IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-411

Filed: 6 December 2016

Pender County, Nos. 14CRS50033–34, 14CRS52008, 15CRS884–86

STATE OF NORTH CAROLINA

v.

ROY LEE STUBBS

Appeal by defendant from judgments entered 9 December 2015 by Judge Jay D. Hockenbury in Pender County Superior Court. Heard in the Court of Appeals 20 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant.

BRYANT, Judge.

Where the trial court properly admitted photographic evidence and testimony of prior sexual misconduct pursuant to Rules 404(b) and 403, there was no error, and where the trial court's technical statutory violation did not prejudice defendant, the trial court committed no prejudicial error.

Defendant Roy Lee Stubbs was indicted, tried by jury, and found guilty of the following: two counts of felonious secret peeping, felonious second-degree sexual

exploitation of a minor, and three counts of sex offense with a child by an adult. The evidence presented at trial tended to show that the child victim, Lila,[1] was born on 11 July 2001. Lila lived with her mother in Carteret County, but often, on holidays and weekends, she visited her grandmother who lived in Pender County with her boyfriend, defendant. Over the years beginning before she was ten years old, defendant started regularly molesting Lila. Even though, at first, Lila slept in her grandmother's room and defendant slept in the living room, most nights defendant came in the room and would massage Lila's back, put his hands in her pants, and rub her vaginal area. Then, he started inserting his fingers inside her vagina "more times than [she could] count." In fact, when she was ten or eleven years old and got her own room at her grandmother's house, defendant molested her more frequently.

One day Lila and defendant were sitting in a car and defendant said, "Do you ever hear me come into your room at night? . . . You don't worry, I'm not going to hurt you. And I don't know why you squirm at night because I'm not going to do anything." Defendant also told her he "would spend time with [his] daughter just like [he] did with [Lila] and would rub her back and do what [he did] with [Lila]."

On 12 September 2013, Lila was taking a bath when she saw what resembled a phone and a flash. Lila went to her grandmother and said, "I need to talk to you in private[,]" at which point she told her that defendant "had been coming into [her]

[1] A pseudonym will be used in place of the victim's name as the child was a minor when the trial division proceedings occurred. N.C. R. App. P. 4(e) (2015).

room at night and touching [her], penetrating [her] with his fingers." She also told her grandmother about the "recording device and a flash" she saw while in the bathroom. Lila slept in her grandmother's room that night.

The next day after falling and hurting her arm at school, Lila disclosed defendant's sexual abuse to Detective Leatherwood at the Pender County Sheriff's Department and to a therapist at the Teddy Bear Center in Greenville, North Carolina. Shortly thereafter, defendant was charged with the aforementioned sex offenses and upon surrendering said to Detective Leatherwood, "I guess it's time to face the music."

During the course of the investigation, Detective Leatherwood received two cell phones that had belonged to defendant. Photos of Lila's crotch were found on one phone and later admitted at trial as State's Exhibits 7 and 8. Detective Leatherwood also received a Kindle that had belonged to defendant. The Kindle contained a number of photos, three of which were identified at a pretrial hearing as State's Exhibits 9, 19, and 15, and later admitted at trial as State's Exhibits 39A, 39B, and 39C.

Prior to trial, defendant wrote a letter to Lila's grandmother accusing her of having had sexual relations with her brother, with her friend Nancy, with Nancy and Lila together, and with Lila. A redacted version of the letter was admitted at trial, and Lila's grandmother denied all the accusations in the letter.

The case came on for trial at the 30 November 2015 Criminal Session of Pender County Superior Court, the Honorable Jay D. Hockenbury, Judge presiding. The State moved to join all offenses for trial, and the trial court allowed the motion. At the conclusion of jury selection, the trial court conducted an evidentiary hearing regarding the admission into evidence of certain photographs and ruled that it would admit three photographs (State's Exhibits 39A, 39B, and 39C) to show motive or intent as to first-degree sex offense.

In addition to testimony and other evidence regarding defendant's abuse of Lila, the State introduced evidence of defendant's abuse of another child, Sally.[2] Sally testified she knew defendant, who had a relationship with her mother and lived with them for several years when Sally was younger. Starting when Sally was about eight years old, defendant would come into her bedroom at night and touch and rub her breasts and vagina by putting his hands underneath her clothes. This occurred about two or three times a week while the rest of the family slept in other rooms. When Sally was eleven years old, defendant began to masturbate after fondling her breasts and vagina. The abuse continued in the same fashion until Sally turned fourteen, at which time defendant "penetrate[d] [her] and took [her] virginity." Sally told her grandmother that defendant raped her, but did not tell anyone else until 2013 when she saw defendant on television and called the Pender County Sheriff's Department.

[2] Though not a juvenile at the time of trial, a pseudonym will be used to designate this woman, who testified as the State's 404(b) witness.

After the close of all the evidence (defendant did not present any evidence), the jury, during its deliberations, requested and received State's Exhibits 7 and 8, the two photographs of Lila's crotch. The trial court directed the bailiff to hand the requested exhibits to the jury. There was no objection. Thereafter, the jury returned verdicts of guilty on all charges. The trial court sentenced defendant to a total active sentence of imprisonment of 600 months minimum and 789 months maximum. Defendant gave notice of appeal in open court.

On appeal, defendant contends the trial court erred when it (I) admitted as 404(b) evidence (1) State's Exhibits 39A–C and (2) Sally's testimony; and (II) failed to have the jury conducted to the courtroom to respond to its request for exhibits.

I

Defendant argues the trial court erred when, over objection, it admitted State's Exhibits 39A–C and the testimony of Sally pursuant to Rule 404(b). We disagree. Defendant also challenges the admission of the exhibits and testimony as an abuse of discretion under Rule 403.[3] Again, we disagree.

Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or

[3] Because defendant's legal challenge to the exhibits and Sally's testimony are virtually the same, our standard of review for purposes of Rule 404(b) and Rule 403 is the same as to each.

disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). "To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted). "In other words, 'the ultimate test of admissibility is whether the incidents are sufficiently similar to those in the case at bar and not so remote in time as to be more prejudicial than probative under . . . Rule 403[.]' " *State v. Mangum*, ___ N.C. App. ___, ___, 773 S.E.2d 555, 562 (2015) (alterations in original) (quoting *State v. Love*, 152 N.C. App. 608, 612, 568 S.E.2d 320, 323 (2002)). North Carolina courts "ha[ve] been markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b)." *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987) (citation omitted).

Once it is determined that "Rule 404(b) evidence [is] sufficiently similar . . . [this Court] review[s] the trial court's 403 ruling for abuse of discretion." *Mangum*, ___ N.C. App. at ___, 773 S.E.2d at 564. "Evidence is not excluded under . . . Rule [403] simply because it is probative of the offering party's case and is prejudicial to the opposing party's case. Rather, the evidence must be *unfairly* prejudicial." *State v. Gabriel*, 207 N.C. App. 440, 452, 700 S.E.2d 127, 134 (2010) (citations omitted). Furthermore, where "a review of the record reveals that the trial court was aware of

the potential danger of unfair prejudice to defendant and was careful to give . . . proper limiting instruction[s] to the jury[,]" *Mangum*, ___ N.C. App. at ___, 773 S.E.2d at 564 (quoting *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998)), and where there are "significant points of commonality between the Rule 404(b) evidence and the offense charged," *id.* (citations omitted), this Court will not discern an abuse of discretion in the trial court's Rule 403 determination. *Id.*

1. State's Exhibits 39A–C

Here, prior to the admission of the photographic evidence, the trial court conducted a lengthy hearing on the admissibility of the photographs, Exhibits 39A–C, pursuant to Rule 404(b) and Rule 403. Outside the presence of the jury, the trial court heard from four witnesses and heard arguments from counsel. In its order, the trial court made the following relevant findings of fact and conclusions of law:

> 13. On September 2nd, 2014, [Lila's grandmother's] friend, . . . while cleaning up a trash pile in the back of [the grandmother's] yard, found a Kindle . . . . The Kindle was bought by [the grandmother] and given to . . . Defendant on or around July 2013. He used it every day and no one else used it. . . .
>
> 14. . . . After the defendant's arrest on September 27, 2013, [Lila's grandmother] tried to find the Kindle to no avail, until it was discovered by [the grandmother's friend] on September 2nd, 2014, in [the grandmother's] yard inside a pile of rubbish which he was cleaning up. The Kindle had 3–4 plastic grocery bags around it. Other than the bags being removed and dirt cleared away . . . , the Kindle was not touched or opened at that time.

. . .

16. [An agent] extracted 14 photo images [from the Kindle] and printed them out as State's Exhibit Numbers 6 through Number 19 . . . .[4]

. . .

19. State's Exhibit Number [39A] is a photographic image of a juvenile female having sexual intercourse with an adult male.

. . .

25. . . . State's Exhibit [39C] is a photographic image of a juvenile female having sexual intercourse with an adult male.

. . .

29. State's Exhibit [39B] is a photographic image of two juvenile females engaged in oral sexual activity with two adult females.

. . .

42. In August 2015, [Lila's grandmother] received a letter . . . from the defendant that . . . reads: "I . . . seen and heard what you and Nancy were doing with [Lila] . . . . You, Nancy, and [Lila] was in bed together. . . . Then you made [Lila] lay on her back and Nancy started licking and

[4] All but one image had been deleted from the Kindle when it was found. However, as noted by Detective Leatherwood, forensic technology software enables law enforcement to extract photographic images that have been previously deleted:

> When files are deleted using the Windows operating system, the contents of the files are not actually erased. In layman's terms, the operating system removes the location identifiers notifying the operating system that the area where the file was previously located is now available for use. The data maintained in the actual file, is possibly recoverable.

playing with [Lila's] privates. She started crying and telling you and Nancy to stop. You told her to stop and get still. She said she didn't want Nancy to put her finger in her."

43. This language is similar to the sexual activity in State's Exhibit [39B] and is similar to the sex offense charges against the defendant.

. . .

BASED ON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW:

. . .

4. The sexual acts portrayed in . . . State's Exhibit [39C] are sexual intercourse, penetration of the vagina by adult male penis into a young juvenile female vagina.

5. There are similarities and unusual facts present with these acts and the acts perpetrated on [Lila]:

A. The acts perpetrated on the victim were done when the victim was between the ages of 9 through 12 when she was a young juvenile.
B. The defendant is an adult male and between the ages of 43 and 46 at the time the victim had her vagina penetrated by the defendant's fingers.
C. There is a temporal proximity in that the images were discovered on the defendant's Kindle which disappeared shortly after the victim reported the sexual abuse . . . . The Kindle was found approximately one year later under a trash pile with all but one image deleted. . . .

6. The sexual act portrayed in the image in State's Exhibit [39B] is strikingly similar to the sexual activity written by the defendant on page 4 of his letter to [Lila's grandmother] . . . .

> 9. . . . The sexual acts portrayed in the image of State's [Exhibit 39A] and State's [Exhibit 39C] are sexual intercourse penetration of the vagina by an adult male penis into a young juvenile female vagina. . . .
>
> 10. In the discretion of the court considering the balancing test under Rule 403, the strong probative value of the 404(b) evidence contained in State's Exhibits [39A, 39C, and 39B], is not substantially outweighed by the danger of unfair prejudice to the defendant. This evidence does not unfairly prejudice the defendant.

The trial court ordered that the State's proffered 404(b) evidence in State's Exhibits 39A–C was admissible to show motive and intent. The trial court found the sexual acts depicted in defendant's letter to Lila's grandmother "strikingly similar" to the acts depicted in Exhibit 39B and that there were "similarities and unusual facts present" with Exhibits 39A and 39C and the acts perpetrated on Lila. Later, the trial court gave the jury a limiting instruction with regard to these exhibits, both at the time the evidence was admitted and again during the jury charge. "The law presumes that the jury heeds limiting instructions that the trial [court] gives regarding the evidence." *Mangum*, ___ N.C. App. at ___, 773 S.E.2d at 564 (quoting *State v. Shields*, 61 N.C. App. 462, 464, 300 S.E.2d 884, 886 (1983)).

"[E]vidence of possession of pornography is generally admissible if it provides relevant 'proof of motive, opportunity, [or] intent . . . .' " *State v. Brown*, 211 N.C. App. 427, 431, 710 S.E.2d 265, 268 (2011) (quoting N.C. Gen. Stat. § 8C-1, Rule 404(b))

(holding evidence of the defendant's possession of incestuous pornography admissible to show the defendant's motive, intent, and purpose).

In *Brown*, the defendant was convicted of indecent liberties with a child and first-degree rape. *Id.* at 429, 710 S.E.2d at 268. On appeal, the defendant argued the trial court erroneously admitted into evidence a book of incestuous pornography because there was no evidence he ever showed the book to the victim, his daughter, and as such, it should have been excluded under Rule 404(b). *Id.* at 430, 710 S.E.2d at 268. However, this Court reasoned that because "the possession was of an uncommon and specific type of pornography" (incestuous), among other things, the "trial court correctly admitted evidence of [the defendant's] possession of [the incestuous pornography] as relevant evidence showing both [the defendant's] motive and intent in committing the acts underlying the charged offenses, two proper purposes for such evidence under Rule 404(b)." *Id.* at 432, 710 S.E.2d 269–70. This Court in *Brown* held as follows:

> [E]vidence of a defendant's incestuous pornography collection sheds light on that defendant's desire to engage in an incestuous relationship, and that desire serves as evidence of that defendant's motive to commit the underlying act—engaging in sexual intercourse with the victim/defendant's child—constituting the offense charged.
> . . .
>
> Where the pornography possessed consists solely of incestuous encounters, there arises a strong inference that the possessor is sexually excited by at least the idea of, if not the act of, incestuous sexual relations. Accordingly, in

> this case, the fact of [the defendant's] possession of incestuous pornography reasonably supports the inference that [the defendant] was sexually desirous of an incestuous relationship.

Id. at 433–34, 710 S.E.2d at 270–71. *Cf. State v. Bush*, 164 N.C. App. 254, 261, 595 S.E.2d 715, 719 (2004) (holding that evidence of the defendant's possession of *general pornography* was "tenuously related to the crime charged" and was inadmissible to prove any proper purposes under Rule 404(b)); *State v. Smith*, 152 N.C. App. 514, 522–23, 568 S.E.2d 289, 294–95 (2002) (holding that evidence of the defendant's "mere possession" of *general pornography* in his home was irrelevant of his intent to engage in a sexual relationship with his twelve-year-old stepdaughter).

In the instant case, the pornography, similar to the pornography deemed admissible in *Brown*, was also of an "uncommon and specific type"; the exhibits were exclusively photographs depicting sexual encounters between adults and juveniles. There was also no evidence that defendant ever showed Lila the pornographic images at issue. Thus, evidence of defendant's collection of a "specific type" of pornography (photographs depicting sexual encounters between adults and juveniles) "sheds light" on defendant's desire to engage in such a relationship, and that desire serves as evidence of defendant's motive to commit the underlying act—engaging in sexual intercourse with a juvenile. *See Brown*, 211 N.C. App. at 432, 434, 710 S.E.2d at 269, 270.

Thus, "[g]iven the significant points of commonality between the Rule 404(b) evidence and the offense charged and the trial court's conscientious handling of the process," *see Mangum*, ___ N.C. App. at ___, 773 S.E.2d at 564, including an order detailing the reasons for the photographs' admissibility, the trial court properly admitted State's Exhibits 39A–C pursuant to Rule 404(b), and did not abuse its discretion in determining that the danger of unfair prejudice did not substantially outweigh the exhibits' probative value pursuant to Rule 403. Defendant's argument is overruled.

2. Sally's Testimony

Defendant argues the trial court erred when it admitted Sally's testimony for the purpose of showing identity, modus operandi, intent, or a plan, scheme, system, or design to commit the charged offenses. Specifically, defendant argues that the conduct Sally described was not "so connected or contemporaneous" with the conduct Lila accused him of "as to form a continuing action," with respect to intent. We disagree.

"Rule 404(b) provides that evidence of other crimes, wrongs, or acts may be admissible 'for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.' " *State v. Carter*, 338 N.C. 569, 588, 451 S.E.2d 157, 167 (1994) (quoting N.C.G.S. § 8C-1, Rule 404(b)). Other crimes evidence "may be offered on the issue of

defendant's identity as the perpetrator when the *modus operandi* of that crime and the crime for which defendant is being tried are similar enough to make it likely that the same person committed both crimes." *Id.* (citation omitted).

To show similarity, some unusual facts must be present, although the two incidents need not be "unique and bizarre." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991) (quoting *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988)). Remoteness in time tends to affect the weight of the evidence, rather than its admissibility. *Id.* at 307, 406 S.E.2d at 893. Further, a lapse in time when the defendant did not have access to the victim could also weigh in favor of the inclusion of evidence of prior sexual abuse. *State v. Frazier*, 121 N.C. App. 1, 11, 464 S.E.2d 490, 496 (1995) (citations omitted).

Here, the trial court made the following relevant conclusions of law (in which it incorporated its findings of fact) to support its Rule 404(b) ruling regarding the admissibility of Sally's testimony:

> 12. After looking at several factors as listed in *State v. Beckelheimer*, [366 N.C. 127, 726 S.E.2d 156 (2012),] such as age ranges of both [Sally] and [Lila], the location of the occurrences of [Sally] and [Lila], and how the occurrences were brought about, the defendant's actions were sufficiently similar to show the defendant's modus operandi, intent, identity, continuous pattern, and plan, scheme, system or design.
>
> 13. The defendant was in a domestic relationship with both [Sally's] and [Lila's] family member, specifically mother and grandmother, respectively.

14. The defendant at one time or another slept in the same house with both [Sally] and [Lila].

15. The defendant touched both [Sally] and [Lila's] vagina beginning when they were both prepubescent girls of 8 and 9 years old, respectively and lasting until at least 3 years. Both cases progressed over a period of years from rubbing both victims' breasts and vagina to ultimately inserting fingers into their vaginas. Only when [Sally] was 14 years old did the defendant progress to vaginal intercourse. Due to the defendant's incarceration he did not have the opportunity to progress his actions with [Lila] after she was 12 years old.

16. The defendant would touch both victims at night when they were asleep in their beds. He would stay in the victims' rooms performing the acts for extended periods of time from 30 minutes to hours.

17. The defendant's actions occurred in a secretive fashion as evidenced by the fact that he waited for everyone to go to bed before he entered their bedrooms and he told both victims not to tell anyone about what happened.

18. The court finds that [Sally's] incidents lasted from approximately 1994 to 2000 and [Lila's] approximately began in [2010] and ended in 2013. Therefore, the timeframe between the incidents was approximately 10 years.

19. Due to the strikingly similar acts and circumstances against both victims and especially the ages of the victims when the incidents began, the court finds that the 10 year gap in time is not too remote and temporal proximity is reasonable. In addition, the court finds that remoteness in time is not so significant as to render the prior acts irrelevant as evidence of modus operandi, thus goes to weight of evidence and not to admissibility.

> 20. Therefore, the court concludes as a matter of law that the Rule 404(b) testimony of [Sally] is sufficiently similar and not too remote to show modus operandi, intent, identity, continuous pattern, and plan, scheme, system or design in [Lila's] case and therefore should be admitted as evidence.

The order allowing Sally's testimony into evidence considered the similarities and differences between the two patterns of abuse and concluded as a matter of law that the acts were "strikingly similar" and "that remoteness in time is not so significant as to render the prior acts irrelevant as evidence of modus operandi[.]" Therefore, Sally's testimony was properly admitted under Rule 404(b).

With regard to admissibility under Rule 403, the trial court did not specifically cite to this rule in its order, but we believe its citation to *State v. Beckelheimer* is sufficient to presume the trial court weighed the evidence's probative value against any unfair prejudice to defendant. In reviewing the trial court's Rule 403 determination in *Beckelheimer*, the N.C. Supreme Court considered that the trial court (1) first heard the testimony of the 404(b) witness outside the presence of the jury and then heard arguments from the attorneys on its admissibility, 366 N.C. at 133, 726 S.E.2d at 160–61; (2) ruled on admissibility, stating "the probative value for the purposes offered exceeds . . . any prejudicial effect[,]" *id.* at 133, 726 S.E.2d at 161; (3) "excluded testimony about one incident that did not share sufficient similarity to the charged actions, thus indicating his careful consideration of the evidence[,]" *id.*; and (4) "gave an appropriate limiting instruction." *Id.* The Supreme

Court held that "[g]iven the similarities between the accounts of the victim and the 404(b) witness and the trial judge's careful handling of the process, we conclude that it was not an abuse of discretion for the trial court to determine that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence." *Id.*

In the instant case, the trial court did everything the trial court did in *Beckelheimer*, save for making an explicit Rule 403 ruling. Here, the trial court first heard Sally's testimony outside the presence of the jury and heard arguments from both the State and defendant. The trial court also excluded the testimony of another proffered 404(b) witness, "indicating his careful consideration of the evidence[,]" *id.*, and gave a limiting instruction before Sally's testimony at trial and before the jury began its deliberations. Accordingly, the trial court did not abuse its discretion pursuant to Rule 403. Defendant's argument is overruled.

II

Lastly, defendant argues the trial court erred as a matter of law when it failed to conduct the jury to the courtroom pursuant to N.C. Gen. Stat. § 15A-1233(a) in order to respond to its request for State's Exhibits 7 and 8. Defendant contends this error prejudiced him because the jury was not instructed as to the legally permissible use of State's Exhibits 7 and 8, and he is therefore entitled to a new trial. We disagree.

Despite defense counsel's failure to object to this error at trial, this question is nevertheless preserved for this Court's review. *State v. Nobles*, 350 N.C. 483, 506, 515 S.E.2d 885, 899 (1999) ("Although he did not object to the failure of the trial court to conduct the jury to the courtroom, defendant is not precluded from raising this issue on appeal." (citation omitted)). However, the N.C. Supreme Court has held that this question is preserved, notwithstanding defendant's failure to object at trial, when "a defendant is *prejudiced thereby*[.]" *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (emphasis added).

"If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom." N.C. Gen. Stat. § 15A-1233(a) (2015); *see Ashe*, 314 N.C. at 36, 331 S.E.2d at 657 (holding that N.C.G.S. § 15A-1233 "*requires* all jurors to be returned to the courtroom when the jury 'requests a review of certain testimony or other evidence' " (emphasis added)). Thus, the trial court "technically violated the N.C. Gen. Stat. § 15A-1233 mandate that 'for deliberation requests [for] a review of certain testimony or other evidence, the jurors must be conducted to the courtroom.' " *State v. Ross*, 207 N.C. App. 379, 397, 700 S.E.2d 412, 423 (2010) (alteration in original) (quoting *Ashe*, 314 N.C. at 36, 331 S.E.2d at 657). However, where the technical violation of N.C. Gen. Stat. § 15A-1233 does not prejudice defendant, this Court will not find such a violation to be reversible error. *See Ashe*, 314 N.C. at 39, 331 S.E.2d at 659.

In *Ross*, the jury requested to review an exhibit, a picture, during its deliberations. 207 N.C. App. at 395, 700 S.E.2d at 423. The trial court sent the exhibit back to the jury room and instructed the bailiff to let the jurors know the court would need the exhibit returned. *Id.* Because the trial court did not ask the jury foreman to relay a message "regarding matters material to the case," this Court "[could not] discern how the bailiff's delivery of the exhibit to the jury, with the instruction that it would need to be returned . . . could be detrimental to [the] defendant's case . . . ." and held the error was not prejudicial to the defendant. *Id.* at 395–96, 700 S.E.2d at 423 (citation omitted).

Here, during its deliberations, the jury sent a note through the bailiff to the trial court requesting review of State's Exhibits 7 and 8, both of which were photographs. The trial court told counsel for defendant and the State that the court could either send the photos back to the jury room with the attorneys' consent or bring the jury into the courtroom and have the bailiff show them the photos in the courtroom. Defendant's counsel made no objection and consented to allowing Exhibits 7 and 8 to be sent back to the jury room without bringing the jury into the courtroom. Given that defendant's attorney consented to this practice, this vitiates defendant's claim of prejudicial error. Defendant's argument is overruled.

Accordingly, where the trial court properly admitted State's Exhibits 39A–C and Sally's testimony pursuant to Rules 404(b) and 403, and the trial court's technical

statutory violation did not prejudice defendant, we hold the trial court committed no prejudicial error.

NO PREJUDICIAL ERROR.

Judges STEPHENS and DILLON concur.

Report per Rule 30(e).