IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-730

No. COA20-448

Filed 21 December 2021

Wake County, Nos. 18 CRS 221292-94

STATE OF NORTH CAROLINA

v.

MACK WASHINGTON, Defendant.

Appeal by defendant from judgment entered 11 October 2019 by Judge Andrew T. Heath in Wake County Superior Court. Heard in the Court of Appeals 24 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. A. Kelly Chambers, for the State-appellee.

Dylan J.C. Buffum for defendant-appellant.

GORE, Judge.

¶ 1 On 11 October 2019, defendant Mack Washington was convicted of one count of statutory sexual offense with a child by an adult and six counts of taking indecent liberties with a child. On appeal, defendant argues the trial court prejudicially erred by excluding evidence under Rules 401, 402, and 412 of the North Carolina Rules of Evidence and abused its discretion by limiting his cross-examination of the

complaining witness. He asserts this error was in violation of his constitutional right to present a defense and confront the witnesses against him, and he was prejudiced thereby. Defendant also contends the trial court erred when it failed to intervene *ex mero motu* when the State made grossly improper statements during its closing argument. We discern no error.

I. Factual and Procedural Background

¶ 2 LaKenya Campbell first met defendant in 2005 while they were in high school. At that time, she was dating Phillip McKoy, with whom she had three children, including her oldest N.M.[1] born 2 November 2005. Defendant and Ms. Campbell reconnected in 2013 after she had ended her relationship with Mr. McKoy, and she and her three children moved in with Ms. Campbell's father. Defendant was not introduced to Ms. Campbell's three children until 2014. Around the end of 2014, defendant began spending the night with Ms. Campbell and her three children, and the two were married on 30 September 2015.

¶ 3 While Ms. Campbell worked third shifts (7 P.M. to 7 A.M.) as a certified nursing assistant, defendant and Ms. Campbell's father would be at home with her children. Ms. Campbell and Mr. McKoy each testified defendant was "very playful" with the kids. Defendant and Ms. Campbell's relationship was dysfunctional such

[1] Pursuant to N.C.R. App. P. 42(b), a pseudonym is used to protect the identity of the juvenile.

that it was common for Ms. Campbell to kick defendant out of the house when they got into a fight. This pattern increased in frequency between 7 September 2018 to 21 October 2018 until Ms. Campbell told defendant she did not want to see him again on 22 October 2018. They have been separated since that date.

¶ 4 On 22 October 2018, N.M., who was 12 years old at the time, communicated through multiple texts and attempted phone calls to her mother that her stepfather, defendant, had raped her. Ms. Campbell came home and asked N.M. questions to discern whether she was telling the truth. N.M. told her mother that defendant perpetrated acts of sexual abuse on multiple occasions while she was at work. Ms. Campbell then asked N.M. to tell her what defendant's genitalia looked like because she knew he had a distinct skin disease, lichens planus, on his genitalia. N.M. responded by telling her mother it was crusty and scaly and that defendant would put "oil and stuff on it." Ms. Campbell knew at this point her daughter was telling the truth.

¶ 5 N.M. told her mother that defendant would rub his genitalia against her genital area over her underwear and that "some white stuff had came [sic] out." She also communicated that defendant had attempted to penetrate her one time by putting her legs up and that it was hurting her. Defendant only stopped because someone started to walk into the room. Ms. Campbell then took N.M. to the Raleigh police station, and they met with Officer Sisson. N.M. then met with the following

people over the course of a couple weeks: Dr. Damilola Joseph at WakeMed, Joy Lassiter of Wake County Child Protective Services, Dr. Karen Todd and Tiffany Hampton of SAFEChild, and Detective Kevin Hubard of the Raleigh Police Department. These individuals later testified at trial along with N.M. and defendant.

¶ 6 N.M. first told Officer Sisson, Dr. Joseph, and Ms. Lassiter that defendant had been molesting her almost every day for five years while her mother was working. At trial, N.M. testified defendant had molested her from ages 9 to 12. Defendant kissed her mouth and sucked on her breasts. Defendant would rub his penis up against her vaginal area and then ejaculate on the floor or in her underwear. Defendant made N.M. rub his penis and would then push her to the side and ejaculate on the floor, which N.M. would then clean up. Sometimes N.M. would rub oil or lotion on defendant's penis. Defendant made N.M. perform oral sex on him and he ejaculated in her mouth which she then spit out in the sink and used water to wash the "white stuff" down the sink. One time, defendant ripped N.M.'s shirt when she attempted to avoid him. N.M. said that during the last assault, defendant penetrated her vagina by lifting up her legs while she was lying on the bed, and it was painful afterwards. N.M. testified that defendant's penis was very flaky and rough and that she had not seen his genitals until he began molesting her.

¶ 7 N.M. testified she did not know what was going on at first, but once she realized what was happening, she was concerned her mother would not believe her

or that defendant might hurt her siblings. She stated the abuse occurred in her bedroom or her mother's bedroom while her mother was working, her siblings were watching TV in another room, and her grandfather was in his room with the door closed. Dr. Joseph testified there were no physical findings of trauma to her genital area, but this was common in sexual assault cases because the female genital area recovers quickly. Dr. Todd, an expert in pediatric sexual abuse cases, testified N.M.'s genital area and anal area were normal, but that 94 percent of sexually abused children have normal findings. She further testified N.M.'s exam was consistent with child sexual abuse based on her review of N.M.'s interview and disclosure.

¶ 8 During N.M.'s videoed interview with Ms. Hampton at SAFEChild, N.M. described the sexual abuse perpetrated by defendant. Ms. Hampton asked N.M. if anyone else had done this to her in addition to defendant. N.M. said yes, but she did not want to talk about it. N.M. only stated the additional abuser was fifteen years old, and the sexual abuse occurred more than once when she was eleven to twelve years old, but it stopped about nine months prior to the interview. N.M. refused to respond to many of Ms. Hampton's questions, and stated she was concerned people would think she welcomed the sexual abuse when she in fact did not. She stated she was afraid if she said what happened "the person might do something crazy" and asked she not be taken away from her mother. She also communicated concern that talking about the additional abuser would cause even more to happen than was

happening with just one person.

¶ 9 On 10 December 2018, defendant was indicted on two counts of sexual offense with a child by an adult and six counts of indecent liberties with a child. Defendant pled not guilty, and a jury trial began 7 October 2019. Prior to trial, defendant moved in limine to admit the portion of the SAFEChild interview with Ms. Hampton in which N.M. confessed she had been abused by a fifteen-year-old. The trial court denied the motion in limine and excluded the evidence under Rules 401, 402, and 412 of the North Carolina Rules of Evidence.

¶ 10 At trial, N.M. testified she had memory issues and these issues caused confusion in the length of abuse and thinking defendant also abused her at her prior home. Defendant conducted a *voir dire* examination of N.M. regarding the sexual abuse by the fifteen-year-old. Defendant asked questions about the sexual acts with the teen, and further learned the teen at one point stayed at her father's house but moved to New York. Defendant entered into the record an offer of proof, and a transcript of the excluded portion of the interview. The trial court granted defendant's request for the State to limit its introduction of medical testimony of signs or symptoms of sexual abuse but communicated if the door was opened to this evidence, it would allow defendant to offer evidence of alternative reasons.

¶ 11 On direct examination, the State asked Detective Hubard if he did not charge defendant with the incident involving penetration into N.M.'s vagina because she

could not determine where he penetrated at first, and he agreed that under the law he could not charge defendant. The State asked a follow-up question, "so he just—that he gets away with?" and Detective Hubard said, "Correct." The trial court sustained an objection by defendant to the follow-up question and answer.

¶ 12 During cross-examination, Ms. Campbell offered unsolicited testimony about N.M. cutting her wrists. Further information about self-harm subsequently came out from the State's witnesses, therefore defendant renewed his motion to introduce the excluded evidence, but it was denied. At the close of the State's evidence, the trial court gave jury instructions explaining there could be other reasons for the self-harm, and it struck the testimony about therapy and wrist cutting from the record.

¶ 13 Defendant testified to his relationship with N.M. as brother-like, yet more mature since she is the eldest child. Defendant testified to talking to N.M. about "the birds and the bees," sending her a video about sexually immoral behavior that they watched together, late-night texts he sent her between 10:30 P.M.–4 A.M., and providing reasons as to how N.M. may have seen his penis, *i.e.*, jumping out of bed, the shower, or changing his clothes.

¶ 14 Prior to closing arguments, the trial court granted defendant's motion to dismiss one of the two charges for statutory sex offense with a child by an adult. During the State's closing argument, the prosecutor stated, "So what about that other penetration? She wasn't able to say if that was her vagina or her butt. She wasn't

able to say that. And so guess what. He gets away with that one. He just gets that. He should not get away with any others." The State also stated, "I almost fell out of the chair[,]" in reference to defendant's testimony that he watched a video with N.M. containing information on pedophilia. Finally, the State stated, "I thought her memory was really good for a kid. It was really good."

¶ 15 The jury found defendant guilty of all remaining charges. He was convicted 11 October 2019 and sentenced to an active term of 340 months' to 478 months' imprisonment. Defendant entered oral notice of appeal in open court.

II. Discussion

¶ 16 On appeal, defendant first argues the trial court prejudicially erred by excluding evidence under N.C.R. Evid. 412, the Rape Shield Statute, and the exclusion of this evidence deprived him of his constitutional right to present a complete defense and confront the witnesses brought against him. We disagree.

A. Prejudicial Error and Violation of Constitutional Right

¶ 17 Rulings on relevancy are not discretionary, however, on appeal these rulings receive great deference. *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). This Court applies this deference when looking at the exclusion of evidence under Rule 412. *State v. Mendoza*, 250 N.C. App. 731, 750,794 S.E.2d 828, 840–41 (2016). When the trial court excludes evidence considered relevant under Rule 412, this Court reviews for prejudice. *Id.* at 754,794 S.E.2d at 842–43. Prejudice only exists

if "there is a *reasonable* possibility that, had the error[s] in question not been committed, a different result *would have been reached* at trial." *State v. Goins*, 244 N.C. App. 499, 527, 781 S.E.2d 45, 63 (2015) (citation omitted) (emphasis in original).

¶ 18 The trial court's ruling limiting the scope of cross-examination is within its sound discretion and is only overturned upon determination of an abuse of discretion. *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988).

1. Rules 401, 402, and 412

¶ 19 Defendant argues the excluded evidence should only be decided under Rules 401 and 402 rather than Rule 412, because sexual abuse does not fall within the definition of "sexual behavior" as intended by the General Assembly.

¶ 20 Rule 401 defines relevant evidence as any "evidence having a 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." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). Rule 402 states relevant evidence is generally admissible if it also comports with the United States Constitution, North Carolina Constitution, Acts by the United States Congress, Acts by the General Assembly, and the other rules of evidence, but irrelevant evidence is inadmissible. N. C. Gen. Stat. § 8C-1, Rule 402 (2019). Rule 401 is interpreted broadly and "in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994)

(citations omitted).

¶ 21 The Rape Shield Statute, Rule 412, is a statutory limitation to this broad inclusion under Rule 402. Rule 412 states that evidence of other sexual behavior of the complainant is generally irrelevant unless it falls within one of the four statutory exceptions. N.C. Gen. Stat. § 8C-1, Rule 412(b) (2019). Rule 412 was enacted for the purpose of protecting the "witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has *little relevance to the case and has a low probative value*." *State v. Mbaya*, 249 N.C. App. 529, 536, 791 S.E.2d 266, 271 (2016) (citation omitted) (emphasis in original). Sexual behavior under Rule 412 is defined as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." N.C. Gen. Stat. § 8C-1, Rule 412(a). Sexual activity is not defined within Rule 412, but under the statutory offenses for which defendant is charged, Article 14 defines "sexual act" as "Cunnilingus, fellatio, analingus, or anal intercourse, . . . [also] the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2019). Prior child sexual abuse is included within the definition of sexual activity under Rule 412. *State v. Bass*, 121 N.C. App. 306, 309–10, 465 S.E.2d 334, 336 (1995).

¶ 22 Defendant intended to challenge N.M.'s credibility and suggest motive to cover up another abuser through the excluded evidence. Such evidence while admissible

under Rule 401, must yield to the statutory limitation under Rule 412. The plain language of Rule 412 only distinguishes between the timing of the sexual act or activity and does not speak to a consensual requirement. § 8C-1, Rule 412(a). The videotaped interview and the questions during *voir dire* cross-examination of N.M. point directly to sexual acts with the fifteen-year-old abuser. Such evidence is what the Rape Shield Statute sought to prevent as it would only humiliate the witness and confuse the jury.

¶ 23 In the alternative, defendant argues the evidence falls under the Rule 412(b)(2) exception, "[E]vidence of specific instances of sexual behavior offered . . . [to] show[] that the act or acts charged were not committed by the defendant." § 8C-1, Rule 412(b)(2).

¶ 24 In *State v. Ollis*, the defendant sought to examine the victim regarding the sexual acts of another abuser under the Rule 412(b)(2) exception, but this was excluded by the trial court. 318 N.C. 370, 376–77, 348 S.E.2d 777, 781–82 (1986). The sexual acts perpetrated by the second abuser occurred the same night and in the same location as the sexual act perpetrated by the defendant. *Id.* The Court held the exclusion of this evidence was erroneous and prejudicial because it could have provided an alternative explanation to the medical evidence, and a reasonable jury could have determined it was attributed to the other abuser. *Id.* at 377, 348 S.E.2d at 782. It reasoned that although the victim was consistent in her testimony and did not

appear to confuse the two men, it could not say a reasonable jury would not see the testimony as a valid alternative to the defendant being the perpetrator of the crime charged. *Id.*

¶ 25 Here, the SAFEChild interview transcript and the *voir dire* cross-examination only suggest an additional abuser. N.M. communicated to SAFEChild that the fifteen-year-old was someone *other than* Defendant who "did something like this [sexual abuse]" and that "all of this stuff [interviews, prosecution] is going on all because of one person. . . . [I]f there were two people then more stuff would be going on . . . that makes me very stressed." During the *voir dire* cross-examination of N.M., defendant asked specific questions about sexual acts, which N.M. refused to respond to other than to communicate that the fifteen-year-old boy no longer lived near her. N.M. is consistent throughout her testimony and gives no indication of confusing the abuser's identity. In fact, N.M.'s testimony describes the distinct features of defendant's genitalia, whereas the excluded evidence distinguishes the abuser as a fifteen-year-old who was around her father's house. The overlap of time between defendant and fifteen-year-old abuser (around age 11 or 12, a nine-month period) does not pertain to the same location.

¶ 26 The only suggestion of similar sexual abuse is N.M answering "yes" to the question, "[H]as anyone other than [defendant] ever did [sic] something like this to you before?" This is distinguishable from *Ollis*. She may have been fearful of the

fifteen-year-old and she may have been concerned confessing that abuse would suggest complicity, but those facts do not provide a bridge of inference to defendant's innocence. There must be additional factual evidence to suggest the sexual abuse at issue was committed by someone other than defendant beyond the existence of an additional abuser. Therefore, the excluded evidence does not fall within the Rule 412(b)(2) exception. In giving great deference to the trial court's ruling on relevance, the trial court did not err in excluding the evidence of prior sexual abuse as irrelevant under Rule 412.

¶ 27 Our Supreme Court has made clear the Rule 412 exceptions are not the "sole gauge" in determining evidence admissibility. *State v. Younger*, 306 N.C. 692, 698, 295 S.E.2d 453, 456 (1982). Rule 412 is not meant to prevent evidence that is otherwise normal in all other trials. *State v. Martin*, 241 N.C. App. 602, 609, 774 S.E.2d 330, 335 (2015). In some cases, evidence that "touches on the sexual behavior" of the witness is admissible even though it falls outside of the four exceptions. *Id.*

¶ 28 In *Martin,* the sexual activity at issue fell outside the Rule 412 exceptions. 241 N.C. App. at 609, 774 S.E.2d at 335; *but see State v. Bass*, 121 N.C. App. 306, 309–10, 465 S.E.2d 334, 336 (1995) (refusing to include prior sexual abuse that occurred outside the time frame of the sexual behavior at issue in the trial). This Court held the trial court erred by determining *per* se the evidence of other sexual behavior was irrelevant just because it did not fall within one of the four exceptions. *Martin*, 241

N.C. App. at 610, 774 S.E.2d at 336. The sexual act at issue was one incident rather than reoccurring sexual abuse and there was testimony suggesting overlap. *Id.* This Court reasoned the trial court should have decided on a relevancy basis beyond the four exceptions of Rule 412 to see if there was a motive to falsely accuse—if she was hiding her actions with the football players. *Id.* at 609, 774 S.E.2d at 335; *see also Goins*, 244 N.C. App. at 525–26, 781 S.E.2d at 62 (distinguishing from a case that excluded sexual activity under Rule 412, because in this case the defendant sought to admit specific evidence of the victim's motive to fabricate by blaming the defendant for victim's other sexual activity, rather than introducing completely unrelated sexual activity).

¶ 29 In defendant's case, evidence of prior sexual activity between N.M. and the fifteen-year-old only suggests it was peripheral to the sexual activity at issue rather than proof of a false accusation. The excluded evidence does not contain any suggestion of N.M.'s motive to fabricate. While the timing of the other sexual abuse occurred a couple years after the sexual abuse at issue began, it lacks proximity because the sexual acts at issue occurred within the mother's house whereas the other sexual acts by the fifteen-year-old occurred at the father's house. The only question of credibility is the timing originally claimed by N.M. as five years, when she only lived with defendant for three years—but this evidence was included in the record. While defendant was free to speculate the prosecuting witness protected her abuser

by blaming him, the excluded evidence does not suggest that. *See State v. Alverson*, 91 N.C. App. 577, 580, 372 S.E.2d 729, 731 (1988) (holding the trial court did not err by denying the defendant his request to cross-examine the victim about her sexual behavior with her boyfriend because speculating the victim was motivated to accuse him of rape to cover up the pregnancy with her boyfriend was not an exception under Rule 412). Because the excluded evidence "bore no direct relationship to the incident in question" the evidence was properly excluded as irrelevant when viewed beyond the Rule 412 exceptions. *State v. Edmonds*, 212 N.C. App. 575, 581, 713 S.E.2d 111, 116 (2011).

¶ 30 Even if the trial court did err in excluding the evidence, it was not prejudicial. The distinct, idiosyncratic details N.M. knew about defendant's skin disease on his genitalia, paired with the lack of evidence to suggest confusion of abusers, false accusation, or motive, are sufficient to conclude the inclusion of evidence would not have swayed a reasonable jury to a different verdict.

2. Constitutional Right

¶ 31 Appellant next argues his constitutional right to present a defense and confront the witnesses against him was violated by the trial court limiting his cross-examination of N.M.'s prior statements. We disagree.

¶ 32 Every criminal defendant has a substantial right to confront the witnesses brought against him. *Mbaya*, 249 N.C. App. at 540, 791 S.E.2d at 273. However, the

trial court has discretion over the scope of that cross-examination. *Edmonds*, 212 N.C. App. at 579, 713 S.E.2d at 115. Even in situations in which the defense seeks to discredit the witness, this right is not absolute, and the trial court must protect the witness when the questions only serve to "harass, annoy or humiliate" the witness. *Mbaya*, 249 N.C. App. at 541, 791 S.E.2d at 274. There is no constitutional right to ask a witness an irrelevant question. *Id.* The Rape Shield Statute provides exceptions for when the evidence of sexual behavior is relevant, outside of those exceptions, the evidence is seen as irrelevant and therefore does not impinge on the defendant's constitutional right. *Id.* This includes when the probative value of the evidence is substantially outweighed by its prejudicial value; the trial judge acts properly in preventing the defendant from questioning the witness on that topic. *Id.*

¶ 33 Defendant was given the opportunity to cross-examine every witness against him. The trial court acted within its discretion by excluding the video interview under Rule 412 as other sexual activity. The trial court also limited defendant's scope of cross-examination. Defendant points to *State v. Valdez-Hernandez* as an analogous case in which the trial court violated a constitutional right of the defendant.

¶ 34 In *State v. Valdez-Hernandez*, the trial court would not allow the defense to present character witnesses with personal knowledge of the victim's dishonesty. 184 N.C. App. 344, 346–47, 646 S.E.2d, 579, 581 (2007). The alleged victim and the defendant had a previous consensual relationship. *Id.* While there were no physical

findings at issue and the State relied on the victim's testimony alone, this Court held the denied evidence could have swayed the jury to reach a different conclusion. *Id.* at 350, 646 S.E.2d at 584. However, this case is distinguishable from defendant's case. There is no previous consensual relationship, considering defendant was a thirty-year-old and N.M. was between the ages of nine and twelve. Defendant was provided the foundational opportunity to cross-examine all the witnesses against him, he was only limited in his scope under Rule 412. Once determined irrelevant, defendant had no constitutional right to cross-examine on that subject and furthermore, his attempts to do so would have been more prejudicial than probative leading to jury confusion. The trial court did not abuse its discretion in limiting defendant's scope of cross-examination of witnesses brought against him.

¶ 35 Because the trial court correctly applied the Rape Shield Statute to the prosecuting witness's statements of other sexual abuse and limited the scope of defendant's cross-examination in accordance with the statutory requirements of Rule 412, the trial court did not err.

B. Prosecutor's Closing Argument

¶ 36 Defendant next asserts the trial court erred by not intervening *ex mero motu* during the prosecutor's closing argument. We disagree.

¶ 37 When defense counsel fails to timely object to alleged improper closing arguments, this Court reviews the closing argument to determine if the statements

were so "grossly improper that the trial court committed reversible error by not intervening *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). A grossly improper argument is, "conduct so extreme that it renders a trial fundamentally unfair and denies the defendant due process." *State v. Fair*, 354 N.C. 131, 153, 557 S.E.2d 500, 517 (2001) (citations omitted).

¶ 38 Defendant takes issue with the following statements by the prosecution during the closing argument, "So what about that other penetration? She wasn't able to say if that was her vagina or her butt. She wasn't able to say that. And so guess what. He gets away with that one. He just gets that. He should not get away with any others." He also argues the statements she "almost fell out of the chair" and that she thought N.M.'s "memory was really good" were grossly improper opinions by the prosecutor.

¶ 39 Counsel is given "wide latitude" in their closing statements to the jury. *State v. Anderson*, 322 N.C. 22, 37, 366 S.E.2d 459, 468 (1988) (citations omitted). Counsel may argue any of the evidence presented and any reasonable inferences from that evidence. *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998). "Statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *Id.* (citation omitted). However, if the prosecutor "becomes abusive, injects his personal views and opinions into the

argument before the jury, he violates the rules of fair debate[,] and it becomes the duty of the trial judge to intervene to stop improper argument and to instruct the jury not to consider it." *State v. Smith*, 279 N.C. 163, 166, 181 S.E.2d 458, 460 (1971); *see also State v. Scott*, 314 N.C. 309, 312, 333 S.E.2d 296, 298 (1985) (determining evidence presented in closing argument was improper because of its reference to evidence outside the record and suggesting the jury convict the defendant from a policy standpoint of the impact of other impaired drivers); *State v. Miller,* 271 N.C. 646, 657, 157 S.E.2d 335, 344 (1967) (holding the State's closing argument was grossly improper when referring to evidence of the defendant's character despite no introduction of that evidence in the record).

> [T]o constitute reversible error: the prosecutor's remarks must be both improper and prejudicial. Improper remarks are those calculated to lead the jury astray. Such comments include references to matters outside the record and statements of personal opinion. . . . Improper remarks may be prejudicial either because of their stigma or because of the general tenor of the argument as a whole.

Jones, 355 N.C. at 133, 558 S.E.2d at 107–08.

¶ 40 The prosecutor's statements, when viewed in context and in light of the evidence on the record, are not grossly improper. The evidence prosecutor referred to was extensively covered by both the defense and the State during direct and cross-examination of the witnesses. Defense counsel's sustained objection to the State's questioning of Detective Hubard was toward his affirmation to the question "so he

gets away with it?" This rhetorical question is proper for a jury but not for a detective. Looking at the statements within the context of the State's closing argument, the prosecutor was discussing elements of the crimes defendant was charged with and why some of the evidence presented was not charged based upon the legal system. We cannot say that the statements by the prosecutor rise to the level of "conduct so extreme as to render the trial fundamentally unfair."

¶ 41 Finally, defendant takes issue with the following statements by the prosecutor, "I almost fell out of my chair" and "I thought her memory was pretty good."

¶ 42 The prosecutor's further statement about falling out of her chair in response to an answer by defendant was not grossly improper. Although seemingly dramatic, it was an instance where "wide latitude" should be given. The State's isolated statement about N.M.'s memory was not grossly improper nor prejudicial given the wide latitude afforded to trial attorneys during closing arguments.

III. Conclusion

¶ 43 For the foregoing reasons, we hold the trial court did not err in excluding the prior statements made by N.M., and in limiting the scope of defendant's cross-examination under Rules 401, 402, and 412. Nor did the trial court err by not intervening *ex mero motu* during the State's closing argument.

NO ERROR.

Judge ZACHARY concurs.

Judge MURPHY concurs in result only.

Report per Rule 30(e).