IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-383

No. COA20-355

Filed 20 July 2021

New Hanover County, No. 18 CRS 051345

STATE OF NORTH CAROLINA

v.

TORREY JERMAINE GRADY, Defendant.

Appeal by Defendant from judgment entered 30 January 2020 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 27 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Forrest P. Fallanca, for the State.

Richard Croutharmel for the Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Torrey Jermaine Grady appeals the trial court's judgment entering a jury verdict finding him guilty of felony child abuse. Defendant argues that the trial court abused its discretion when it overruled Defendant's objection to the admission of evidence that Defendant and the victim child's mother ("Mother") were engaged to be married. Defendant also argues that the trial court abused its

discretion in overruling Defendant's objection to the portion of the State's closing argument that explained why the State did not call Mother as a witness. We discern no error.

I. Factual and Procedural History

¶ 2 On 20 January 2018, Defendant was serving as the sole caregiver for Mother's seven-year-old child, Z.W. ("Zane"), who was nonverbal due to developmental delays. Defendant awoke that morning to find Zane had wet the bed during the night and smelled like urine. Defendant took Zane to get a bath. Defendant tended to his own personal hygiene while Zane bathed.

¶ 3 After Zane got out of the bath, Defendant noticed Zane was dragging his feet on the carpet and the skin on the tops of Zane's feet was peeling and blistering. Zane had no injuries to his feet or legs prior to taking a bath. Defendant sent Mother a picture of Zane's feet, and then applied ointment to them. The peeling and blistering on Zane's feet continued to worsen over the next few hours. Defendant again contacted Mother and asked her to come home to take Zane to the hospital. Mother left work early, and she and Defendant took Zane to the hospital.

¶ 4 Sarah Fuller, an emergency room nurse, and Dr. De Winter, an emergency physician, treated Zane upon his arrival at the hospital. Dr. Winter and Ms. Fuller both noted that Zane appeared to have first- or second-degree thermal burns on the tops of both feet. These burns extended to the tops of the ankles but the soles of both

feet appeared normal. Zane was in pain and unable to assist Dr. Winter and Ms. Fuller's understanding of how he obtained his injuries. Mother was uncooperative and refused to help hospital staff determine how Zane sustained his injuries.

¶ 5 Zane was transferred to the University of North Carolina Burn Center (the "Burn Center") in Chapel Hill because his injuries required specialized treatment. Dr. Samuel Jones with the Burn Center treated Zane and performed surgery to repair the skin on the tops of Zane's feet and ankles. At trial, Dr. Jones explained that when the tops of the feet are burned and the soles are spared, it can indicate that the feet were held down while hot water was poured over the tops of the feet. Dr. Jones also explained that burns inflicted in this manner can cause "stocking feet," in which a clear line separates burnt and unburnt tissue following immersion in a liquid. Dr. Jones noted that Zane had stocking feet during his treatment.

¶ 6 Holly Warner, a nurse practitioner with UNC's Beacon child protection team, testified that she was asked to investigate Zane's injuries because there were concerns that they were intentionally inflicted. Ms. Warner noted bedwetting is often a triggering event that can lead a caretaker to inflict burn injuries in child abuse cases. Ms. Warner concluded Zane's injuries were consistent with those of an intentionally inflicted forced immersion burn.

¶ 7 Zane and Mother were not called as witnesses to testify at trial. Corporal Rich Knopf, the investigating officer, testified that, despite a no-contact order that

prohibited contact between Defendant and Mother, at the time of the trial the two were engaged to be married. Defendant objected to the admission of this evidence, and the trial court overruled the objection.

¶ 8 At the close of the State's evidence, Defendant made a motion to dismiss. The court denied Defendant's motion to dismiss. Defendant chose not to put on any evidence. Defendant renewed his motion to dismiss after the jury charge conference. This motion was denied.

¶ 9 During closing arguments, the State again referenced Defendant's engagement with Mother as an anticipatory rebuttal to any potential question of why Mother was not called as a witness for the State. Defendant again objected to this evidence and was overruled.

¶ 10 On 30 January 2020, the jury found Defendant guilty of felony child abuse. The trial court entered judgment and sentenced Defendant to a term of sixty-seven to ninety-three months imprisonment. Defendant timely appeals.

II. **Analysis**

¶ 11 Defendant makes two challenges on appeal. Defendant first argues the trial court erred when it overruled Defendant's objection to the admission of evidence that Defendant and Mother were engaged to be married. Next, Defendant argues the trial court erred when it overruled Defendant's objection to the portion of the State's

closing argument explaining why Mother was not called to testify on behalf of the State.

¶ 12 This Court reviews both of these challenges for an abuse of discretion. *State v. Gettys*, 243 N.C. App. 590, 594, 777 S.E.2d 351, 355 (2015); *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). The trial court's decision may be overturned for an abuse of discretion only if it is shown that its decision was "so arbitrary that it could not have been the result of a reasoned decision." *Gettys*, 243 N.C. App. at 594–95, 777 S.E.2d at 355. For both challenges, upon a finding of error, we must then determine whether that error was prejudicial to the defendant's case. *State v. Jones*, 278 N.C. 259, 265, 179 S.E.2d 433, 437 (1971); *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 40 (1994).

A. Direct Examination

¶ 13 We first determine whether the trial court erred when it overruled Defendant's objection to the admission of evidence that Defendant and Mother were engaged to be married. Defendant argues that the evidence was both irrelevant and substantially more prejudicial than probative. We disagree.

¶ 14 Evidence is relevant when it has any tendency to make the existence of any fact of consequence in the determination of an action more or less probable than it would be without the evidence. N.C. Gen. Stat. § 8C-1, Rule 401 (2019). At trial, relevant evidence is generally admissible, while irrelevant evidence is inadmissible.

State v. Smith, 263 N.C App. 550, 564, 823 S.E.2d 678, 688 (2019); N.C. Gen. Stat. § 8C-1, Rule 402 (2019). Evidence does not have to bear directly on the issue in question to be considered relevant and competent. *State v. Arnold*, 284 N.C. 41, 47–48, 199 S.E.2d 423, 427 (1973). Rather, evidence is competent and relevant "if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *Id*.

¶ 15 At trial, Defendant objected to the following line of questioning:

> [STATE]: Corporal, I just have one question: What is the relationship between [Defendant] and [Mother] right now?
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Overruled.
>
> [DETECTIVE KNOPF]: It appears that they are engaged.
>
> [STATE]: To be married?
>
> [DETECTIVE KNOPF]: Correct.

¶ 16 In the present case, evidence of Defendant's engagement to Mother is relevant. It explains "the circumstances surrounding the parties" in the action. *Id*. Admission of this evidence "allow[ed] the jury to draw an inference" as to why the State did not call Mother as a witness. *Id*. Although the evidence did not bear directly on the specific issue in question, it was relevant and properly admitted because it helped the

jury understand the relationships between the parties and the reason why Mother was not called as a witness. *State v. Murillo*, 349 N.C. 573, 600, 509 S.E.2d 752, 768 (1998); *see also Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C.App. 444, 786 S.E.2d 335 (2016) (holding the trial court properly admitted evidence which did not bear directly on the issue in question, but helped explain the circumstances surrounding the parties). Therefore, the evidence was relevant and properly admitted.

¶ 17 Defendant next argues that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice against Defendant. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2019). "Certainly, most evidence tends to prejudice the party against whom it is offered." *State v. Lyons*, 340 N.C. 646, 669, 459 S.E.2d 770, 783 (1995). However, Rule 403 only excludes relevant evidence if its probative value is *substantially* outweighed by unfair prejudice. *Id.*

¶ 18 Defendant contends that he was prejudiced by the evidence because the State insinuated that Mother was manipulated by Defendant. However, this was not the State's purpose for admitting the evidence. The State made no claim to the jury that Defendant manipulated Mother. The State offered the evidence to explain the

circumstances surrounding the parties and, ultimately, to explain to the jury why Mother was not called as a State witness.

¶ 19 A reasonable juror could conclude that the State did not call Mother as a witness because of a concern of manipulation by Defendant, her fiancé. However, an equally likely conclusion by a reasonable juror could be that Mother's demonstrated reluctance to assist was a result of biases stemming from her attachment to and relationship with Defendant—as the State contended before the jury. Even if the evidence in some way prejudiced Defendant, the prejudice against Defendant did not outweigh—much less substantially outweigh—the probative value of the evidence.

¶ 20 The trial court did not abuse its discretion in overruling Defendant's objection to the admission of the State's evidence that Defendant was engaged to be married to Mother. The evidence was relevant and its probative value was not substantially outweighed by its danger of unfair prejudice to Defendant.

B. Closing Argument

¶ 21 We turn next to Defendant's argument that the trial court erred when it overruled Defendant's objection to a portion of the State's closing argument explaining why Mother was not called as a witness for the State. Defendant argues it was an abuse of discretion to allow the State to argue this in its closing argument and to suggest to the jury that Defendant had manipulated Mother into not testifying against him.

¶ 22 When applying an abuse of discretion standard of review to the trial court's ruling on a closing argument objection, this Court will first look to see if the remarks were improper. *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003). If we find that the remarks were improper, we must determine if they were such that the remarks prejudiced the defendant, and should have been excluded. *Id.* "[I]mproper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. However, "a prosecutor's argument is not improper when it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *State v. Small*, 328 N.C. 175, 185, 400 S.E.2d 413, 418 (1991) (quoting *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911 (1987)).

¶ 23 This Court has long held that "argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975); *see State v. Seipel*, 252 N.C. 335, 113 S.E.2d 432 (1960); *see also State v. Barefoot*, 241 N.C. 650, 86 S.E.2d 424 (1955); *State v. Bowen*, 230 N.C. 710, 55 S.E.2d 466 (1949); *State v. Little*, 228 N.C. 417, 45 S.E.2d 542 (1947). This 'wide latitude' may include all of the relevant laws and facts, and any inferences drawn therefrom. *State v. Anderson*, 175 N.C. App. 444, 452, 624 S.E.2d 393, 400

(2006); N.C. Gen. Stat. § 15A-1230 (2019). Our Supreme Court has expanded this permissible wide latitude to specifically allow for anticipatory rebuttal of opposing counsel's closing arguments. *State v. Barden*, 356 N.C. 316, 370, 572 S.E.2d 108, 142 (2002).

¶ 24 The following portion of the State's closing argument prompted Defendant's objection:

> But let's talk a little bit about [Zane]'s mother. One of the things that might be brought up in cross – in closing argument by [D]efendant is: Why didn't the State call [Mother]? Well, you've heard through every witness, she refused to answer the most basic of questions with Detective Knopf. She wouldn't tell her name, her son's date of birth, or her son's full name.
>
> When she was up at Chapel Hill, Holly Warner said, I tried to talk to her; she refused to talk to me.
>
> Every single witness that took that stand that met or saw [M]other in Wilmington at the hospital, what are the words that they used to describe her? Belligerent, angry, agitated, combative. The list goes on.
>
> What did one of the witnesses tell you? She didn't want [D]efendant to speak with police. She didn't want [D]efendant to talk to law enforcement and DSS, even though he was the only adult who could tell someone how her child was injured. Her son can't talk. This is the only person that can tell us what happened, and she doesn't want healthcare professionals to know?
>
> And now she's engaged to be married to him. Whose side do you think she's on? Do you think she is standing in [Zane]'s corner, or do you think she's standing in

> [Defendant's] corner?
>
> And she's doing this all in violation of a court order. You know that he's not supposed to have any contact with her. And what do they do? They go ahead and get engaged.

¶ 25 The State's argument makes no mention or insinuation of manipulation. The State asks the jury to come to their own conclusions as to whose side Mother supports based upon the evidence of her actions presented at trial. The State's argument does not include any personal opinions or conclusions, name-calling, or references to anything outside the evidence. *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. All of the statements made were supported by evidence. Further, the initial remarks within the challenged language illustrate that the State purposefully referenced Mother's engagement to Defendant in anticipation of Defendant drawing attention to the State's decision not to call Mother as a witness. Such anticipatory rebuttal is permissible. *Barden*, 356 N.C. at 370, 572 S.E.2d at 142. Therefore, the State's closing statement remarks were not improper, and the trial court did not abuse its discretion when it overruled Defendant's objection.

¶ 26 We find no error in the trial court's decision to allow mention of Mother's engagement to Defendant in the State's closing argument and need not address the issue of prejudice.

III. Conclusion

¶ 27 We hold the trial court did not commit error in admitting evidence of Mother's engagement to Defendant or in allowing its reference in the State's closing argument.

NO ERROR.

Judges INMAN and GORE concur.

Report per Rule 30(e).