NO. COA13-347
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 10 CRS 249021

TIMOTHY JOHN LONG

Appeal by defendant from judgment entered 19 September 2012 by Judge R. Allen Baddour in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Angenette Stephenson, for the State.

Attorney Julie Ramseur Lewis, Assistant Public Defender, for defendant.

Elmore, Judge.

On 17 September 2012, a jury found Timothy John Long (defendant) guilty of felony child abuse inflicting serious injury. Defendant received a sentence of 31-47 months imprisonment. Defendant now appeals and raises as error the trial court's admission of 404(b) evidence and its failure to

conduct a proper jury poll. After careful consideration, we find no prejudicial error.

I. Facts

Defendant was indicted on 1 November 2010 for one count of felonious child abuse pursuant to N.C. Gen. Stat. § 14-318.4. In August 2010, defendant lived in his parents' home with his girlfriend, Cameron Lightfoot, their five-month-old child, E.L., Lightfoot's three-year-old daughter, K.W. (the victim), defendant's sister, Jennifer Long, and her three-year-old daughter, R.L. Defendant is not the victim's biological father, but he assumed the role of primary caregiver for her and E.L. because Lightfoot suffered from post-partum depression and frequently abused drugs and alcohol.

The alleged offense occurred on 12 August 2010 in defendant's parents' home. That morning, defendant was giving the victim a bath. Long, who sat in the living room, heard the victim "screaming and crying[.]" Long testified that she assumed that what she heard was "a pretty common tantrum" because the victim had a "tendency to pitch a fit when having to get clothed and diapered[.]" Long soon heard four or five "soft-carpeted thumps," but she was unable "to identify what the sound was[.]" Long overheard defendant asking the victim "why

are you crying like this[?]" Moments later, defendant came out of the bathroom crying and holding the victim in his arms. Long described the victim as "completely limp" with "shallow" breathing. Long testified that the victim "had a little bit of blood on her mouth, and it looked like she had . . . a bitten or busted lip." Long performed CPR, but when the victim's breathing did not improve, defendant's father called 9-1-1.

Dr. Otwell Timmons, the pediatric intensive care specialist who treated the victim, testified that she was unresponsive upon arrival. Dr. Timmons conducted a physical exam of the victim and found a number of "unusual bruises in places where [he doesn't] tend to see bruises in children involving accidents." A CAT scan revealed a "very long" complex skull fracture "that [was] out of character for children who fall from adult arm height, from high furniture." Based on the skull fracture, Dr. Timmons testified that "more energy would have to be applied to the impact on [the victim's] head than a fall from a five or six foot height." The victim also suffered from a "concussion with a brief coma[.]" Dr. Timmons concluded that the victim was injured as a result of "non-accidental trauma[.]"

Prior to trial, the trial court heard arguments under Rule 404(b) of the North Carolina Rules of Evidence concerning the

admissibility of two prior acts allegedly committed by defendant in June and August 2010. First, the trial court denied defendant's motion *in limine* to exclude testimony concerning an alleged prior assault by defendant on Lightfoot one week before the alleged assault on the victim. Lightfoot testified at trial, over defendant's objection, that a week before 12 August 2010, defendant tackled and beat her in the head causing "welts on [her] head." Later that evening, they engaged in another physical altercation whereby defendant forcibly attempted to pull her outside the home.

The second prior act related to the State's *motion in limine* to admit testimony about prior injuries of the victim allegedly caused by defendant in June 2010. The trial court allowed the State's motion. Angela Tate, a therapeutic recreation specialist who worked with Mecklenburg County Parks and Recreation Department, testified at trial, over defendant's objections, about her observations and contact with the victim, defendant, and Lightfoot, while the victim was enrolled at summer camp. Tate testified that she observed the victim with bruising under her eyes on 21 June 2010. Tate explained that Lightfoot or defendant reported that the victim "had been playing with her cousin on their deck and had fallen, that she

had been pushed and fell backwards down the stairs and that her bruising was from her fall on the stairs." An incident report was prepared, and photographs were taken of the bruising. On 28 June 2010, Tate observed and documented "significant bruising and what appeared to be bite marks on [the victim's] face and hands[.]" Tate further described the bruising as a "large bump, like a goose egg on her forehead with bruising."

After all of the evidence was presented, the jury returned a unanimous verdict of guilty. Defendant then asked for the trial court to poll the jury. The clerk proceeded to ask each member of the jury if he or she reached a guilty verdict and whether the juror "still agree[d] with this verdict?" Subsequently, the trial court requested the jurors, collectively, to raise their hands if they found the presence of aggravating factors. After all the jurors raised their hands, the trial court asked counsel if there was "[a]nything further for the jury?" Defendant responded, "[n]o Your Honor[,]" and the trial court released the jury and proceeded to sentencing.

II. Analysis

a.) Previous Alleged Abuse Against Victim

Defendant argues that the trial court erred in admitting 404(b) evidence of the victim's prior injuries allegedly

committed by defendant. Defendant specifically avers that the State failed to produce substantial evidence to support a reasonable finding that defendant inflicted the prior alleged injuries. Defendant further contends that the testimony should have been excluded under North Carolina Rule of Evidence 403 for unfair prejudice. We disagree and find no error.

In reviewing 404(b) evidence, our Supreme Court has previously held that

> [t]hough this Court has not used the term *de novo* to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of probative value and unfair prejudice under Rule 403. For the purpose of clarity . . . when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012).

N.C. Gen. Stat. § 8C-1, Rule 404(b) 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, Rule 404(b) (2011). Under Rule 404(b) a prior act or crime is similar if there are "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both[.]" *State v. Green*, 321 N.C. 594, 603, 365 S.E.2d 587, 593 (1988) (citation and internal quotation omitted). However, it is not necessary that the similarities between the two acts "rise to the level of the unique and bizarre." *Id.* at 604, 365 S.E.2d at 593.

Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). Thus, "[t]o effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal

proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002).

This Court's first inquiry under Rule 404(b) is to determine whether there was substantial evidence presented by the State to support a reasonable finding by the jury that the defendant committed the prior bad act. *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991). The State may offer direct or circumstantial evidence to support this finding so long as the evidence "contain[s] similarities that support the *reasonable inference that the same person* committed both the earlier and the later [acts]." *State v. English*, 95 N.C. App. 611, 614, 383 S.E.2d 436, 438 (1989) (citation and quotation omitted). Should the State offer such substantial evidence, "then we must conduct a three-pronged analysis regarding the admissibility of the 404(b) evidence." *State v. Adams*, ___ N.C. App. ___, ___, 727 S.E.2d 577, 580 (2012). We must first determine whether "the evidence [is] relevant for some purpose other than to show that defendant has the propensity to commit the type of offense for which he is being tried[.]" *State v. Houseright*, ___ N.C. App. ___, ___, 725 S.E.2d 445, 448 (2012) (citation omitted). Second, we consider if that purpose is "relevant to an issue material to the pending case[.]" *Id.*

(citation omitted). Under the first two prongs, relevant evidence means "evidence having 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." *State v. Capers*, 208 N.C. App. 605, 615, 704 S.E.2d 39, 45 (2010) (citation and quotation omitted). Third, we assess whether, under Rule 403, "the probative value of the evidence [is] substantially outweighed by danger of unfair prejudice" to the defendant. *Houseright* at ___, 725 S.E.2d at 448 (citation omitted).

Here, Tate testified about two separate instances in which the victim arrived at summer camp with bruising on her face and a bump on her forehead in June 2010. Testimony at trial established that the victim's injuries in June 2010 and on 12 August 2010 occurred 1.) while defendant assumed the role of primary caregiver to the victim and was responsible for her daily feeding, bathing, and diapering; 2.) in or around the home defendant shared with the victim; 3.) when the victim was in defendant's exclusive care, with no other adult present to corroborate defendant's account of how the victim's injuries occurred. In both instances, the victim sustained bruising consistent with abuse. Thus, the State presented substantial

evidence to support a reasonable finding by the jury that defendant committed the prior acts in June 2010. Furthermore, the similarities mentioned above surrounding the circumstances and nature of the victim's injuries in June 2010 and on 12 August 2010 properly allowed the jury to identify defendant as the individual who had the opportunity to cause the victim's injuries. *See State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 434 (1988) (stating that "[c]ourts may resort to circumstantial evidence of motive, opportunity, capability and identity to identify the accused as the perpetrator of the crime"). Accordingly, Tate's testimony was both admitted for a proper purpose under Rule 404(b) and relevant. *See State v. Johnson*, 317 N.C. 417, 425, 347 S.E.2d 7, 12 (1986) ("In a criminal case, the identity of the perpetrator of the crime charged is always a material fact though not always is it in issue.").

In reviewing the admission of this evidence, we conclude that defendant was not unduly prejudiced. As previously discussed, Tate's testimony was highly probative as to the issues of identity and opportunity. Moreover, the trial court analyzed the evidence under Rules 404(b) and 403 for unfair prejudice outside the presence of the jury and was later careful

to give a proper limiting instruction to the jury. *See State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 75 (2002) (admitted prior misconduct not unduly prejudicial under Rule 403 where trial court gave limiting instruction regarding permissible uses of 404(b) evidence). Given the purpose for which this evidence was admitted, and the trial court's careful determination of its admissibility, we hold that the trial court did not abuse its discretion in ruling that the probative value of the evidence was not substantially outweighed by unfair prejudice. Thus, the trial court did not err in admitting Tate's testimony.

b.) Defendant's Alleged Prior Assault Against Lightfoot

Next, defendant argues that the trial court erred in admitting evidence of a prior alleged assault on Lightfoot. Defendant contends that this evidence was inadmissible under Rule 404(b) because it was not relevant for any admissible purpose. Defendant further avers that even if relevant, the evidence was unfairly prejudicial such that it should have been excluded under Rule 403. After careful consideration, we disagree and find no prejudicial error.

"An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction." *State v. Nelson*, 341 N.C. 695, 701, 462 S.E.2d 225, 228 (1995). Furthermore,

"the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *State v. Autry,* 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) (citation omitted). The defendant carries the burden to show both error and that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *State v. Anderson*, 177 N.C. App. 54, 62, 627 S.E.2d 501, 505 (2006) (citation and quotation omitted).

We first note that the trial court might not have erred in admitting Lightfoot's testimony regarding defendant's alleged prior assault on her. However, we need not answer that question to dispose of this issue on appeal. *See State v. Ray*, 364 N.C. 272, 278, 697 S.E.2d 319, 323 (2010) (determining whether the admission of the defendant's prior act was prejudicial error assuming *arguendo* that the court erred). Instead, we assume *arguendo* that the trial court erred in admitting Lightfoot's testimony and must now decide whether the error was prejudicial.

At trial, defendant did not testify or present any evidence. The State offered undisputed evidence that on 12 August 2010, defendant was alone in giving the victim a bath, several thumps were heard, and the victim was screaming and

crying. Shortly thereafter, defendant emerged from the bathroom crying while he carried the victim. Long described the victim as "completely limp" with "shallow" breathing and a bloody lip. Moreover, Dr. Timmons concluded that the victim's injuries on the morning of 12 August 2010 were caused by "non-accidental trauma[.]" In support of his conclusion, Dr. Timmons listed the following: 1.) a skull fracture that could not have been caused by an accidental fall; 2.) no explanation from the victim's caregivers as to "how the skull fracture happened[;]" 3.) no documented history of the victim falling in the past; and 4.) multiple "bruises in unusual places" on the victim. Tate also testified that she observed similar bruising on the victim in June 2010, at a time when the victim was under the exclusive supervision of defendant.

Accordingly, even if the admission of the alleged prior assault on Lightfoot amounted to error, it did not constitute prejudicial error due to the presence of other overwhelming evidence pointing to defendant's guilt. *See State v. Anderson*, ___ N.C. App. ___, ___, 730 S.E.2d 262, 267 (2012) (finding harmless error as to the admission of prior acts when 1.) overwhelming evidence of defendant's guilt was found from victim's detailed testimony about when and where he suffered

injuries; and 2.) defendant "did not present any evidence or any witnesses to suggest an alternate theory of events").

c.) Jury Poll

In his last issue on appeal, defendant argues that the trial court violated Article I, § 24 of the North Carolina Constitution and North Carolina General Statute § 15A-1238 in conducting a jury poll by allowing the jury to collectively raise its hands to establish assent to a special verdict finding of two aggravating factors. Because defendant failed to preserve his argument on appeal, we dismiss this issue.

"Generally . . . issues occurring during trial must be preserved if they are to be reviewed on grounds other than plain error." *Reep v. Beck*, 360 N.C. 34, 36-37, 619 S.E.2d 497, 499 (2005). To preserve an issue for appellate review, "a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make." *Id.* at 37, 619 S.E.2d at 499 (citation and quotation omitted).

Here, defendant requested that "the jury be polled" as to the general guilty verdict pursuant to N.C. Gen Stat. § 15A-1238. The clerk responded by polling each juror, individually, as to their guilty verdicts. Thereafter, the trial court polled

the jurors, collectively, concerning the aggravating factors without objection from defendant. Before releasing the jury, the trial court asked counsel, "[a]nything further for the jury?" Defendant replied "[n]o, Your Honor." Because defendant did not object to the trial court's method of polling or make a timely request that the trial court poll the jurors, individually, concerning the aggravating factors, defendant has waived this issue on appeal. *See State v. Osorio*, 196 N.C. App. 458, 467, 675 S.E.2d 144, 149 (2009) (holding that the defendant waived any error by the trial court and did not preserve an issue on appeal where he "fail[ed] to object to the trial court's polling of the jury by show of hands and did not request individual polling").

III. Conclusion

In sum, the trial court did not err by admitting evidence of the victim's prior injuries allegedly caused by defendant, nor did it commit prejudicial error by allowing testimony related to defendant's alleged prior assault on Lightfoot. We dismiss defendant's issue on appeal relating to the trial court's jury poll because he failed to preserve this issue for our review.

No prejudicial error.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).