

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1199

Filed: 20 November 2018

Forsyth County, Nos. 15 CRS 54961, 54962

STATE OF NORTH CAROLINA

v.

ERNIE DONNELL PINNIX, II

Appeal by defendant from judgment entered 27 January 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 4 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Margaret A. Force, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

BRYANT, Judge.

Where witness testimony was not relevant or otherwise admissible to impeach another witness, the trial court did not err in excluding the evidence. Where the trial court denied a jury's request to review witness testimony, there was no prejudicial error. Where a witness's prior statement corroborated her trial testimony, the trial court did not err in admitting the statement. Where the trial court properly overruled defendant's objections to the State's closing argument, there was no error.

STATE V. PINNIX

Opinion of the Court

Defendant Ernie Donnell Pinnix, II, was indicted for twenty felonies alleged to have occurred between 12 April 2013 and 16 March 2016: six counts of rape and six counts of sexual offense of a fourteen or fifteen year old by a person at least six years older; six counts of indecent liberties; and two counts of child abduction. On 17 January 2017, the case was tried in Forsyth Superior Court before the Honorable Susan E. Bray, Judge presiding. At the close of evidence, ten of the twenty charges were dismissed. A jury acquitted defendant of seven charges, and a mistrial was declared after the jury failed to reach a verdict on two rape charges. Defendant was found guilty of statutory rape that occurred in January 2014.

The teenage victim in this case is Kayla.¹ At trial, the State's evidence revealed that defendant began dating Kayla's mother in November 2012. Eventually, defendant became close to all of Kayla's family and assumed a father-figure role with Kayla, who was fourteen at the time. According to Kayla, by April 2013, she and defendant had begun having sexual intercourse and continued to have sex until at least June 2014. During a visit to her maternal grandparents' house in January 2014, Kayla testified that she snuck defendant into the house after everyone was asleep. She said they had vaginal intercourse in the basement and used a condom. Kayla said that afterwards, she put on her clothes, and they fell asleep.

Kayla's maternal grandmother testified at trial. She stated that on or about January 2014, she woke up around 4:30 a.m. to get water and saw defendant's vehicle

¹ A pseudonym is used to protect the identity of the minor child and for ease of reading.

STATE V. PINNIX

Opinion of the Court

parked in front of the house. She woke her husband and they went down to the basement, where they found defendant and Kayla laying under blankets on the floor. Both were fully clothed. Defendant jumped up and ran out of the house. Later that morning, while cleaning, Kayla's grandmother found condoms in the basement. There was an unopened condom near defendant's hat on the couch and a used condom with the wrapper in the bathroom waste basket. Kayla's grandmother threw out the condoms and did not tell Kayla's mother right away about finding them.

Kayla's mother, Jennifer, also testified at trial. Jennifer detailed her life with Kayla's father who died of alcohol poisoning in 2013, her friendship with defendant, and her sometimes turbulent relationship with Kayla. Her testimony included her belief that Kayla was "manipulative," had "never been an honest person," and had fabricated details about her relationship with defendant. In fact, Jennifer had sent an email to the investigating officer indicating she did not want to go forward with trial because she had recently discovered information on Kayla's phone having to do with sexual communications with other individuals, communications about defendant, and possible drug use. When questioned, Jennifer said: "I was very angry with my child and not really eager to help her in this matter." On cross-examination, defendant sought to elicit details from Jennifer about the information she discovered, but most of what defendant sought was excluded by the trial court. The State rested its case and defendant, having no evidence to present, rested his case also.

STATE V. PINNIX

Opinion of the Court

Following the jury verdict convicting defendant of one count of statutory rape, the trial court sentenced defendant to 275 to 390 months in prison. Defendant appeals.

On appeal, defendant raises several issues contending that the trial court erred by: (I) excluding impeachment evidence where the State opened the door; (II) failing to exercise discretion in denying the jury's request to review witness testimony, (III) admitting an unsent letter as a prior consistent statement; and (IV) overruling objections to the State's closing argument. Defendant also makes a summary argument (V) that cumulative errors occurring during the trial warrant a new trial.

I

Defendant's first argument challenges the trial court's ruling to exclude evidence of Kayla's past behavior, which defendant argues was admissible to impeach Kayla's credibility where the State opened the door. We disagree.

"The admissibility of evidence is governed by a threshold inquiry into its relevance." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000). "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 than it would be without the evidence." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (quotations omitted). "The trial court may exclude evidence that is irrelevant, non-probative, speculative, not within a witness' personal knowledge, and

calling for legal conclusions from a lay witness.” *State v. Pallas*, 144 N.C. App. 277, 283, 548 S.E.2d 773, 779 (2001)

Although the trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court’s ruling on relevancy pursuant to Rule 401 is not as deferential as the ‘abuse of discretion’ standard which applies to rulings made pursuant to Rule 403.

Dunn, 162 N.C. App. at 266, 591 S.E.2d at 17 (citations and internal quotation marks omitted).

“Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.” *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981); *see also State v. Burgin*, 313 N.C. 404, 407, 329 S.E.2d 653, 656 (1985).

Generally, the opposing party has a right to cross-examine a witness when the witness takes the stand. *See Burgin*, 313 N.C. at 406, 329 S.E.2d at 656. “If the witness during direct examination raises specific issues, he ‘opens the door’ to an inquiry into these subject areas during cross-examination.” *Id.* However, “[t]he testimony sought to be elicited on cross-examination must be relevant to some defense or relevant to impeach the witness and, in certain instances, may bow to accommodate other legitimate interests in the criminal trial process such as the rules

of evidence.” *In re Oliver*, 159 N.C. App. 451, 454, 584 S.E.2d 86, 87 (2003) (quotation marks omitted).

On direct examination, Jennifer testified to the following:

[The State]: Now, was there a time that you sent Detective Pritchard an e-mail regarding this case?

[Jennifer]: Yes.

[The State]: And what was that e-mail about?

[Jennifer]: I had found conversation --

[The State]: What was that -- what did that e-mail say?

[Jennifer]: That I did not believe that [Kayla] was raped; I believed that it was consensual.

[The State]: And did you also tell her that you didn't want to go forward with the case?

[Jennifer]: Yes.

[The State]: Why did you do that?

[Jennifer]: Because I felt that they were both wrong in the situation.

[The State]: What do you mean by that?

[Jennifer]: Based on the information I had seen on [Kayla]'s phone where she had had conversations --

[The State]: Well --

[Jennifer]: -- with people --

[The State]: -- what do you -- what do you mean -- what did you mean when you talked to Detective Pritchard?

[Jennifer]: I felt like they both had manipulated each other. [Kayla], with her mental illness, can be very manipulative to get what she wants. I felt not only was she manipulated, but she had manipulated. And I was angry with my child and not really eager to help her in this matter.

.....

[The State]: And what about the things you said in that e-mail?

[Jennifer]: Do I regret them?

[The State]: Yes.

[Jennifer]: Depends on the day.

Generally, Jennifer testified about her suspicions that Kayla may have been involved with other men, and in particular Kayla's involvement with defendant. On cross-examination, defendant attempted to question Jennifer regarding information she had discovered on Kayla's phone. Following voir dire, the trial court excluded any questions regarding Kayla's phone messages from October 2016 relating to possible sexual behavior with other individuals and possible drug use. However, the trial court allowed evidence of any messages that involved Kayla's feelings about defendant.

The evidence defendant sought to introduce about Kayla's sexual communications and drug use were not relevant, as the behavior (phone communications) was not alleged to have occurred during the time Kayla was involved with defendant. Further, the evidence was very prejudicial and not

probative. The information Jennifer conveyed, in sum, was too speculative (e.g., she testified on direct examination about concerns “based on the information [she] had seen on [Kayla’s] phone where she had conversations with people.” It was only during voir dire, outside the presence of the jury, that Jennifer explained what she saw on Kayla’s phone—sexual pictures, sexual communications, and a text message that led her to believe Kayla may have been using illegal drugs). Jennifer’s testimony about her “concerns” was not sufficient to “open the door” to cross-examination of what Jennifer thought her daughter may have been doing, and further, such testimony was not relevant evidence that could be used to impeach Kayla’s credibility.

Even assuming the statements were somehow relevant, defendant has not demonstrated that the probative value is substantially outweighed by unfair prejudice. *See State v. Whaley*, 362 N.C. 156, 159–60, 655 S.E.2d 388, 390 (2008) (“A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. . . . However, such evidence may nonetheless be excluded under Rule 403 if the trial court determines its probative value is substantially outweighed by [its prejudicial effect].” (citations omitted)).

Accordingly, defendant’s contention that the State opened the door to further inquiry about details within the email sent by Jennifer to impeach Kayla’s credibility is overruled.

II

Defendant next challenges the trial court’s ruling that the jury could not receive a written copy of witness testimony in the jury room. Before the jury left for

deliberations, a request for witness testimony was made to the trial court, and in response, the trial court stated:

“No” is the simple answer. No. If you wish to see any of the exhibits that were offered and admitted into evidence, if you put that request in writing, I can do that. But we do not have instant – no, we don’t. It’s your duty to remember and recall the evidence. All right?

Defendant contends that the trial court erred by not exercising its discretionary authority to allow the jurors to review testimony. Assuming *arguendo* the trial court’s incomplete references could be considered error, the error did not prejudice defendant and was not reversible error.

North Carolina General Statutes Section 15A-1233 “is a codification of the common law rule that the decision whether to grant or refuse the jury’s request for a restatement of the evidence lies within the discretion of the trial court.” *State v. Starr*, 365 N.C. 314, 316, 718 S.E.2d 362, 364 (2011). “When the trial court gives no reason for a ruling that must be discretionary, we presume on appeal that the court exercised its discretion.” *Id.* at 318, 718 S.E.2d at 365. “Where the trial court indicates that it lacks discretion to grant or deny a request, such decision is error.” *State v. White*, 163 N.C. App. 765, 770, 594 S.E.2d 450, 453 (2004); *see also Starr*, 365 N.C. at 318, 718 S.E.2d at 365 (“[A] response [from the trial court] indicating the inability to provide a transcript constitutes erroneous failure to exercise discretion.”). The trial court’s failure to exercise discretion is preserved by law for appellate review even when defendant does not object; however, defendant must demonstrate prejudice to constitute reversible error. *Starr*, 365 N.C. at 319, 718 S.E.2d at 366.

Here, the trial court clearly said “no” when asked to provide the witness testimony. After letting the jury know she would provide items that had been introduced into evidence upon their request, the trial court’s next words might seem to imply she had no discretion to produce the testimony —“we do not have instant – no, we don’t.” Then, the trial court immediately went on to remind the jury of their duty to recall the evidence. On this record, the trial court’s partial phrases noted above cannot be said to be a failure to exercise discretion which rises to the level of error, especially when the trial court’s first and immediate response was “no.” Assuming, for the sake of argument, that the trial court’s awkward phraseology was an indication that it was not *permitted* to allow the jury to review testimony of one of the witnesses and was a violation of N.C.G.S. § 15A-1233, defendant is unable to show prejudice. *See id.* (Defendant “must show a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” (citation omitted)).

Defendant argues that he was prejudiced because the jury would have reached a different result on his conviction had they been able to review the requested testimony and analyze inconsistent statements of Kayla. However, notwithstanding defendant’s contention, the jury’s request for further review was not specific to any witness. Further, there was competent evidence to support defendant’s conviction. Multiple witnesses offered direct and circumstantial evidence surrounding the incident in January 2014. For the foregoing reasons, we find no prejudicial error in the trial court’s ruling.

III

Defendant next challenges the trial court’s ruling to admit an unsent letter from Kayla as a prior consistent statement. Specifically, defendant argues that the trial court erred because Kayla’s testimony contradicted the letter. We disagree.

“Under Rule 613 of the North Carolina Rules of Evidence, prior consistent statements by a witness are admissible to corroborate sworn trial testimony.” *State v. Alexander*, 152 N.C. App. 701, 703–04, 568 S.E.2d 317, 319 (2002). “Where a witness’s prior statement contains facts that *manifestly contradict* his trial testimony, however, such evidence may not be admitted under the guise of corroborating his testimony.” *Id.* (citing *State v. Frogge*, 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997)) (emphasis added).

In a letter Kayla wrote to defendant on 6 May 2016 but never sent to him, she professes unconditional love, writing they shared a “spiritually intimate relationship.” At the time of trial, Kayla’s testimony was that she was confused about her feelings towards defendant and the situation despite having genuinely cared for him in the past. While Kayla never expressed “unconditional love” for defendant during her testimony, the letter did not manifestly contradict Kayla’s testimony. Kayla’s testimony that there was a significant sexual relationship with defendant supported the State’s position that Kayla and defendant were intimate. Accordingly, as Kayla’s testimony was consistent with her statements within the letter, we affirm the trial court’s ruling to admit the letter as corroborative evidence.

IV

Defendant next contends the trial court erred in overruling defendant's objections to statements made by the State in closing argument. Defendant alleges he was prejudiced as a result of the statements. We disagree.

When a defendant objects at trial, this Court reviews closing arguments to determine whether the trial court abused its discretion by failing to sustain the objection. In reviewing closing arguments for an abuse of discretion, this Court must first determine if the remarks were improper. If so, this Court must then determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court.

State v. Dalton, 369 N.C. 311, 315, 794 S.E.2d 485, 488 (2016) (quotations and citations omitted).

Defendant argues the State made an improper reference as to defendant's exercise of his right to remain silent:

You didn't hear from Detective Pritchard. You didn't hear from Detective Rankin. They were here. What are their jobs? To gather facts and present them to you. The only witness to the sex acts were [Kayla] and the defendant. You heard from [Kayla].

Defendant cites to *State v. Shores*, 155 N.C. App. 342, 573 S.E.2d 237 (2002), to support his contention that the State's argument was an implied reference to his failure to testify and a violation of his constitutional rights. However, *Shores* is inapposite.

In *Shores*, this Court held that the State's *repeated attacks* during cross-examination and closing argument as to the defendant's exercise of his right to remain silent was enough to create a strong inference of guilt. However, in the

instant case, it is not reasonably possible that the State's comment contributed to defendant's conviction. *See id.* at 351–52, 573 S.E.2d at 242 (“The test is whether the appellate court can declare a belief that there is no reasonable possibility that the violation might have contributed to the conviction.”).

Additionally, defendant contends that the State, in closing argument, commented about evidence not supported by the record:

All throughout the trial, you've got instructions about limited, if it corroborates, if it impeaches. The information the detectives would have testified to was what you already heard from witnesses They take notes. It may have been inconsistent or it may have been a mirror image of what they had previously stated. The evidence is what you heard in the courtroom.

The State's comments offered context to the witnesses' statements to detectives and did not offer facts or inferences unsupported by the evidence. The State's argument was based on reasonable inferences from facts introduced at trial. *See State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (“Counsel is permitted to argue the facts [in closing argument] which have been presented, as well as reasonable inferences which can be drawn therefrom.”). Therefore, the trial court did not abuse its discretion by overruling defendant's objections to certain statements made in closing argument.

V

Finally, defendant argues that the cumulative errors he alleges deprived him of a fair trial. However, as we have reviewed each of defendant's allegations of error at trial and found no error—or even assuming *arguendo* error was committed, it was

STATE V. PINNIX

Opinion of the Court

not prejudicial—defendant cannot sustain his argument that he was deprived of a fair trial.

Accordingly, for the reasons stated herein, we hold defendant received a fair trial, free from prejudicial error.

NO PREJUDICIAL ERROR.

Judge HUNTER, JR., concurs.

Judge ARROWOOD concurs in the result only.

Report per Rule 30(e).