability to think and remember details:

So one of the important transitions that happens is that the prefrontal cortex . . . it’s the part of our brain that helps us direct our attention, resist impulses, engage in contemplation. That part of our brain, which is so helpful to us in our everyday lives, like right now, listening and paying attention, that part of our brain stops functioning during perceptions of trauma.

So memories are impacted . . . . one consequence of the prefrontal cortex shutting down is memories are not often encoded with chronology, linearity, and structure, so crime victims, trauma victims, often have a very difficult time telling you the order in which things have happened. . . . it’s like the recorder was shutoff when that information was being encoded.

(Tpp. 1291, 1292) Without any testimony as to whether this happened to H.B. or Jacob, the jurors were free to deduce any inconsistency or gap in the testimony could be attributed to their brains shutting off. The failure to connect the research to the facts of the case violated due process.

Defendant could not confront Dr. Mechanic as to the relationship between her research and the facts of the case. In his cross-examination of H.B. and Jacob, the defense attorney spent a considerable amount of time highlighting the inconsistencies and gaps in the testimony and statements. (Tpp. 883-942; 1042-1068) As the defense counsel could not confront Dr. Mechanic as to whether either victim exhibited any of the generalized traits she testified to, Mr. Lee’s defense—that incriminating facts testified to at trial were not disclosed earlier—was nullified. For example, on direct examination H.B. testified the assailant ejaculated into her mouth because he did not want to leave traces of his DNA. (Tp. 812) On cross-examination, defense counsel pointed out that she had been interviewed several times and never mentioned DNA before the trial testimony. (Tp. 883) Both victims identified another man in the photo line-ups, even though a photo of Mr. Lee was included. The jurors could attribute the misidentifications to the failure to encode memories discussed by Dr. Mechanic, even though other trial evidence failed to support this connection to her studies. For example, both H.B. and Jacob correctly chose Ms. Sullivan in the photo line-up. (Tpp. 863, 2095, 2088) H.B.’s description of her tattoos was used to identify Ms, Sullivan (Tp. 2279) H.B. remembered the route to Ms. Sullivan’s drop-off point accurately enough to drive a detective to the spot, which turned out to be a crack house. (Tp. 2275) But because Dr. Mechanic had not related the facts to her research, Defendant could not confront her with the discrepancies.

The State cannot show beyond a reasonable doubt that admitting expert testimony on memory deficits and statement inconsistencies without any connection to the facts of the case was harmless error. Even under defendant’s burden for non-constitutional error, there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. N.C.G.S. § 15A-1443(a). Defendant respectfully requests this Court find reversible error and order a new trial.

**II. THE COURT ERRED WHEN IT DENIED DEFENDANT’S MOTION FOR A MISTRIAL AFTER THE PROSECUTOR ELICITED TESTIMONY THAT POLICE TAGGED TITUS LEE AS HAVING VIOLENT TENDENCIES AFTER DEFENDANT’S OBJECTIONS HAD BEEN SUSTAINED**

Pre-trial Defendant filed a motion to exclude testimony that he was a validated gang member. (Rpp. 34-35) At the beginning of the trial, the State informed the court it intended to call Sgt. Odham to testify to gang affiliation. (Tp. 733) After a hearing, the court ruled testimony from H.B. and Jacob concerning what the intruder told them about his gang affiliation was admissible, but reserved ruling on Sgt. Odham. (Tpp. 766-767) Before Sgt. Odham testified, the court heard from the parties and ruled evidence of Defendant’s gang affiliation was admissible because the perpetrator told H.B. and Jacob that he was in a gang. (Tpp. 2394, 2208, 2302-2303) During Sgt. Odham’s testimony, the State asked him to explain an alert in a background check on Mr. Lee. (Tp. 2330) Sgt. Odham testified the alert was for violent tendencies. Defense counsel objected. The objection was sustained. The court instructed the jurors to disregard the testimony, but the prosecutor asked similar questions two more times, eliciting the same inadmissible response. (Tp. 2331) Defendant moved for a mistrial. (Tp. 2332) The court agreed testimony concerning alerts to violent tendencies was improper. (Tp. 2335) The jurors were brought back in and asked if they could disregard the testimony. All jurors raised their hands to indicate they could. (Tp. 2336) The court denied the motion for a mistrial. Defendant’s objection and exception were noted. (Tpp. 2339-2340) Denying Defendant’s motion for a mistrial after the sergeant testified to violent tendencies was an abuse of discretion. As Defendant had no record of violence that the State could present to the jury and as a tendency to violence was evidenced by the perpetrator, failing to grant a mistrial violated Defendant’s constitutional rights to due process and a fair trial. U.S. Const. Amends. V and XIV; N.C. Const. Art. I, Secs. 19 and 35. A new trial is required.

standard of review

 “We review the trial court’s denial of Defendant’s motion for a mistrial for abuse of discretion.” *State v. Sistler*, 218 N.C. App. 60, 70, 720 S.E.2d 809, 816 (2012).

 **discussion**

A. Testimony That The Police File Tagged Defendant For Violent Tendencies Could Not Be Disregarded By The Jurors

 “A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant’s case and make it impossible for the defendant to receive a fair and impartial verdict.” *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990); N.C.G.S. § 15A-1061. When a court acknowledges evidentiary error “and instructs the jury to disregard it, the refusal to grant a mistrial based on the introduction of the evidence will ordinarily not constitute an abuse of discretion.” *State v. Barts*, 316 N.C. 666, 684, 343 S.E.2d 828, 849 (1986). “In some cases, however, the cautionary admonitions of the trial judge are ineffective to erase from the minds of a jury the effects of prejudicial errors.” *State v. Hines*, 131 N.C. App. 457, 463, 508 S.E.2d 310, 314 (1998). “Whether the erroneous admission of . . .evidence . . . should be deemed cured and held nonprejudicial . . . depend[s] largely upon the nature of the evidence and the circumstances of the particular case.” *State v. Aldridge*, 254 N.C. 297, 300, 118 S.E.2d 766, 768 (1961).

 The evident connection between the testimony of H.B. and Jacob as to the violence they endured and the sergeant’s assertion that Defendant had violent tendencies shows that under *Aldridge* the nature of the evidence and the circumstances of the case rendered the erroneous admission incurable. The jurors could not erase the accusation from their minds. The prosecutor asked Sgt. Odham to tell the jurors what he had found in Defendant’s background file:

A. Well, the first thing I noticed was an alert.

Q. What does that mean?

A. Well, it’s built into the system. If someone has violent tendencies . . .

MR. HOSFORD: Objection. Move to strike.

THE COURT: Sustained as to the status of an alert. Ladies and gentlemen, you will disregard that testimony.

 Next question.

BY MS. JORDAN:

Q. Sir, when you see an alert, is it information for law enforcement?

A. Yes.

Q. And what was the alert regarding this defendant Titus Lee?

MR. HOSFORD: Objection.

THE COURT: Sustained.

BY MS. JORDAN:

Q. What did you find?

A. I found that he was a violent . . .

MR. HOSFORD: Objection. Move to strike.

(Tpp. 2330-2331) Out of the presence of the jury, defense counsel argued the prosecutor and the sergeant ignored the court’s rulings and continued to talk about Mr. Lee being violent. Counsel asserted it was intentional and prejudicial and moved for a mistrial. (Tp. 2332) Counsel pointed out the questions and answers violated the court’s ruling that while gang affiliation could come in, character evidence about the defendant had been ruled inadmissible by the court. (Tp. 2333) The court asked the court reporter to let him read the question and answer sequence at issue. After reading the passage, the court ruled: “the investigation of violent or violence tendencies is improper, and so in that regard, I am going to make inquiry of the jury.” (Tp. 2335) The court addressed the jurors as follows:

 Ladies and gentlemen: In my discretion I have stricken testimony concerning the status and/or interpretation of an alert. My question to each of you, will you disregard and not consider any testimony regarding the status or interpretation of a law enforcement alert?

 If you will disregard and not consider, please signify by raising your hand at this time.

(Tp. 2336) The jurors all raised their hands. After hearing further argument on the motion for a mistrial, the court ruled the jurors understood the court’s question and answered “in an informed response.” The court concluded: “in the exercise of discretion, that the questions and partial responses in light of the Court’s instructions and inquiry do not constitute substantial and irreparable prejudice to defendant’s case.” (Tp. 2340)

B. Failure To Grant The Motion For A Mistrial Substantially And Irreparably Prejudiced The Defendant’s Case

 In *Aldridge* our Supreme Court ordered a new trial in a case in which incompetent evidence came before the jury but was withdrawn by the trial court. The case involved the question of whether the alleged father of a child born out of wedlock was guilty of failure to pay child support. The incompetent evidence was the prosecutrix’s testimony that she had not “had access” to her husband in two years. The court instructed the jury to “disregard” the prosecutrix’s testimony “about her non-access to her husband.” 254 N.C. at 298, 118 S.E.2d at 767. Our Supreme Court found the incompetently introduced evidence to be prejudicial error, even though the trial court had instructed the jurors to disregard the testimony: “While the State offered the testimony of other witnesses relevant to non-access, obviously such testimony had much less probative force than the testimony of the prosecutrix. In our opinion, notwithstanding the court’s instruction, it was virtually impossible for the jurors to erase from their minds the impact of said incompetent testimony of the prosecutrix.” *Id*. at 299, 118 S.E.2d at 767; also see, *State v. Hines*, 131 N.C.App. 457, 508 S.E.2d 310 (1998) (inadmissible evidence of prior drug-related convictions); *State v. Foster*, 27 N.C. App. 531, 219 S.E.2d 535 (1975) (witness testified to nature of defendant’s prior conviction). What these cases have in common is the centrality of the incompetent evidence to the jury’s decision.

 Sgt. Odham’s revelation that the police department had a file on Titus Lee and that the file alerted to violent tendencies was central to the jury’s decision in this case. Identification of Mr. Lee as the perpetrator was the issue before the jury. Despite exhaustive efforts, the crime scene investigators were unable to locate any forensic evidence tying Mr. Lee to the scene. The trial evidence connecting Mr. Lee to the crime consisted of his possession of stolen items, social media posts, phone downloads and his injured finger. Mr. Lee testified at trial giving the jurors a choice between the State’s case and his explanations. He told the jurors he had found the items in a trash bag in the bin located in the parking lot of the apartment complex. (Tp.2844) The media posts and phone texts were open to interpretation. Once Mr. Lee learned the police had appeared at his mother’s apartment, his subsequent behavior—leaving town and discussing getting a new identity—could be attributed to the fear of arrest even an innocent person might feel. Both H.B. and Jacob had chosen a different man from the photo line-ups, even though Mr. Lee’s photo was included in the line-up. H.B. admitted she identified Mr. Lee as the perpetrator only after she had seen video of his arrest. (Tp. 942) The violence of the attack stands out in the testimony of the victim. Informing the jury that the police flagged Defendant for violent tendencies was the only evidence the State had that his character might fit the character of the perpetrator as Mr. Lee’s criminal record did not include crimes of violence. (Tp. 2889) As in *Aldridge*, it would have been virtually impossible for the jurors to erase Sgt. Odham’s inadmissible testimony from their minds. The prejudice engendered by telling the jurors Mr. Lee had been flagged for violent tendencies substantially and irreparably prejudiced his case, making it impossible to receive a fair and impartial verdict in violation of his constitutional rights. U.S. Const. Amends. V and XIV; N.C. Const. Art. I, Secs. 19 and 35. Defendant respectfully requests his convictions be vacated and he be granted a new trial.

CONCLUSION

For the reasons set forth above, Defendant respectfully contends that this Court should reverse his convictions.

 Respectfully submitted this the 25th day of January 2022.

Electronic Filing

/s/ Marilyn G. Ozer

Attorney for Appellant

211 North Columbia Street

Chapel Hill, NC 27514

(919) 967-8555

State Bar #: 18360

redwood@nc.rr.com

**CERTIFICATE OF FILING AND SERVICE**

 I hereby certify that the original Defendant-Appellant’s Brief has been filed electronically pursuant to Rule 26.

 I further hereby certify that a copy of the above and foregoing Defendant-Appellant’s Brief has been duly served upon Sherri Horner Lawrence, Special Attorney General, by email to slawrence@ncdoj.gov

 This the 25th day of January 2022.

Electronic Filing

Marilyn G. Ozer

Attorney at Law

**CERTIFICATE OF COMPLIANCE**

 Undersigned counsel certifies that this Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it was prepared using Microsoft Word, Century Schoolbook, 13-point type. The word count, including footnotes and citations, is less than 8750 words, as indicated by Word, the program used to prepare the brief.

 This the 25th day of January 2022.

Electronic Filing

Marilyn G. Ozer

Attorney at Law

1. Indigent Defense Services policies require the substitution of initials or pseudonyms for the names of all victims of sexual crimes, including adult victims. In accordance with this rule, the initials H.B. will be used in this brief to identify the victim of the rape and sexual offense crimes. [↑](#footnote-ref-1)
2. A physician’s assistant from the emergency room at New Hanover ER testified that Mr. Lee came to the emergency room at 11:44 a.m. on the morning of November 22 with a right index finger laceration. Stitches were used to close the wound. (Tp. 1687-88, 1690) [↑](#footnote-ref-2)