IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-445

No. COA20-642

Filed 17 August 2021

Chatham County, No. 18 CRS 577

STATE OF NORTH CAROLINA

v.

KISHA JOANN WELCH, Defendant.

Appeal by Defendant from judgment entered 26 September 2019 by Judge Susan E. Bray in Chatham County Superior Court. Heard in the Court of Appeals 12 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany Pinkham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Kisha Joann Welch appeals from a judgment entered after a jury found her guilty of felony child abuse. Defendant argues that the trial court erred by (1) denying Defendant's motion to dismiss; (2) failing to exclude expert testimony; (3) denying Defendant's motion to continue; (4) admitting evidence of Defendant's alleged drug use; and (5) failing to intervene *ex mero motu* during the State's closing

argument. Upon review, we conclude that Defendant received a fair trial, free from error.

I. Factual and Procedural Background

¶ 2 On 5 April 2018, Defendant arrived at the home of Donnette Sanders to pick up and watch Sanders's four-month-old daughter Abby.[1] Amanda Hall Johnson was dressing the baby when Defendant began aggressively "jerking [Abby's] pants on her," apparently in a hurry to leave. Abby "started screaming and crying." However, when Johnson was dressing Abby, Abby did not have bruises, marks, or any apparent injuries.

¶ 3 In the early morning of 7 April 2018, Defendant asked her friend Carson Williams to take Abby to Sanders, which did not happen. Ultimately, Williams followed Defendant in her car to return Abby to Sanders. Williams knocked on Sanders's door multiple times without an answer, so the two were unsuccessful at returning Abby. Williams testified that he had previously seen Defendant "rocking back and forth" with Abby "a little harder than [he] thought was normal."

¶ 4 That afternoon, Defendant met Laurie Wright. Wright testified that Defendant asked Wright to return Abby to Sanders without Defendant. Wright said she would not take Abby alone "[b]ecause [she] knew something wasn't right."

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[1] We use a pseudonym to protect the anonymity of the child and for ease of reading. *See* N.C. R. App. P. 42.

Instead, Wright accompanied Defendant to Sanders's residence and returned Abby to Sanders.

¶ 5 Soon after Defendant and Wright returned Abby, Sanders discovered that Abby's face was bruised and scratched. The right side of her face also had a large, circular burn mark. Billy Kiser, Sanders's friend, called 911 after seeing the injuries to Abby at Sanders's residence. Doctors later reported that Abby had four fractured ribs and a fractured arm in addition to her visible injuries.

¶ 6 Defendant claimed that Abby's facial burn occurred when Defendant was mopping and accidentally splashed bleach on Abby before attempting to rub the bleach off with a rag. Defendant also claimed that Abby was bruised and scraped accidently when Defendant slipped on a wet front porch step and fell onto the gravel with Abby. Later that night, Defendant asked Wright to "vouch" for her and tell the police that Wright had been with Defendant when Abby was injured.

¶ 7 On 30 July 2018, Defendant was indicted by a Chatham County grand jury for (1) felony intentional child abuse causing serious bodily injury and (2) felony negligent child abuse causing serious bodily injury. The trial court set the case for trial on 16 September 2019. Pretrial motions were due by 26 August 2019.

¶ 8 The State filed a Notice of Experts on 20 August 2019. The notice included links to each expert's education, experience, and papers. The State first listed Dr. Michael Vreeland, an expert in emergency medicine. He treated Abby in the

emergency room and was to testify about his medical evaluation and how Abby's injuries were consistent with "non-accidental trauma." The State listed Deborah Flowers as an expert on the "proper examination and documentation of child abuse injuries." She was to testify about the medical reports and documentation as well as how Abby's injuries were consistent with physical abuse. The State also named Dr. Samantha Schilling—an expert in the evaluation and care of kids who have suffered from abuse or neglect—to testify as to her reports on Abby, Abby's medical records, and "notes of verbal conversations provided in discovery." The State also listed Dr. Samuel Jones who was to testify that Abby's burn was consistent with a contact burn.

¶ 9 Defendant filed a motion to continue, arguing that Defendant had insufficient time to review the expert opinions. At the motion to continue hearing held on 29 August 2019, Defendant's counsel argued the following:

> I cannot and will not tell the [c]ourt that I didn't have the child's healthcare records; they were provided fairly early on. . . . I just would like a little bit more time to have somebody of my choosing, at least on a consulting basis, look at this a little bit further[.]

The court responded, "These [experts] are individuals you have known of for a year, had access to for a year, [and] for whatever reason, I guess, [you have] chosen not to understand their opinion." The trial court denied Defendant's motion to continue.

¶ 10 On 16 September 2019, Defendant's case came before a jury in Chatham County Superior Court. The State's theory of the case relied heavily on Defendant's

alleged drug use to show that Defendant caused Abby's injuries intentionally. For example, the State called Gwendolyn Marie Locklear to the stand, and Locklear testified that while she and Defendant were in Moore County Jail, Defendant said she had spilled liquid meth on Abby's face.

¶ 11 The State also elicited testimony from Tracy Riley with the Moore County Department of Social Services, Child Protection Services. Riley went to the hospital to complete intake and begin investigating Abby's injuries. Riley observed Abby's bruises, scratches, and a facial burn that had been covered by makeup. Further, Sanders admitted to Riley that Defendant had given Sanders meth on 5 April 2018—the day Defendant picked up Abby.

¶ 12 The State called narcotics investigator Brent Fonville with the Chatham County Sheriff's Office to the stand. Fonville testified that he saw a glass pipe that can be used to smoke meth and loose batteries that can be used to manufacture meth in Defendant's bedroom drawer. Defendant confessed to Fonville that she had previously used meth. However, Defendant kept changing her story about the amount of meth she last kept for personal use. Fonville located two stores within five miles of Defendant's home where glass pipes similar to the one found at Defendant's home could be purchased. One store sold pipes in the same box that was found in Defendant's car.

¶ 13 The State tendered three witnesses as experts without objection from

Defendant. First, Dr. Vreeland reported that Abby had a mark on her face that had been covered up with makeup, and she had sustained bruising, as well as fractured ribs. He testified that the rib fractures were not consistent with an accident and that "[t]he constellation of all those injuries together would not be explained by one single incident of trauma," such as falling down the steps. Defendant made several general objections during Dr. Vreeland's testimony.

¶ 14 Next, Dr. Jones testified about Abby's burn and her medical charts. In Abby's medical charts, Dr. Jones stated that the "burn wounds appear to be of a contact mechanism versus chemical burn." At trial, Dr. Jones testified that the glass pipe similar to the one found in Defendant's home would have been "almost an exact fit" over Abby's burn. Dr. Jones testified that he would be concerned about inconsistencies in the story had he been told someone "splashed bleach on the child's face and rubbed it off" because "wiping would leave a different pattern" than a splash of bleach. The Defendant objected to the testimony on the basis of lack of foundation. The trial court overruled this objection.

¶ 15 The State also elicited testimony about Abby's injuries from Dr. Schilling. Dr. Schilling wrote a "Child Medical Evaluation" after Abby was referred to UNC Hospital's Beacon Program Child Evaluation Clinic by Moore County Child Protection Services. Dr. Schilling's evaluation included "Impression" notes stating that "[d]uring the hospitalization and since discharge, no plausible accidental

mechanism has been identified to account for these severe and multiple injuries. These injuries are consistent with a diagnosis of non-accidental trauma." Dr. Schilling also reported the following about Abby:

> [S]he did sustain a facial burn which based on history may have been caused by methamphetamine production and/or use by her caregivers. Although this cannot be diagnosed based on the appearance of the burn alone, the pattern of the burn is consistent with this history. In addition to the direct harm from the substances, harm to children may also result indirectly due to the risk of maltreatment of children living in homes with substance abusing caregivers.

¶ 16 Dr. Schilling's testimony described how Abby's arm fracture was of the type more frequently seen in non-accidental trauma cases and that Abby's rib fractures were of the type "more consistent with being caused by child abuse." Dr. Schilling also testified that the bruises on Abby's face demonstrated multiple blunt force trauma impact points, and those injuries would be inconsistent with Defendant's reported history of falling down the stairs with Abby. Lastly, Dr. Schilling testified that Abby's burn was "well circumscribed, round, and would [have been] consistent with the reported history" of meth use. Defendant made general objections during Dr. Schilling's testimony.

¶ 17 In the State's closing argument, the prosecutor illustrated her theory of the case: "[Defendant] sets the baby down . . . starts heating up that meth pipe and she

gets her fix. . . . We don't know what effect methamphetamine had on [Defendant's] brain. But at some point she looked down at that baby and did the unthinkable." The prosecutor continued with remarks that Defendant "squeez[ed] the air out of" the baby, "snatched [the] baby up by the arm," and suggested that Defendant may have punched the baby or thrown the baby across the yard. Defendant did not object to any of the prosecutor's statements.

¶ 18 The State concluded its argument with the following statement:

> The [j]udge is going to give you the law in a few minutes . . . [a]nd when she tells you that law, it's going to be a count of felony child abuse causing serious physical injury and misdemeanor child abuse, which would mean the injury is not serious. And that's it.

The judge subsequently instructed the jurors and sent them to deliberate. The jury returned a verdict finding Defendant guilty of felony child abuse. Defendant gave oral notice of appeal in open court.

II. Analysis

¶ 19 Defendant argues that the trial court erred by (1) denying Defendant's motion to dismiss; (2) failing to exclude expert testimony; (3) denying Defendant's motion to continue; (4) admitting evidence of Defendant's alleged drug use; and (5) failing to intervene *ex mero motu* during the State's closing argument. We address each issue in turn.

A. Motion to Dismiss

¶ 20 The trial court denied Defendant's motion to dismiss all charges at the close of the evidence. Defendant argues that the trial court erred by dismissing the motion because the State did not present substantial evidence regarding intent to harm Abby. We disagree.

¶ 21 Defendant "preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020). The standard of review for the denial of a motion to dismiss is de novo. *Id.* at 250, 839 S.E.2d at 790.

¶ 22 When a defendant makes a motion to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (citations omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *Powell*, 299 N.C. at 98, 261 S.E.2d at 117 (citation omitted).

¶ 23 "In making its determination, the trial court must consider all evidence

admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192–93, 451 S.E.2d 211, 223 (1994). "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citation omitted). Further, "[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988) (citation omitted).

¶ 24 In North Carolina, felony child abuse occurs when

> [a] parent or any other person providing care to or supervision of a child less than 16 years of age . . . intentionally inflicts any serious physical injury upon or to the child or . . . intentionally commits an assault upon the child which results in any serious physical injury to the child.

N.C. Gen. Stat. § 14-318.4(a) (2019). "While intent may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred." *State v. Wilson*, 269 N.C. App. 648, 652, 839 S.E.2d 438, 441 (2020) (citation and quotation marks omitted).

We conclude that the State presented "such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion" of intent. *Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169. At trial, experts testified that Abby suffered from non-accidental injuries; two witnesses observed Defendant handling the baby improperly; multiple witnesses testified that Abby's burn had been concealed with makeup; Defendant asked Wright to "vouch" for her; a glass pipe that can be used to smoke meth and loose batteries that can be used in manufacturing meth were found in Defendant's drawer; two stores within five miles of Defendant's home sold glass pipes similar to the one found at Defendant's home; one store sold pipes in the same box that was found in Defendant's car; a glass pipe fit almost exactly over Abby's burn; and Locklear testified that Defendant said she had spilled meth on Abby's face.

¶ 25 Considering the evidence "in the light most favorable to the State," *Rose*, 339 N.C. at 192–93, 451 S.E.2d at 223, there is more than a "suspicion or conjecture" as to "the commission of the offense[.]" *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. Although some evidence supports Defendant's account of the injuries, "[c]ontradictions and discrepancies" of evidence "are for the jury to resolve." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. The trial court did not err by denying Defendant's motion to dismiss all charges.

B. Admission of Expert Testimony

¶ 26 Defendant argues expert testimony from three expert physicians should have been excluded because the testimony was not sufficiently reliable under Evidentiary

Rule 702(a). Defendant also contends that, should we find her assignments of error unpreserved, the trial court's failure to exclude the expert testimony constitutes plain error. We disagree.

¶ 27 A trial court's 702(a) ruling will not be reversed without a showing of abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

¶ 28 "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); N.C. R. App. P. 10(a)(1). "Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citations omitted). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and internal quotations omitted). "Under the plain error rule, [the] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v.*

Jordan, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

¶ 29 "Preserved legal error is reviewed under the harmless error standard of review." *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330 (citations omitted). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 998, 893 (2001) (citation omitted). In addition, error is harmless "[w]here it does not appear that the erroneous admission of evidence played a pivotal role in determining the outcome of the trial[.]" *State v. Mason*, 144 N.C. App. 20, 28, 550 S.E.2d 10, 16 (2001) (citation omitted). "Because the plain error standard of review imposes a heavier burden on the defendant than the harmless error standard, it is to the defendant's advantage to object at trial and thereby preserve the error for harmless error review." *Lawrence,* 365 N.C. at 512, 723 S.E.2d at 330 (citation omitted).

¶ 30 To satisfy Rule 702(a), expert testimony must (1) be based upon sufficient facts or data; (2) be the product of reliable principles and methods; and (3) apply the principles and methods reliably to the facts of the case. N.C. Gen. Stat. § 8C-1, Rule 702 (2019); *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. "The trial court has discretion in determining how to address the three prongs of the reliability test," and it is necessary for the trial court to "have the same kind of latitude in deciding *how* to test an expert's reliability . . . as it enjoys when it decides *whether* that expert's relevant

testimony is reliable." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (alteration in original) (citations omitted).

¶ 31 Defendant preserved a 702(a) argument for appellate review when she objected to Dr. Jones's testimony about what pattern a splash of bleach would leave on a child. When Drs. Vreeland and Schilling testified about the non-accidental nature of Abby's injuries, Defendant only made general objections to the testimony. *See, e.g.*, *Powell v. Omli*, 110 N.C. App. 336, 350, 429 S.E.2d 774, 780 (1993) ("A specific objection that is overruled is effective only to the extent of the grounds specified." (citations omitted)).

¶ 32 Even assuming *arguendo* that all assignments of error were preserved, Defendant cannot show that the trial court's failure to exclude the testimony "was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Riddick*, 315 N.C. at 756, 340 S.E.2d at 59. Defendant provides no support for her contention that the challenged expert testimony should have been excluded as insufficiently reliable under Rule 702(a). The court received Drs. Jones, Schilling, and Vreeland as experts without objection from Defendant and each of the experts based their testimony on their firsthand evaluations of Abby and her injuries. Further, the jury members "are the triers of the facts. The credibility of the evidence is for them." *State v. Artis*, 233 N.C. 348, 350, 64 S.E.2d 183, 184 (1951). The trial court did not err in admitting the experts' testimony.

C. Motion to Continue

¶ 33 Next, Defendant argues "[t]he trial court should have granted a continuance or struck the . . . opinions of Drs. Jones and Schilling" because Defendant needed more time to develop a defense. We disagree.

¶ 34 "Although a motion for a continuance is ordinarily addressed to the discretion of the trial judge and is reviewable only upon a showing of an abuse of discretion, when the motion is based on a constitutional right the ruling of the trial judge is reviewable on appeal as a question of law." *State v. Maher*, 305 N.C. 544, 547, 290 S.E.2d 694, 696 (1982) (citation omitted). "Regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when [the] defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error." *State v. Walls*, 342 N.C. 1, 24–25, 463 S.E.2d 738, 748 (1995).

¶ 35 "The rights to assistance of counsel and of confrontation of one's accusers and witnesses are guaranteed by the Sixth Amendment to the Federal Constitution and by Article I, sections 19 and 23 of the North Carolina Constitution." *State v. Harris*, 290 N.C. 681, 686–87, 228 S.E.2d 437, 440 (1976) (citations omitted). "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 332, 431 S.E.2d 331, 337, 338 (1993) (citation omitted)

("The defendant's evidence did not tend to show that he had inadequate time to confer with counsel or that counsel had inadequate time to prepare for trial."). However, "no set length of time for investigation, preparation and presentation is required, and whether [the] defendant is denied due process must be determined upon the basis of the circumstances of each case." *Harris*, 290 N.C. at 687, 228 S.E.2d at 440 (citations omitted). "To demonstrate that the time allowed was inadequate, the defendant must show 'how his case would have been better prepared had the continuance been granted[,] or that he was materially prejudiced by the denial of his motion.'" *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 337 (quoting *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986)).

¶ 36 In addition, N.C. Gen. Stat. § 15A-903(a)(2) provides that:

> [T] court must order . . . [t]he prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

N.C. Gen. Stat. § 15A-903(a)(2) (2019). "[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990)

(citations omitted).

¶ 37 Here, a public defender represented Defendant for "a period of time" until Defendant hired a private attorney who handled the trial, and no evidence in the record shows that Defendant lacked "adequate time to confer with counsel or that counsel had inadequate time to prepare for trial." *Tunstall*, 334 N.C. at 332, 431 S.E.2d at 338.

¶ 38 Moreover, even assuming *arguendo* that the trial court erred, Defendant cannot prove she "suffered prejudice as a result of the error." *Walls*, 342 N.C. at 24–25, 463 S.E.2d at 748 (citation omitted); *Harris*, 290 N.C. at 687, 228 S.E.2d at 440. At the motion to continue hearing, Defendant's counsel stated the following:

> I cannot and will not tell the [c]ourt that I didn't have the child's healthcare records; they were provided fairly early on. . . . I just would like a little bit more time to have somebody of my choosing, at least on a consulting basis, look at this a little bit further.

Before denying Defendant's motion, the court responded: "These [experts] are individuals you have known of for a year, had access to for a year, [and] for whatever reason, I guess, [you have] chosen not to understand their opinion."

¶ 39 Dr. Jones wrote in a medical chart that Abby's "burn wounds appear[ed] to be of a contact mechanism versus chemical burn[,]" and Dr. Schilling's "Child Medical Evaluation" reported that "[d]uring the hospitalization and since discharge, no plausible accidental mechanism has been identified to account for these severe and

multiple injuries. These injuries are consistent with a diagnosis of non-accidental trauma." Further, Dr. Schilling wrote the following about Abby:

> [S]he did sustain a facial burn which based on history may have been caused by methamphetamine production and/or use by her caregivers. Although this cannot be diagnosed based on the appearance of the burn alone, the pattern of the burn is consistent with this history. In addition to the direct harm from the substances, harm to children may also result indirectly due to the risk of maltreatment of children living in homes with substance abusing caregivers.

The statements in these medical reports, in combination with the Notice of Experts, demonstrate that defense counsel had adequate time to "investigate, prepare and present [a] defense" because the documents point to non-accidental trauma and alleged meth use. *Tunstall*, 334 N.C. at 329, 431 S.E.2d at 337. Defendant had access to the medical reports since initial discovery in 2018, long before pretrial motions were due on 26 August 2019. Defendant has not shown "how [her] case would have been better prepared had the continuance been granted." *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 337.

D. Drug Use Evidence

¶ 40 Defendant argues that the trial court erred by admitting evidence of Defendant's alleged drug use. Specifically, Defendant argues that evidence relating to Defendant's prior alleged drug use and possession of drug paraphernalia was irrelevant under Evidentiary Rule 401, inadmissible under Evidentiary Rule 404(b),

and should have been excluded under Evidentiary Rule 403. We disagree.

1. *Rule 401*

¶ 41 "Relevant evidence" is evidence that 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." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). The standard of review for a trial court's Rule 401 decision "is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted). However, because a trial judge "is better situated to evaluate whether a particular piece of evidence" is relevant, *id.*, a trial court's ruling on relevancy is "given great deference on appeal," *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (citation omitted).

¶ 42 The party arguing "that evidence was improperly admitted" must "show both error and that he was prejudiced by its admission." *State v. Anderson,* 200 N.C. App. 216, 220, 684 S.E.2d 450, 454 (2009) (quoting *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987)). Also, "evidence tending to support a theory of the case being tried is admissible." *State v. Coffey*, 326 N.C. 268, 280, 389 S.E.2d 48, 55 (1990) (citation omitted).

¶ 43 In this case, Defendant's intent to physically harm Abby was an element of felonious child abuse that the State needed to prove. N.C. Gen. Stat. § 14-318.4(a).

The State's theory of the case relied heavily on Defendant's alleged drug use to show that the injuries Abby sustained were caused intentionally and not by accident. The evidence admitted and the testimony elicited supports the State's theory of the case and made the existence of a consequential fact—that Defendant caused the injuries intentionally and not by accident—more probable. *Coffey*, 326 N.C. at 280, 389 S.E.2d at 55; N.C. Gen. Stat. § 8C-1, Rule 401. The trial court did not err.

2. *Rule 404(b)*

¶ 44 We disagree with Defendant's argument that all evidence relating to Defendant's alleged drug use was inadmissible character evidence under Rule 404(b).

¶ 45 "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). However, Rule 404(b) is a "general rule of *inclusion,"* and "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident" are "permissible purposes" that allow the trial court to admit the evidence. *State v. Pierce*, 346 N.C. 471, 490, 488 S.E.2d 576, 587 (1997) (emphasis in original) (citations and quotation marks omitted). The "permissible purposes" listed above are "not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime" charged. *State v. Clark*, 138 N.C. App. 392, 403, 531 S.E.2d 482, 490 (2000); *Coffey*, 326 N.C. at 278–79, 389 S.E.2d at 54.

The trial court's 404(b) ruling is reviewed de novo. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d at 158–59 (2012).

¶ 46 In this case, evidence of Defendant's alleged drug use was not introduced to "prove the character" of Defendant "in order to show that [Defendant] acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b). Rule 404(b) is a "general rule of *inclusion*," *Pierce*, 346 N.C. at 490, 488 S.E.2d at 587, and the State presented evidence of Defendant's alleged drug use to prove "absence of . . . accident" as well as the element of intent for felonious child abuse, N.C. Gen. Stat. § 8C-1, Rule 404(b); N.C. Gen. Stat. § 14-318.4(a). Thus, the trial court did not err in admitting evidence of Defendant's alleged drug use. N.C. Gen. Stat. § 8C-1, Rule 404(b); *Pierce*, 346 N.C. at 490, 488 S.E.2d at 587.

3. *Rule 403*

¶ 47 Defendant argues that even if the evidence of alleged drug use was properly admitted under Rules 401 and 404(b), the evidence should have been excluded under Evidentiary Rule 403 because the evidence unfairly prejudiced Defendant. We disagree.

¶ 48 Rule 403 states "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2019). The decision to exclude evidence under Rule 403 is "within the sound discretion of the trial court," and we review the trial court's ruling for abuse

of discretion. *State v. France*, 94 N.C. App. 72, 76, 379 S.E.2d 701, 703 (1989) (citation omitted); *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 158–59. A trial court's Rule 403 decision will only be reversed "when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *State v. Stevenson*, 169 N.C. App. 797, 800–01, 611 S.E.2d 206, 209 (2005) (citation and quotation marks omitted).

¶ 49 Here, the evidence of Defendant's drug use had "probative value" which was not substantially outweighed by "the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403. As previously discussed, the State needed to prove intent as an element of felonious child abuse. N.C. Gen. Stat. § 14-318.4(a). The evidence at issue was probative of intent, so the trial court's ruling was not "so arbitrary that it could not have resulted from a reasoned decision." *Stevenson*, 169 N.C. App. at 800–01, 611 S.E.2d at 209.

E. The State's Closing Argument

¶ 50 Defendant contends that the trial court erred by twice failing to intervene *ex mero motu* during the State's closing argument to correct improper remarks made by the prosecutor.

¶ 51 First, Defendant takes issue with the following remarks made by the prosecutor: "[Defendant s]ets the baby down . . . starts heating up that meth pipe and she gets her fix. . . . We don't know what effect methamphetamine had on

[Defendant's] brain. But at some point she looked down at that baby and did the unthinkable." The prosecutor's argument continued with remarks that Defendant "squeez[ed] the air out of" the baby and "snatched [the] baby up by the arm." Later, the prosecutor suggested Defendant may have punched the baby or thrown the baby across the yard. Defendant claims the State did not base the above illustrations on "logical deductions" from the evidence but instead appealed to "passion or prejudice.

¶ 52 Second, Defendant argues that the following remarks by the prosecutor impermissibly misstated the law:

> The [j]udge is going to give you the law in a few minutes . . . [a]nd when she tells you that law, it's going to be a count of felony child abuse causing serious physical injury and misdemeanor child abuse, which would mean the injury is not serious. And that's it.

¶ 53 Defendant concedes that she did not object at trial to any of the remarks that she now challenges on appeal. Nonetheless, Defendant argues that the prosecutor's remarks were so improper that the trial court erred by failing to intervene *ex mero motu*. We disagree.

¶ 54 N.C. Gen. Stat. § 15A-1230(a) outlines the boundaries of closing arguments:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take

> judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2019). Pursuant to this standard, parties are given "wide latitude" during closing arguments and may argue "the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Huey*, 370 N.C. 174, 180, 804 S.E.2d 464, 469 (2017) (citations and quotation marks omitted); *State v. McNeill*, 371 N.C. 198, 249, 813 S.E.2d 797, 829 (2018); *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995). In general, "[i]ncorrect statements of law in closing arguments are improper." *State v. Ratliff*, 341 N.C. 610, 616, 461 S.E.2d 325, 328 (1995). However, a trial court may "cure[] any prejudice resulting from a prosecutor's misstatements of law by giving a proper" jury instruction. *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007).

¶ 55 When the defense does not object to the prosecutor's improper argument(s), the standard of review "is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). Under this standard, "[o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *Huey*, 370 N.C. at 180, 804 S.E.2d at 470

(alteration in original) (citation and quotation marks omitted).

¶ 56 We conclude that the State's closing argument was not so grossly improper that the trial court erred by failing to intervene *ex mero motu*. The prosecutor did not "become abusive, inject [her] personal experiences, [or] express [her] personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of [] [D]efendant." N.C. Gen. Stat. § 15A-1230(a). The record provides evidence of Defendant's substance abuse and evidence suggesting that the injuries were not accidental. The State's argument regarding Defendant's substance abuse relied upon "reasonable inferences" from the law and the facts in evidence.

¶ 57 The judge properly instructed the jury on both felonious child abuse and misdemeanor child abuse. Thus, the trial court cured "any prejudice resulting from [the] prosecutor's misstatements of law." *Goss*, 361 N.C. at 626, 651 S.E.2d at 877.

¶ 58 Accordingly, Defendant's argument that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument is without merit.

III. Conclusion

¶ 59 For the foregoing reasons, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges DILLON and JACKSON concur.

Report per Rule 30(e).