IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-806

Filed 17 October 2023

McDowell County, Nos. 17 CRS 554, 51791-93

STATE OF NORTH CAROLINA

v.

CHAD DEWAYNE BARTLEY, Defendant.

Appeal by defendant from judgment entered 9 December 2021 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 22 February 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella for the defendant-appellant.

STADING, Judge.

Chad Bartley ("defendant") appeals from a judgment after a jury found him guilty of the following crimes: statutory rape of a child by an adult, statutory sexual offense with a child by an adult, taking an indecent liberty with a child, first degree rape, first degree sexual offense, statutory rape of a child 15 years of age or younger,

and statutory sexual offense with a child 15 years of age or younger. For the reasons set forth below, we hold no error.

I. Background

"Martha"[1] was a minor child living in Illinois with her mother. Defendant was a friend of her family and began dating Martha's mother after Martha's father died in 2013. At the outset of the relationship, Martha and her family moved to Marion, North Carolina to be closer to defendant. Upon relocating, defendant moved into the family home and began sexually abusing Martha shortly thereafter. Once Martha's extended family discovered the abuse and it was reported, an investigation ensued. Thereafter, the State indicted defendant with an array of sexual crimes against Martha alleged to have occurred between December 2015 and September 2016.

In November of 2021, the State provided supplemental discovery to defendant that included a Facebook message exchange between him and Martha's cousin, who was a minor when the conversations occurred. Prior to trial, defendant filed a motion to exclude evidence of other crimes, wrongs, or acts pursuant to Rules of Evidence 403, 404(a), and 404(b). In December of 2021, defendant presented the motion and the trial court preliminarily indicated that the Facebook message exchange would be admissible contingent upon its probative value when considering other available evidence, followed by a weighing of any prejudicial effect. Subsequently, the trial

[1] Pursuant to Rule 42 of the North Carolina Rules of Appellate Procedure, the minor will be referred to by the pseudonym "Martha."

began with the State's evidence, which included the testimony of Martha, her cousin, her grandmother, and individuals who witnessed concerning behavior in public.

Martha testified that, in early 2015, defendant "asked [her] to come into the bathroom, . . . shut the door behind [her]" and "pulled down [her] pants and started fingering [her]." At that time, Martha was eleven years old, and defendant was in his early thirties. She started crying and defendant attempted to comfort her by saying that his actions were completely normal, and she should not tell anyone. About three weeks later, right after her twelfth birthday, defendant showed her a pornographic video and they had intercourse for the first time. Martha believed that she was in love with defendant, and they were a couple. As time passed, they began having intercourse multiple times a week. Defendant would tell Martha that she was "his girlfriend and his wife," that he was going to break up with her mother once she turned eighteen, and he called her "hot" and "sexy."

Sometimes, defendant would take Martha and her siblings to the YMCA pool while her mother was working. At the YMCA, she would sit on defendant's lap in the pool, and he would take her into the family restroom to "give him a blow job or a hand job." In noticing the age differential, one incident of kissing in the pool drew the attention of a lifeguard. Another YMCA employee witnessed defendant go into the bathroom with Martha for so long that she had a coworker knock on the door and direct him to leave. This event was captured by a video surveillance camera which was accepted into evidence as State's exhibit no. 2 and published to the jury. These

concerns prompted the membership director to suspend their YMCA membership, contact the Department of Social Services, and report the incident to the police.

One day, Martha was watching television and saw a news report about a girl who was sexually assaulted by her stepfather—this led the realization that her relationship with defendant was inappropriate. Martha then called her cousin, who was several years older than her, cried and confided in her about defendant's actions. However, the phone call ended abruptly when defendant caught Martha on the phone. Defendant threatened her with a knife and forced Martha to call her cousin back and say that she was lying for attention. Martha's cousin testified at trial that she did not believe that Martha was joking during the phone call.

As a result of the phone call, Martha's grandmother, who lived in Illinois, traveled to North Carolina the following day. After arriving, her grandmother invited everyone to the pool at her hotel under the pretext of celebrating a birthday. At the hotel, she noticed defendant and Martha touching in the pool. Martha's grandmother confronted defendant and stated that she was "going to get professionals involved." The next day, defendant showed the grandmother provocative pictures of Martha on his phone—claiming that Martha took them to send to her boyfriend. However, Martha claimed that she took those photos at defendant's request. Martha testified that the last time defendant sexually abused her was the day her grandmother arrived in North Carolina.

Following Martha's testimony, her cousin provided testimony underlying exhibits comprising a Facebook message exchange initiated by defendant between July and August 2014—when she was fifteen years old. Defendant told Martha's cousin that he loved her and wanted to be with her, despite being in a relationship with Martha's mother. Defendant also called Martha's cousin "sexy" and requested a "good" picture of her—to which she replied, "I'm 15 stop." Before trial, defendant presented a motion *in limine* to the trial court requesting exclusion of this evidence. Initially, the trial court deferred ruling on the matter. During trial, defendant objected when the State moved to admit these exhibits into evidence. Ultimately, the trial court overruled defendant's objection and admitted the messages into evidence because the trial court found they were "relevant to show plan, intent, design, and scheme."

Later in the proceeding, upon presenting its closing argument, the State replayed the video of defendant and Martha entering the YMCA bathroom. While the video was playing, the State asked the jury to "think about what he is doing to her right now." The State then drew the jury's attention to defendant's behavior after the employee knocked on the door, stating:

> You saw her knock on the door and interrupt them. Watch how he puts his hands on [Martha]. . . . He takes her back into the bathroom and closes the door. Was that because they got interrupted when the other lady knocked on the door? What is he doing to her now? How long has their sexual relationships [sic] been going on at this point to be having sexual relations in public places?

At trial, defendant did not object when the State made these statements.

After the trial court judge read the instructions to the jury, the jury retired to deliberate for an hour before finding defendant guilty of all charges. Thereafter, the trial court held a sentencing hearing and imposed an active term of imprisonment for each judgment. Defendant promptly gave notice of his appeal in open court after sentencing.

II. Jurisdiction

Appellate jurisdiction is proper pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2021).

III. Analysis

Defendant presents two issues on appeal: (1) whether the trial court erred in denying his motion to exclude the Facebook message exchange under Rules of Evidence 403 and 404(b), and (2) whether the trial court erred in failing to intervene *ex mero motu* during the State's closing argument to the jury.

A. Admission of Evidence

1. Rule 404(b)

Defendant first argues that the trial court abused its discretion in admitting the Facebook messages—State exhibit nos. 10 and 11—as there was no proper purpose for their admission under Rule 404(b). This Court reviews a trial court's determination "that the evidence is, or is not, within the coverage of Rule 404(b)" *de novo*. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). "Under

de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Harper*, 285 N.C. App. 507, 510, 877 S.E.2d 771, 776 (2022) (internal quotation marks and citation omitted).

Rule 404(b) of North Carolina's Rules of Evidence provides that:

> 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, R. 404(b) (2021). In general, Rule 404(b) is considered a rule of inclusion of such evidence that "is relevant to any fact or issue other than the defendant's propensity to commit the crimes charged." *State v. Goins*, 244 N.C. App. 499, 515, 781 S.E.2d 45, 56 (2015) (citing *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852–53 (1995)). However, we have noted that Rule 404(b) evidence "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Khouri*, 214 N.C. App. 389, 397, 716 S.E.2d 1, 7 (2011) (internal quotation marks and citation omitted).

To effectuate important evidentiary safeguards, the admission of prior bad acts evidence "is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154–55, 567 S.E.2d 120, 123 (2002). "Evidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes substantial evidence tending to support a reasonable finding by the jury that the defendant

committed the similar act." *Id.* at 155, 567 S.E.2d at 123 (internal quotation marks and citations omitted). A defendant's prior acts are sufficiently similar, and admissible under Rule 404(b) as evidence of common plan or scheme, if they show "some unusual facts present in both crimes" establishing that the same person committed them. *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (internal quotation marks and citations omitted).

In both instances of conduct, defendant used his relationship with Martha's mother to initiate and forge inappropriate contact with the minor girls. The contact was an aggressive pursuit, persistent towards minor girls of similar ages and temporally proximal in both instances. The Facebook messages illustrate defendant's several attempts to convince Martha's cousin that he wanted to date her, telling her "love ya" and "love you," and persuading her to send "good" photographs of herself, in the context of calling her "babe," "baby," "hot," and "sexy." Defendant sent these messages in 2015 when Martha's cousin was fifteen years old, and defendant was in his thirties. Between February 2015 and August 2017, defendant exhibited similar behavior towards Martha—distinguishable in that he was able to further pursue his improper prurient interests as this minor child was in the same house and directly under his control—a distinction which he now argues should cut in his favor. When Martha was between the ages of eleven and thirteen, defendant convinced her that she was his girlfriend, called her "sexy" and "hot," and requested sexual photographs.

The present case bears semblance to our Court's decision in *State v. Khouri*, 214 N.C. App. 389, 716 S.E.2d 1 (2011). In *Khouri*, our court found no error in the trial court's admission of Rule 404(b) testimony showing that the defendant had similar conversations when he initiated varying degrees of sexual contact with two minor girls who were around the same age when the conduct occurred. 214 N.C. App. at 399, 716 S.E.2d at 8. Here, defendant's actions toward Martha and the messages to her cousin are sufficiently close in time and show the same unusual facts, as defendant engaged in strikingly comparable communication toward both minor girls in pursuit of inappropriate relationships. *See Al-Bayyinah*, 356 N.C. at 154–55, 567 S.E.2d at 123. Thus, we hold that the trial court did not err in admitting the Facebook message exchange into evidence because the State did not use them to show that defendant had a propensity to commit sexual crimes, but instead, offered it for a proper purpose under Rule 404(b).

2. Rule 403

Next, defendant argues that the messages should have been inadmissible because the probative value is heavily outweighed by any prejudicial effect. We note that Rule 403 determinations are reviewed for abuse of discretion. *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. An abuse of discretion occurs where the trial court's ruling is "unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Under Rule 403, "[a]lthough 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, R. 403 (2021). "In making its determination with respect to the Rule 403 balancing test, a trial court must analyze the similarity and temporal proximity between the acts." *State v. Mabrey*, 184 N.C. App. 259, 265, 646 S.E.2d 559, 563 (2007) (internal quotation marks and citation omitted). "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). Moreover, "in the context of showing an abuse of discretion by the trial court in its Rule 403 ruling, a defendant must demonstrate a reasonable possibility that, but for the admission of this evidence, the jury would have reached a different result." *State v. Graham*, 200 N.C. App. 204, 207–08, 683 S.E.2d 437, 440 (2009) (citation omitted). "Thus, we will reverse only upon a clear showing that the trial court abused its discretion in admitting this evidence and that the admitted evidence prejudiced defendant." *Id.* at 208, 683 S.E.2d at 440.

The trial court delayed its ruling on defendant's motion *in limine* until it had the opportunity to hear and consider additional testimony. The record shows the trial court permitted the admission of the disputed exhibit only after it heard an appropriate threshold of testimony. The trial court stated that Martha's "testimony indicates that she is a youthful age and that [defendant] . . . creat[ed] a romantic

relationship with her. These texts . . . appear to try to do the same thing [with Martha's cousin] . . . who was 15." Further, the trial court concluded that the "probative value is not outweighed by . . . unfair prejudice to the defendant." Our review leads to the same conclusion: the messages to Martha's cousin, in view of the testimony produced at trial, provide probative value to display a common plan in various stages as defendant pursued both minor girls. Additionally, while defendant cites Martha's cousin's reaction to his messages as substantiation of their inflammatory nature, such response is to be expected, *de minimis*, and does not substantially outweigh the probative value of these disputed exhibits.

In any event, defendant fails to show that he suffered prejudice resulting from the trial court's decision to admit the Facebook message exchange. The State presented overwhelming evidence permitting the jury to find defendant guilty of the charged crimes—even without the messages. Martha's testimony establishes that, starting in 2015, defendant began regularly committing sexual crimes against her and manipulating her into believing his actions were "normal." Also, Martha's grandmother testified that defendant showed her sexualized photographs of Martha on his phone. Furthermore, employees from the YMCA witnessed defendant's inappropriate conduct toward Martha in public. In view of the foregoing, defendant is unable to show that the jury would have come to a different conclusion had the Facebook message exchange not been allowed into evidence. *Graham*, 200 N.C. App. at 207–08, 683 S.E.2d at 440. Therefore, we hold that the trial court did not err in

overruling defendant's Rule 403 objection because the prejudice defendant claims occurred did not substantially outweigh the probative value of the evidence.

B. Closing Arguments

In his final argument, defendant contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. Defendant maintains that the State misrepresented the evidence and improperly instructed the jurors to imagine events while playing the video admitted as State's exhibit no. 2. At trial, defense counsel did not object during the State's closing. On appeal, our task is to review defendant's claim and determine "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, the defendant has the burden of showing "that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Anthony*, 354 N.C. 372, 423, 555 S.E.2d 557, 590 (2001) (citation omitted).

To assess the alleged inaction of the trial court, we must review the remarks by the State. "Trial counsel is allowed wide latitude in argument to the jury and may argue all of the evidence which has been presented *as well as reasonable inferences which arise therefrom*." *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998) (emphasis added) (citation omitted). However, "counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by

injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." *State v. Hill*, 311 N.C. 465, 473, 319 S.E.2d 163, 168 (1984) (citations omitted).

In the matter presently before us, during its closing argument, the State replayed exhibit no. 2 for the jury—the video showing the area of the YMCA where defendant and Martha entered the family bathroom. As the video played, the State continued to provide closing remarks, including the questions "[w]hat is he doing to her now?" and "[h]ow long has their sexual relationships [sic] been going on at this point to be having sexual relations in public places?" Defendant argues that the State misrepresented this evidence by offering an opinion unsupported by the record at trial as to what the video portrayed. However, Martha testified that, on several occasions, she would perform sexual acts on defendant in the family restroom at the YMCA. By asking the jury to consider what was happening in the video, the State properly drew the jurors' attention to a reasonable inference that could be drawn from the evidence presented at trial. *Jones*, 355 N.C. at 133, 558 S.E.2d at 107. Accordingly, we cannot find "that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Anthony*, 354 N.C. at 423, 555 S.E.2d at 590 (citation omitted).

IV. Conclusion

We hold that the trial court did not abuse its discretion in allowing the State to introduce the Facebook message exchange, admitted as State's exhibit nos. 10 and

11, because (1) the State introduced evidence under a proper Rule 404(b) purpose and (2) the probative value of the evidence is not 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. We further hold that the trial court did not err in failing to intervene during the State's closing argument.

NO ABUSE OF DISCRETION; NO ERROR

Judges CARPENTER and DILLON concur.

Report per Rule 30(e).