IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-482

No. COA20-661

Filed 7 September 2021

Randolph County, No. 18 CRS 52687

STATE OF NORTH CAROLINA

v.

DEREK SIDNEY SCHMIDT, Defendant.

Appeal by Defendant from judgment entered 30 January 2020 by Judge Kevin M. Bridges in Randolph County Superior Court. Heard in the Court of Appeals 26 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Chris D. Agosto Carreiro, for the State.

W. Michael Spivey for Defendant-Appellant.

INMAN, Judge.

¶ 1 Derek Sydney Schmidt ("Defendant") appeals from his convictions for assault on a child under 12 years old and felonious child abuse. Defendant contends that (1) the trial court lacked jurisdiction to try him for assault on a child under 12 because the warrant failed to allege the essential elements of the offense and (2) the trial court plainly erred by admitting jail telephone recordings because the excerpts were

irrelevant and unduly prejudicial. After careful review, we vacate Defendant's conviction for assault on a child under 12.

I. FACTS & PROCEDURAL HISTORY

¶ 2 The evidence presented at trial tends to show the following:

¶ 3 In early 2018, Defendant lived with his girlfriend and her two children, G.J.B., fourteen months old, and N.D.B, two and a half years old. In late May 2018, the children's great-grandmother and aunt observed bruises, rashes, and other injuries on the children after they were exclusively in Defendant's custody. The children also displayed an extreme unwillingness to be left in Defendant's care. The children's great-grandmother called law enforcement along with Child Protective Services ("CPS") and took them to their pediatrician for medical care. A doctor's examination of G.J.B. revealed significant bruising on his chest, forehead, and ear and petechiae around his neck and chest. In the doctor's opinion, the injuries to G.J.B. were painful and significant and demonstrated intentional trauma by strangulation and force.

¶ 4 CPS subsequently opened an investigation into the alleged abuse of G.J.B. and N.D.B. When Defendant met with a social worker from CPS, he lied to her and gave her a false name. A few days later, Defendant traveled to New York with his girlfriend. Defendant's girlfriend testified it was Defendant's idea to move to New York together after the child abuse investigation started. Defendant was arrested

there and extradited to North Carolina. The arrest warrant for the charge of assault on a child under 12 alleged that Defendant

> . . . unlawfully and willfully did assault [N.D.B] a child 2 YEARS OF AGE [sic] and thus under twelve years of age, by THE CHILD PRESENTS BRUISING AND CONTUSIONS TO THE FACE, WHICH RESULTED IN WHAT IS COMMONLY REFERRED TO AS A BLACK EYE.

¶ 5 While in jail awaiting trial, Defendant made a series of phone calls to his father, who did not testify at trial. The jail monitored and recorded those calls, as it does with all calls from the jail phones. The State introduced three recordings of the calls at trial. Defense counsel objected generally to the admission of the phone recordings but did not specify the grounds for the objection and did not move to suppress them. The trial court admitted the recordings without review and the jury listened to the telephone conversations between Defendant and his father.

¶ 6 Each taped conversation contained an initial disclaimer that the calls were subject to monitoring and recordation. The conversations between Defendant and his father covered a variety of topics including plea negotiations, Defendant's trip to New York, and personal advice. For example, Defendant's father advised Defendant not to take a plea deal, and Defendant asked his father how he should plead if he were guilty on multiple occasions. When Defendant's father questioned whether Defendant was in fact guilty, Defendant replied, "I don't want to say too much over

this phone if it's recorded." At another point, Defendant's father opined that Defendant's bond was set high because Defendant was a "flight risk." Regarding Defendant's time in prison, Defendant's father chastised Defendant, "you've hit rock bottom here son. When you're done with this you got to turn it around—the way you live, the way you think, you've got to change all that when this is done. The way you were doing it did not work. Got you where you are now."

¶ 7 The jury found Defendant guilty of assault on a child under 12 and felonious child abuse. The trial court sentenced Defendant to 51 to 74 months in prison. Defendant filed written notice of appeal.

II. ANALYSIS

1. Subject Matter Jurisdiction

¶ 8 Defendant contends that the trial court lacked subject matter jurisdiction to try Defendant for assault on a child under 12 because the warrant failed to allege all essential elements of the offense. We agree.

¶ 9 A criminal pleading is fatally defective if it fails to state an essential element of the offense. *State v. Ellis*, 368 N.C. 342, 344-45, 776 S.E.2d 675, 677 (2015) (citations omitted). The specificity requirement in criminal pleadings serves fundamental purposes

> (1) to [ensure] such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused

> from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty, to pronounce sentence according to the rights of the case.

State v. Hunt, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (cleaned up). On appeal, we review the sufficiency of charging documents *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009).

¶ 10 North Carolina's assault statute does not list the essential elements of assault on a child under the age of 12 years, *see* N.C. Gen. Stat. § 14-33(c)(3) (2019), so the offense is governed by common law rules, *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967) (citation omitted). A defendant may properly be charged with assault if the pleading alleges the defendant committed an "overt act evidencing an attempt by force or violence to do injury to the person of another," or a show of violence "sufficient to cause a reasonable apprehension of immediate bodily harm." *State v. O'Briant*, 43 N.C. App. 341, 344, 258 S.E.2d 839, 841 (1979). A battery, defined as an unlawful application of force to the person of another, *State v. Thompson*, 27 N.C. App. 576, 577-78, 219 S.E.2d 566, 568 (1975), always includes an assault, *State v. Hefner*, 199 N.C. 778, 780, 155 S.E. 879, 880 (1930). North Carolina Pattern Jury Instructions provide a battery is "an intentional, offensive touching of another person without that person's consent."

¶ 11 On the charge of assault of a child under 12 years old in this case, the warrant alleged that Defendant

> . . . unlawfully and willfully did assault [N.D.B] a child 2 YEARS OF AGE [sic] and thus under twelve years of age, by THE CHILD PRESENTS BRUISING AND CONTUSIONS TO THE FACE, WHICH RESULTED IN WHAT IS COMMONLY REFERRED TO AS A BLACK EYE.

The warrant seems to rest on the theory of battery, but it does not allege that Defendant acted, touched, or applied force to N.D.B. in any way. Instead, the warrant merely describes the child's injuries and indicates the child's age. Even if all the information in the warrant were true, it fails to allege that Defendant overtly acted or applied some force to the child as required by our common law. *See O'Briant*, 43 N.C. App. at 344, 258 S.E.2d at 841-42; *Thompson*, 27 N.C. App. at 577-78, 219 S.E.2d at 568.

¶ 12 Because the warrant does not allege necessary facts to support all elements of the assault on a child under 12 years old, we hold it was fatally defective and the trial court lacked subject matter jurisdiction to try Defendant on this charge. Therefore, we vacate Defendant's conviction.[1]

2. Admissibility of Jail Call Recordings

[1] Defendant does not request we remand for resentencing. The trial court consolidated both judgments for sentencing and sentenced Defendant to one sentence within the presumptive range punishment for felony child abuse.

¶ 13 Defendant argues the trial court plainly erred in admitting the irrelevant and unduly prejudicial jail phone recordings. We disagree.

¶ 14 Defense counsel made a general objection to the admissibility of the jail call recordings at trial. However, the record does not clearly indicate the specific grounds for the objection, so we review for plain error on appeal. *See State v. Rourke*, 143 N.C. App. 672, 675, 548 S.E.2d 188, 190 (2001). On plain error review, the defendant must demonstrate the error had a probable impact on the jury's finding the defendant guilty. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

¶ 15 At the outset of our discussion, we note the State's "significant institutional reason for recording [jail] phone calls outside of procuring evidence." *State v. Roberts*, 268 N.C. App. 272, 279, 836 S.E.2d 287, 293 (2019) (quotation marks and citation omitted), *disc. review denied*, 374 N.C. 269, 839 S.E.2d 350 (2020). While this Court has encouraged trial courts to review recordings for potential hearsay before publishing them to the jury, the failure to do so before the admission of evidence does not necessarily constitute error. *See State v. Miller*, 197 N.C. App. 78, 91-94, 676 S.E.2d 546, 555-56 (2009). The trial court's failure to review the contents of the jail phone calls in this case was not error outright, so we review each portion of the recordings challenged by Defendant in turn.

a. Father's Statement Defendant Was a "Flight Risk"

¶ 16 Defendant first argues his father's opinion statement that Defendant was a "flight risk" after his arrest was prejudicial and not relevant to whether Defendant had attempted to flee before his arrest.

¶ 17 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." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). However, evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. *Id.*, Rule 403. Hearsay, defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," is generally inadmissible. *Id.*, Rule 801(c). But out-of-court statements offered for a purpose other than the truth of the matter asserted are not considered hearsay. *Miller*, 197 N.C. App. at 87, 676 S.E.2d at 552 (citation omitted).

¶ 18 Evidence concerning a defendant's flight to avoid arrest or prosecution, in particular, is relevant and admissible when the evidence suggests a guilty mind. *State v. Capers*, 208 N.C. App. 605, 615-17, 704 S.E.2d 39, 45-46 (2010); N.C. Pattern Jury Instruction 104.35-36.

¶ 19 The State compares this case to *State v. Miller*. In *Miller*, the trial court admitted a recorded interview between the defendant and a police officer, which included questions containing statements from other witnesses. 197 N.C. App. at 88-

89, 676 S.E.2d at 553. The trial court determined the statements made by the police officer about what the defendant did were not being offered for the truth of the matter asserted, but they were introduced for the limited purpose of evaluating the defendant's responses to questions and his conduct during the interrogation. *Id.* This Court held the trial court did not abuse its discretion in admitting the recordings. *Id.*

¶ 20 Here, the issue of Defendant's flight was certainly relevant to the jury's determination—the State and Defendant offered evidence about Defendant's flight. Defendant left North Carolina for New York after learning about the investigation into whether he abused the children. The trial court then appropriately provided a flight instruction to the jurors. In this case, as in *Miller*, the out-of-court statement was not introduced to prove that Defendant was a flight risk, but instead to provide context for Defendant's complaints about his bond amount and his trip to New York.

¶ 21 To the extent that Defendant's father's statement was inadmissible hearsay, the statement was not so prejudicial as to rise to the level of plain error. There was ample evidence in the record from which the jury could otherwise determine Defendant had fled to New York: (1) when the CPS worker met Defendant at the door of his home to investigate the abuse, Defendant admitted he gave CPS a false name; (2) Defendant's girlfriend testified that it was Defendant's idea to move to New York together after the child abuse investigation started; (3) Defendant traveled to New

York only a few days after being interviewed by CPS about the potential abuse; and (4) Defendant knew an investigation was underway when he left for New York.

b. Father's Statements About His Son's Lifestyle

¶ 22 Defendant next asserts his father's statements regarding Defendant's lifestyle, that he had "hit rock bottom" and needed "to turn his life around," were inadmissible to show he was acting in conformity with bad character under North Carolina Rule of Evidence 404(a).

¶ 23 Character evidence is not admissible for the purpose of proving that a defendant acted in conformity therewith on a particular occasion. N.C. Gen. Stat. § 8C-1, Rule 404(a) (2019). It is not clear from the record that the father's statements were being offered for this purpose, and it does not appear from the transcripts that the State sought to use these statements to show Defendant acted in conformity with his poor character in allegedly abusing the children. In addition, as with the statement that Defendant was a "flight risk," the father's statements were offered to provide context for *Defendant*'s admissible statements during their conversation. Defendant's father's statements about his son's imprisonment do not appear to be so prejudicial otherwise that their admission probably impacted the jury's verdict.

c. Defendant's Refusal to Deny Committing the Abuse

¶ 24 Third, Defendant contends that his refusal to tell his father whether he did or did not commit the crimes charged should not have been played for the jury because

Defendant's sole means of communication were the recorded phone calls and his statements cannot be considered voluntary admissions implied by silence.

¶ 25 A defendant's failure to deny an accusatory statement made in his presence may be considered an implied admission. *State v. Castor*, 285 N.C. 286, 289, 204 S.E.2d 848, 851 (1974).

¶ 26 As the State points out, Defendant was not compelled to accept calls from or make calls to his father by jailhouse phone. He knew he was speaking over a recorded line. The State also did not coerce Defendant's father to ask his son whether he was guilty. And, though Defendant states on the recording that he did not want to deny his guilt on the phone because the call was being recorded, Defendant testified at trial that there were actually "many calls" that were not played for the jury in which he did expressly deny guilt. Defendant cannot now credibly claim that he was involuntarily forced to avoid directly denying guilt to his father. Thus, there does not appear to be any actual "circumstance indicating coercion or lack of voluntariness [that would] render[] the admission incompetent," *Castor*, 285 N.C. at 290, 204 S.E.2d at 851, when Defendant testified at trial that he did outright deny guilt on other occasions regardless of any concerns that he was being recorded.

¶ 27 Defendant's refusal to deny his guilt was properly admitted into evidence for consideration by the jury. The trial court also instructed the jury on Defendant's implied admissions, telling the jurors "[i]f you find from the evidence that the

Defendant has admitted a fact relating to the crimes charged in this case, then you should consider all of the circumstances under which it was made in determining whether it was a truthful admission and the weight you will give to it."

d. Defendant's Hypothetical Discussion of Pleading Not Guilty

¶ 28 Finally, Defendant argues that his discussions with his father about pleading not guilty were also inadmissible as involuntary admissions.

¶ 29 Defendant asked his father multiple times if he should plead not guilty even if he committed the crimes. As before, Defendant was not compelled to make or take these phone calls. Nor was he required to ask his father if he should plead not guilty even if he did commit the crimes. The State did not bully Defendant into posing these hypotheticals; he volunteered them. Excerpts of Defendant's discussions with his father about possible plea negotiations were particularly probative.

¶ 30 Though the jury did request to review the recording exhibits during its deliberations, the State presented ample other evidence of the abuse of the children: several family members testified to the physical injuries on the children after they were exclusively in Defendant's care, the jury saw photographs of the injuries, and a medical expert testified that G.J.B.'s injuries were a result of non-accidental trauma most likely caused by strangulation and force. Even assuming *arguendo* the trial court improperly admitted the jail call recordings and statements contained therein, Defendant has failed to demonstrate the admission of these calls and the statements

within them had a probable impact on the jury's finding him guilty. Therefore, we hold the trial court did not plainly err in admitting the recordings.

III. CONCLUSION

¶ 31 For the above-mentioned reasons, we vacate Defendant's conviction of assault on a child under 12 years of age because the warrant was defective. Defendant has failed to demonstrate reversible error otherwise.

VACATED IN PART; NO ERROR IN PART.

Judges DIETZ and WOOD concur.

Report per Rule 30(e).