IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-76

Filed 5 December 2023

Richmond County, Nos. 19 CRS 50890-92

STATE OF NORTH CAROLINA

v.

ROBERT BRANDON HOFFMAN, SR., Defendant.

Appeal by Defendant from judgments entered 2 June 2022 by Judge Stephan R. Futrell in Richmond County Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney Joshua H. Stein, by Assistant Attorney General Ellen A. Newby, for the State.

Christopher J. Heaney for Defendant.

GRIFFIN, Judge.

Defendant Robert Brandon Hoffman appeals from the trial court's judgment entering the jury's verdict finding him guilty of seven sexual crimes against his three daughters, each of whom were aged fifteen or younger at the time. Defendant contends the trial court erred by admitting into evidence a recording of Defendant's conversation with his mother while in jail because the recording's probative value

was substantially outweighed by its risk of prejudice under Rule 403 of the North Carolina Rules of Evidence. We find no error.

I. Factual and Procedural Background

This case arises from sexual acts committed by Defendant against his three daughters. The evidence at trial tended to show as follows:

Defendant and mother were married for twenty-three years but separated prior to trial. Defendant and mother had five children during their marriage, including three daughters: Maeve, Cara, and Sally.[1] The family had no stable housing of their own and often slept at other people's houses. The children were exposed to substance abuse. Defendant provided drugs to the children for their use, and physically abused the children. Defendant was also physically abusive to mother. At the time of the incidents in this case, Maeve was fifteen years old, Cara was thirteen years old, and Sally was twelve years old.

In March 2018, Cara was living with mother. Defendant picked Cara up one day, told her that he needed help cleaning his house, and offered to take her to Walmart to buy clothes and a new phone. That day and the following morning, Defendant touched Cara's legs, stomach, and breasts; "tried to force" himself on her; and demanded she "either suck [his] penis or watch [him] masturbate." Cara eluded Defendant and used Defendant's phone to call mother. Mother sent her boyfriend

[1] We use pseudonyms for each juvenile to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b).

and Maeve to pick up Cara, and also called law enforcement. Cara then described Defendant's illicit acts to a police officer, who stated he was going to call the Department of Social Services. DSS and law enforcement did not follow-up, and Cara did not tell anyone else because Defendant told her that, if she did, "he would kill [her] family, especially the people that [Cara] love[s]."

In the summer of 2018, Sally was staying with Ms. Barton, a family friend, and Ms. Barton's children. One night, Sally awoke startled because she felt like she was being stabbed in her vagina. She got up to recognize that Defendant was on top of her and vaginally penetrating her. Sally tried to scream and push him off. Defendant told Sally he'd kill her if she told anyone. At some time prior, Defendant tried to lick Sally's vagina.

In October or November 2018, Maeve was staying with Ms. Barton and Ms. Barton's children. Like Sally, Maeve woke up frantic one night after feeling heavy pressure on top of her and a sensation inside her vagina. Defendant was on top of her and penetrating her vagina. Maeve's vagina became painful and swollen; she asked Defendant to take her to the doctor, but he refused. Her pain persisted, so she sought help at school and informed the nurse and counselor that her father raped her.

Although Maeve feared Defendant's threats, she also expressed concern about her sister, Cara, who was at a different school. Cara's school counselor was contacted, and Cara told her counselor about Defendant's actions.

Following the reports by Maeve and Cara, DSS and law enforcement initiated investigations. All three daughters received therapy from A. Liles, a licensed, trauma focus certified mental health clinician and clinical addiction specialist. When describing what Defendant did, Maeve started crying, trembling, and completely shut down. Maeve had symptoms consistent with post-traumatic stress disorder, including depression, weight gain, sleeplessness, social avoidance, and difficulty concentrating. Cara was also diagnosed with post-traumatic stress disorder. She shared Maeve's symptoms, in addition to severe anger. Sally's symptoms were more severe, and she experienced more invasive memories that stimulated psychosis, including auditory and visual hallucinations. Sally, like her sisters, was diagnosed with post-traumatic stress disorder and shared overlapping symptoms, including depression and anxiety. Liles testified that, when Sally was explaining Defendant's actions, "she was shaking uncontrollably and then there was also a guilt that she was experiencing that she didn't initially share that to start off with." As of the trial date, all three sisters were still receiving therapy weekly.

During trial, the State played a recording of a phone call between Defendant and his mother while Defendant was in jail. Defendant's mother described that a woman she and Defendant knew was "helping [someone with substance abuse issues] study" for a drug test for a new job. Defendant questioned, "What she's thinking about giving me some of that?" His mother responded, "Probably not." Defendant returned, "Well, she better think about it long and hard. She better know what they

got me in jail for, or I'm going to have to take that." Defendant and his mother laughed, then his mother said, "Might be how she likes it."

Defendant objected to the phone recording. The trial court overruled the objection, but afforded Defendant and his counsel the ability to determine how much of the recording would be played. The trial court did not issue a limiting instruction to the jury regarding the recording. Defendant chose not to present any evidence after the State rested its case.

On 2 June 2022, the jury returned a verdict finding Defendant guilty of one count of incest; two counts of statutory rape of a person fifteen years of age or younger; one count of attempted statutory sex offense of a person fifteen years or younger; one count of indecent liberties; and one count of incest and statutory rape of a child by an adult. The trial court sentenced Defendant to multiple concurrent and consecutive terms of imprisonment for his convictions. The trial court also ordered Defendant to register as a sex offender for the rest of his natural life. Defendant timely appeals.

II. Analysis

Defendant contends the trial court erred by denying his objection to the admission of an audio recording made while he was in jail. Defendant objected to admission of the recording during trial, but the trial court overruled Defendant's objection on grounds that the recording was (1) a statement of a party opponent under Rule 801(d) of the North Carolina Rules of Evidence; (2) admissible evidence of a motive or plan under Rule 404(b); and (3) not more prejudicial than probative under

Rule 403.

Defendant concedes that his recorded statements were indisputably admissible as statements of a party opponent under Rule 801(d). Rule 801(d) states that "[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement." N.C. R. Evid. 801(d)(A). Though Defendant's statements on the recording would usually be rendered inadmissible hearsay, the recording contained Defendant's own statements and was offered against him. The recording was therefore admissible under 801(d).

Defendant further concedes that, though it was technically error for the trial court to rule on the recording under Rule 404(b), such error was not harmful to his case. This Court has previously held that a statement similar to Defendant's statements recorded here did not constitute prior bad acts under Rule 404. *See State v. White*, 131 N.C. App. 734, 743, 509 S.E.2d 462, 468 (1998). Therefore, there was no purpose for the trial court to rule on the admissibility of Defendant's statements under Rule 404(b). *See id.* Even though we agree that the trial court erred by making a ruling under Rule 404(b), the error is harmless because the statements were otherwise admissible. *See id.*

However, Defendant contends the trial court erred by admitting the recording because the risk of prejudice outweighed its probative value under Rule 403. Rule 403 of the North Carolina Rules of Evidence specifies:

> Although relevant, evidence may be excluded if its

> probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. R Evid. 403. This Court reviews the trial court's decision on a Rule 403 issue for abuse of discretion. *State v. Beckelheimer,* 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). "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) (citations omitted). "An [a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Peterson*, 361 N.C. 587, 602–03, 652 S.E.2d 216, 227 (2007) (citation and quotation marks omitted). We will "not intervene where the trial court properly appraises the probative and prejudicial values of evidence under Rule 403." *State v. Miller*, 197 N.C. App. 78, 91, 676 S.E.2d 546, 554–55 (2009) (quoting *Reis v. Hoots*, 131 N.C. App. 721, 727, 509 S.E.2d 198, 203 (1998) (citation omitted)). The defendant must also prove "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial[.]" N.C. Gen. Stat. § 15A-1443(a) (2021).

When determining whether evidence admitted under Rule 403 was unfairly prejudicial, "[o]ur courts have previously held that 'necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree.'" *State v. Washington,* 141 N.C. App. 354, 367, 540 S.E.2d

388, 397 (2000) (quoting *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994)). The recording can only be rendered unfairly prejudicial if it has an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. Mercer*, 317 N.C. 87, 94, 343 S.E.2d 885, 889 (1986); *see also State v. Mackey*, 241 N.C. App. 586, 597, 774 S.E.2d 382, 390 (2015).

Here, the recording contained Defendant's own words referencing the alleged crimes for which he was imprisoned, albeit in a joking manner. After his mother suggested that another woman would be unwilling to have sexual relations with him, Defendant stated: "Well, she better think about it long and hard. She better know what they got me in jail for, or I'm going to have to take that."[2] While incarcerated on charges of rape and sexual assault, Defendant joked that another woman should consent to sexual relations with him because his charges showed he would be willing to force her. Our case law has repeatedly held that evidence of a defendant's own admission of incriminating acts is highly relevant and not unfairly prejudicial to a defendant's case. *See State v. Garcell*, 363 N.C. 10, 34, 678 S.E.2d 618, 633 (2009) (holding admission of a defendant's written statements admitting guilt were not unfairly prejudicial where said statements supported the factual basis for the crimes,

[2] We address the admissibility of Defendant's statements contained within the recording. To the extent Defendant argues it was improper for the court to allow his mother's statements into evidence, this argument was not made to the trial court below and Defendant has therefore failed to preserve it for our review. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount [on appeal].'" (citation omitted)); N.C. R. App. P. 10.

despite their tendency to elicit an emotional response). Defendant did not explicitly admit to having committed the crimes for which he was charged. Rather, he jokingly referenced the acts with a threat to commit similar conduct again. Evidence which tends to show a defendant's guilt, and their attitude toward the crime, is undoubtedly prejudicial to a defendant's claim of innocence; however, in cases such as the present matter it is not unfairly prejudicial. *See State v. Williams*, 355 N.C. 501, 557, 565 S.E.2d 609, 642 (2002) (holding testimony showing the defendant's attitude toward women was not unfairly prejudicial).

The trial court properly appraised the probative and prejudicial values of the recording under Rule 403 and did not commit an abuse of discretion by admitting it into evidence. The trial court considered "the cases that have been submitted, listened to the audio, and [] the arguments of the attorneys" over the course of a two-day hearing on the recording's admissibility. The trial court then issued its ruling alongside an explanation of its analysis of the case law supporting its decision. It cannot be said that the trial court made its decision arbitrarily and without reason.

Even if we assume the trial court committed error, Defendant has failed to show that a different decision would have been reached at trial if the recording was not played for the jury. Defendant repeatedly relies on this Court's decision in *State v. Davis* to support his contentions. In *Davis,* the defendant was charged with four counts of sexual crimes with a child. *State v. Davis*, 222 N.C. App. 562, 564, 731 S.E.2d 236, 238 (2012). The State introduced into evidence a notebook containing a

written statement by the defendant describing "anal intercourse being forced on an adult woman." *Id.* at 565, 731 S.E.2d at 239. This Court held that it was error for the trial court to admit the written statement into evidence; however, the Court found the evidence was unfairly prejudicial in combination with other improper evidence, where a single piece of evidence would have carried less weight. *Id.* at 575, 731 S.E.2d at 244 ("We cannot conclude that the combined effect of an admission of rape and non-consensual anal intercourse together with an expert assessment of psychopathic deviancy was non-prejudicial.").

Defendant's reliance on *Davis* is misplaced. To begin, we do not find the admission of the recording to have been erroneous in this case and the remaining evidence does not contain additional improper evidence. When considering the remainder of the evidence presented, we cannot find cumulative error amounting to unfair prejudice against Defendant. In addition to the two-minute recording of Defendant's phone call, the jury heard corroborating firsthand testimony from each of his three daughters, describing the actions Defendant committed. The jury also heard testimony from Maeve's school counselor, Cara's school counselor, a physician's assistant who examined all three girls, a forensic interviewer who spoke with Maeve, and Liles, who each described that the girls had reported sexual assault and exhibited emotions, abnormal behaviors, and some physical or medical symptoms consistent with abuse and sexual assault. Due to the other sufficient evidence presented, we cannot hold that there would have been a different outcome at trial had the recording

not been admitted.

III. Conclusion

For the aforementioned reasons, the trial court did not err by determining the recording passed scrutiny under Rule 403 and by admitting the recording into evidence.

NO ERROR.

Judges WOOD and STADING concur.

Report per Rule 30(e).