

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-363

Filed: 16 August 2016

Onslow County, No. 13CRS054065

STATE OF NORTH CAROLINA

v.

AMANDA GAYLE REED, Defendant.

Appeal by defendant from judgment entered on or about 6 October 2014 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Court of Appeals 21 October 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Melody R. Hairston, for the State.

The Coxe Law Firm, PLLC, by Matthew C. Coxe, for defendant-appellant.

STROUD, Judge.

Defendant appeals her convictions for misdemeanor child abuse and contributing to the delinquency of a juvenile. For the following reasons, we conclude that defendant's convictions must be vacated.

I. Background

The facts of this case, as presented by the State, begin simply enough: defendant went to use the bathroom in her home for a few minutes, and her toddler, Mercadiez, tragically managed to fall into their outdoor pool and drown. The

complexity of this case arises from the fact that about two years before, defendant was babysitting another child, Sadie Gates, who got out of the house and drowned just outside of her home. Defendant was indicted, tried, and convicted by a jury of misdemeanor child abuse and contributing to the delinquency of a juvenile for Mercadiez's death. Defendant appeals.

II. Defendant's Appeal

Defendant makes three separate arguments on appeal: (1) the trial court erred in denying her motion in limine to exclude the evidence of Sadie's death because it was not an appropriate use of evidence under North Carolina Rule of Evidence 404(b) regarding prior crimes and bad acts *and* it should have been excluded pursuant to North Carolina Rule of Evidence 403 because the probative value of the evidence did not substantially outweigh the unfair prejudice; (2) the trial court erred in denying defendant's motions to dismiss because there was not substantial evidence of each essential element of the crimes charged; and (3) the State went so far beyond the scope of the appropriate use of the admitted Rule 404(b) evidence in its questioning and arguments to the jury that it amounted to plain error in defendant's trial.

This panel has struggled mightily on this case. While defendant's issues may seem typical for a criminal appeal, unfortunately, an analysis of these issues has turned out to be quite complex, but we have addressed each issue, since we believe that all are interrelated as they appear in this case and all have merit.

III. Motions to Dismiss

Defendant argues that “the trial court erred by denying [her] motions to dismiss all three of the charges at the close of the State’s evidence and at the close of all the evidence.” (Original in all caps.) The jury found defendant not guilty of involuntary manslaughter, and thus we address only the crimes for which defendant was convicted: misdemeanor child abuse and contributing to the delinquency of a juvenile.

This Court reviews the trial court’s denial of a motion to dismiss *de novo*. On a motion to dismiss for insufficiency of evidence, 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. 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. Clark, 231 N.C. App. 421, 423, 752 S.E.2d 709, 711 (2013) (citations and quotation marks omitted), *disc. review denied*, 367 N.C. 322, 755 S.E.2d 619 (2014).

A. Misdemeanor Child Abuse

Turning to defendant’s conviction for misdemeanor child abuse, North Carolina General Statute § 14-318.2(a) provides,

Any parent of a child less than 16 years of age, or any other

person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

N.C. Gen. Stat. § 14-318.2(a) (2013). North Carolina General Statute § 14-318.2(a) is awkwardly worded, and it is not immediately clear what the phrase “by other than accidental means” is modifying, but our Supreme Court has clarified that issue: “This statute provides for three separate offenses: If the parent by other than accidental means (1) inflicts physical injury upon the child, (2) allows physical injury to be inflicted upon the child, or (3) creates or allows to be created a substantial risk of physical injury.” *State v. Fredell*, 283 N.C. 242, 244, 195 S.E.2d 300, 302 (1973). In other words,

To convict defendant of misdemeanor child abuse, the State needed to prove only one of the following elements: (1) that the parent nonaccidentally inflicted physical injury on the child; (2) that the parent nonaccidentally allowed physical injury to be inflicted on the child; or (3) that the parent nonaccidentally created or allowed to be created a substantial risk of physical injury on the child.

State v. Armistead, 54 N.C. App. 358, 360, 283 S.E.2d 162, 164 (1981). Furthermore, “G.S. 14-318.2(a), contemplates active, purposeful conduct” on the part of the defendant. *State v. Hunter*, 48 N.C. App. 656, 660, 270 S.E.2d 120, 122 (1980).

Because this Court is required to consider the evidence “in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor” at this point we would normally turn only to the evidence presented in the State’s case in chief to determine whether there was “substantial evidence” of “each essential element of the offense charged[.]” *Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711. But in this case, defendant presented direct evidence which does not conflict with the State’s evidence, and although the charges against defendant should have been dismissed even without consideration of her evidence, in this case, consideration of her evidence is more than appropriate; here, it is required. *See generally State v. Bates*, 309 N.C. 528, 535, 308 S.E.2d 258, 262-63 (1983) (“[O]n a motion to dismiss, the court must consider the defendant’s evidence which explains or clarifies that offered by the State. The court must also consider the defendant’s evidence which rebuts the inference of guilt when it is not inconsistent with the State’s evidence.”).

1. Consideration of Defendant’s Evidence

Generally, the defendant’s evidence is disregarded when deciding whether the evidence is sufficient to submit the charged offenses to the jury unless that evidence is favorable to the State. *See generally State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (“The defendant’s evidence, unless favorable to the State, is not to be taken into consideration.” (citation and quotation marks omitted)). “However, if the

defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *Id.* (citation and quotation marks omitted). Indeed, our Supreme Court has noted that "[w]e have consistently held that on a motion to dismiss, the court must consider the defendant's evidence which explains or clarifies that offered by the State. The court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence." *Bates*, 309 N.C. at 535, 308 S.E.2d at 262-63.

A comparison of the evidence presented by the State and the defendant in *Bates* is helpful to illustrate how defendant's evidence should be used in this situation. *Id.* at 529-32, 308 S.E.2d at 260-61. In *Bates*, the State's evidence was summarized by the Supreme Court as follows:

The State offered evidence tending to show that at around 11:00 p.m. on 6 January 1982, defendant came to the residence of Mrs. Mary Godwin at 307 Kenleigh Road in Fayetteville, North Carolina. Mrs. Godwin testified that defendant appeared to be severely injured and was pleading for help. She stated that defendant's clothing was covered with blood and dirt. A nurse at Cape Fear Valley Hospital, Mrs. Godwin attempted to render first aid assistance to defendant Bates and immediately called an ambulance and the Cumberland County Sheriff's Department.

Deputy John Dean responded to Mrs. Godwin's call. Deputy Everette Searce arrived shortly thereafter and began to search the area around the Godwin residence. In a field approximately 300 feet from the house, Searce discovered the body of Roy Lee Warren, Jr., lying beside an automobile. Warren's body was partially covering what appeared to be a lead pipe approximately 18 inches in

length. Searce testified that he remained in the field only a few moments before leaving to call an ambulance for Warren.

Conrad Rensch, a crime scene technician with the City/County Bureau of Investigation, testified that he received a call to come to Kenleigh Road at approximately 12:30 a.m. on 7 January. He immediately proceeded to the field and began his investigation of the crime scene. He observed that there were numerous scuff marks in the dirt surrounding the body and he detected spots of blood on the car.

Items of personal property belonging to both Bates and Warren were discovered in an area near the edge of the field. These items ranged in distance from approximately 73 feet to 116 feet from Warren's body and were generally located within 25 feet of each other. A watch, keys, wallet, checkbook and calculator were identified as the victim's possessions, while a gauze bandage, gold neck chain and jacket were determined to belong to defendant. Rensch noted that there were scuff marks near several of the items and that the ground was covered with blood in some places.

Rensch also testified that he found a .22 caliber revolver in a grassy area not far from the other items. Douglas Branch, a ballistics expert with the State Bureau of Investigation, stated that in his opinion a bullet recovered from the decedent's body was fired from the revolver discovered in the field. Rensch related that there was a large amount of blood near the gun. He did not see scuff marks in that area, but admitted that it was usually difficult to find them in the grass.

David Hedgecock is a forensic serologist employed by the S.B.I. Crime Laboratory. He testified that after performing laboratory tests upon blood samples removed from Bates and Warren, he determined that defendant's ABO grouping was type B and the deceased's ABO grouping was type O. Hedgecock stated that the blood removed from the car was type B and therefore consistent with defendant's blood type, but that the bloodstains found on the ground and on the various personal items strewn throughout the field were of both type O and B.

The State also presented testimony of Dr. Thomas Bennett, a forensic pathologist. He testified that during the post-mortem examination of the deceased, he located numerous small cuts and abrasions and 32 stab wounds. He further identified two gunshot wounds, one to Warren's right abdomen and another, a grazing wound to the left cheek. Dr. Bennett recovered one bullet from the body in the midline section.

Dr. Bennett testified that in his opinion the gunshot wounds were inflicted at close range, at least within four feet. He further gave his opinion that the gunshot wounds were probably inflicted before the stab wounds.

309 N.C. at 529-31, 308 S.E.2d at 260.

The defendant's evidence was entirely consistent with the State's evidence, but explained what had happened between the defendant and the decedent:

Defendant's evidence, which included his own testimony, tended to show that he and Warren were friends and former co-workers at the Food Town grocery. Defendant Bates testified that a few days prior to 6 January 1982, Warren asked him if he had a gun. Defendant replied that he did not have one, but that his mother did. Defendant asked Warren to meet him in the field on Kenleigh Road and there gave Warren his mother's .22 caliber revolver. Defendant acknowledged that Warren gave him \$30.00 for the weapon, although he maintained that he did not ask for any money in exchange for the gun.

Defendant further testified that, on 6 January, he went to the Food Town where Warren worked and asked him to return the pistol because his mother had discovered that it was missing. Warren offered to bring the gun to defendant's home later that evening, but defendant told Warren he would rather meet at the same field on Kenleigh Road so his mother would not see them. Warren agreed and told defendant to watch for him around 7:00 p.m. Defendant stated that he lived near the field and watched for Warren's car from his bedroom window. Warren

arrived at the field at around 10:00 p.m. and defendant then walked out to meet him.

Defendant testified that he and the decedent had a disagreement over the gun because Warren refused to return it until defendant gave him \$30.00. After Warren consistently refused to relinquish the weapon without payment, defendant said he would have to tell his mother where the gun was. As he rose and turned to get out of the car, defendant testified that Warren stabbed him in the back. Defendant remembered that he stumbled, but after regaining his balance he began to run in the direction of the nearest house. Because defendant had a cast on his leg from a football injury, he did not run to his own home because it was farther away and he was afraid he would not make it.

Defendant testified that Warren fired one or two gunshots and shouted something like, "If you don't stop running, I'll kill you." Defendant stated that he stopped running and Warren caught up with him in the general area where most of the items of personal property were later found. Defendant stated, however, that he did not recall seeing any of the decedent's possessions.

Defendant testified that Warren approached him and hit him across the forehead with the gun. Defendant fell to the ground, Warren jumped on him and they started to fight. Defendant related that at one point during the tussle, he tried to wrestle the gun from the decedent. He testified that the gun went off while he and Warren were fighting on the ground, although he was unaware that a bullet had struck the decedent.

Eventually, defendant was able to break free from Warren and he crawled back toward the car. Defendant testified that he was about to enter the car when Warren grabbed him from behind and pulled him to the ground. Defendant stated that when he opened the door to get into the car, a metal pipe rolled out from the floorboard and onto the ground.

Defendant remembered tussling with Warren beside the car and receiving a second stab wound to the chest. He testified that he pulled the knife from his chest and began

to stab the decedent. At some point, Warren fell off of defendant and, shortly thereafter, defendant lost consciousness. He later awakened and made his way to the Godwin residence on Kenleigh Road.

Id. at 531-32, 308 S.E.2d at 260-61.

The jury convicted the defendant in *Bates* of felony murder and robbery with a firearm. *Id.* at 533, 308 S.E.2d at 262. The defendant argued on appeal that his motion to dismiss the charge of robbery with a firearm should have been allowed “for insufficiency of the evidence[.]” *id.*, and the Supreme Court agreed and expressly based its determination upon consideration of the “defendant’s uncontroverted testimony[.]” *Id.* at 535, 308 S.E.2d at 262. The Court explained that the

[d]efendant’s uncontroverted testimony refutes a conclusion that he forcibly took these items of personal property from the victim with the intent to steal them.

We have consistently held that on a motion to dismiss, *the court must consider the defendant’s evidence which explains or clarifies that offered by the State. The court must also consider the defendant’s evidence which rebuts the inference of guilt when it is not inconsistent with the State’s evidence.*

Defendant Bates’ testimony in its entirety must be characterized as a clarification of the State’s testimonial and physical evidence; it in no way contradicted the prosecution’s case.

Defendant’s testimony and the physical evidence reveal that a brutal fight took place between Bates and Warren. Blood of both defendant and the deceased was found on the items of personal property, on the hood of the automobile and on the ground. Conrad Rensch testified that there were numerous scuff marks in the dirt surrounding the automobile and in other areas in the clearing. It is also important to note that items of personal

property belonging to defendant were also scattered throughout the field. Defendant testified that he never saw decedent's possessions nor was he aware of how they came to be strewn around the area.

When defendant's explanatory testimony is considered along with the physical evidence presented by the State, the logical inference is that the decedent lost these items of personal property during the struggle with defendant. There is simply no substantial evidence of a taking by defendant with the intent to permanently deprive Warren of the property. We therefore hold that defendant's motion to dismiss the charge of robbery with a dangerous weapon should have been granted.

We further note that defendant was found not guilty of premeditated and deliberated murder. He was convicted of felony murder, premised upon the commission of armed robbery. Because there was insufficient evidence to support the commission of the underlying felony, there is also insufficient evidence to support defendant's conviction of felony murder.

Id. at 535, 308 S.E.2d at 262-63 (emphasis added) (citations omitted).

Under the circumstances of this case, as discussed in more detail herein, defendant's motion to dismiss the misdemeanor child abuse charge could only have been properly denied if there was substantial evidence demonstrating that on 11 May 2013, defendant committed some act or omission that created or allowed to be created a substantial risk of physical injury to Mercadiez. N.C. Gen. Stat. § 14-318.2(a); *see Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711. Here, defendant's evidence is entirely consistent with the State's evidence, and thus *must* be considered, according to *Bates*. *Bates*, 309 N.C. at 535, 308 S.E.2d at 262-63. Defendant's evidence can also be

“characterized as a clarification of the State’s testimonial and physical evidence; it in no way contradicted the prosecution’s case.” *Id.* at 535, 308 S.E.2d at 263.

The State elicited testimony from Sergeant Michael Kellum of the Jacksonville Police Department (“JPD”), who at the time of the incident was a detective with the JPD’s criminal investigative division. Sergeant Kellum explained that he was involved in the investigation of Mercadiez’s death and that he spoke with defendant about the events leading up to the drowning two days after it had occurred. Sergeant Kellum testified that defendant told him she had been in the bathroom that afternoon for approximately five to ten minutes and that “when she went into the bathroom, she had seen Mercadiez playing on the side concrete porch by the side door, with the other girls, that being [Sarah] and [Sarah’s] friends from down the street.”¹ Defendant further told Sergeant Kellum that upon leaving the bathroom, she saw Sarah without Mercadiez and asked about Mercadiez’s whereabouts. Detective Kellum’s testimony regarding the pretrial statements that defendant had made to him was the State’s primary evidence concerning the series of events that immediately preceded Mercadiez’s drowning. The State did not call as witnesses Mr. Reed or any of the children who were present in the house at the time of the incident.

¹ Pseudonyms will be used to protect the identity of the other minors involved.

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During defendant's case, Mr. Reed testified at length concerning the events leading up to the drowning, clarifying and elaborating upon the State's evidence. Mr. Reed stated that defendant had asked him, "You got this?" before going to use the bathroom. Mr. Reed explained that he understood defendant's question to mean that she was inquiring as to whether he would supervise the children while she was in the bathroom, and he responded "[Y]es."² After defendant had been in the bathroom for "not even a couple minutes[.]" he then heard defendant say, "Can't I [use the bathroom] in peace?"

Mr. Reed testified that at that point he got up, walked towards the bathroom, and on his way, observed that Mercadiez was still sitting with Sarah on the side porch. Mr. Reed took the two other children from the bathroom into their bedroom to watch a video. Mr. Reed then checked on one of the other children, and as he walked back through the hall he passed defendant leaving the bathroom. Defendant saw Sarah and immediately asked, "[W]here is Mercadiez?" Sarah responded that she "had just put her in the house." Defendant looked at Mr. Reed and said "[H]ey, she's with you." When Mr. Reed responded that Mercadiez was not in fact, with him, defendant and Mr. Reed began to search the house and yard and found Mercadiez in the pool.

² Mr. Reed also testified that he had been on active duty in the United States Marine Corps for the past 18 years and was attending college to become a social worker. No evidence was offered suggesting that Mr. Reed was in any way an unsuitable caretaker.

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While the State’s case did not emphasize the fact that Mr. Reed was also home with defendant at the time of Mercadiez’s drowning, the evidence the State offered did indicate that he was at the house during the relevant period of time. Specifically, Detective Kellum testified that Mr. Reed “came out to reach Mercadiez” from the pool. Furthermore, Mr. Josue Garcia, defendant’s neighbor who came to perform CPR, testified on behalf of the State that he “saw Mr. Reed with the little girl in his hands” “frantically yelling[,]” and Mr. Reed told him Mercadiez had been in the water from “a couple of minutes” to “seven minutes.”³ Thus, the State’s own evidence implied that Mr. Reed was at home during the relevant time period, although it does not specify his exact location or what he was doing at the relevant time; it in no way indicates he was not present. Therefore, the evidence presented by defendant — in the form of Mr. Reed’s testimony — is not in conflict with the evidence offered by the State.

In claiming that defendant’s evidence regarding Mr. Reed contradicted the State’s case-in-chief, the dissent argues that the State’s evidence also referenced the general fact that Mr. Reed was present in the home on the day of Mercadiez’s death. Even if this were true, however, if *both* the State’s and defendant’s evidence noted his presence in the home, where is the conflict? The only difference between the State’s

³ The State also stated in its opening statement that the jury would “hear that Will Reed, the defendant’s husband, the father of this child, was also in the home at the time that Mercadiez got into the pool and drowned.”

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case regarding Mr. Reed's presence and defendant's evidence on this subject is that the State made no effort to ascertain precisely *where* in the house he was immediately prior to and during the time when defendant left to use the bathroom, whereas defendant's case-in-chief filled in this gap in the State's evidence. Had the State put on evidence placing Mr. Reed at a specific location in the home that was different from the locations described by him during his testimony, then a conflict would exist. However, because the State did not put on such evidence, no such conflict existed.

In lieu of providing *actual evidence* from defendant's case that *contradicts* the State's evidence, the dissent relies entirely on the fact that upon coming out of the bathroom, defendant questioned Sarah rather than Mr. Reed as to Mercadiez's whereabouts. We fail to see how this is inconsistent with defendant's evidence. The dissent has failed to show any concrete fact offered during defendant's case in chief that conflicts *in any way* with the State's evidence.

Had the State offered evidence that Mr. Reed was in a different part of the house during the time period in question or that defendant had not spoken with him before she went into the bathroom, then the dissent would be correct that defendant's evidence showing that Mr. Reed understood he was responsible for watching Mercadiez while defendant was in the bathroom would conflict with the State's evidence, and therefore, be ineligible for consideration in connection with defendant's motion to dismiss at the close of the evidence. *See generally Nabors*, 365 N.C. at 312,

718 S.E.2d at 627. But because the State offered no evidence at all regarding Mr. Reed, we cannot agree with the dissent's insistence that defendant's evidence confirming his precise whereabouts from the time defendant left to go to the bathroom until the time of Mercadiez's death somehow contradicts the State's evidence.

By choosing not to offer evidence at all from Mr. Reed and to instead essentially restrict its entire case-in-chief to Sergeant Kellum's account of his interview with defendant, the State left the door open for defendant to fill this crucial gap in the events leading to Mercadiez's death by offering testimony from Mr. Reed, which is exactly what defendant did. Given (1) the State's strategic decision to forego calling as a witness the only adult in the house during the relevant time period other than defendant; and (2) the consistency of defendant's evidence with the State's evidence, the dissent has failed to make any coherent argument why Mr. Reed's testimony should be disregarded.

The dissent notes that when defendant left the bathroom and saw Mercadiez's older sister, Sarah, she asked Sarah – rather than Mr. Reed -- about Mercadiez's whereabouts. However, when defendant left to go to the bathroom, Mercadiez had, in fact, been playing with her sister – while Mr. Reed was watching her. Thus, the fact that defendant directed her question to Sarah is in no way inconsistent with the State's evidence. Indeed, Mr. Reed's testimony included this same exchange between defendant and Sarah.

The dissent also appears to be arguing that defense counsel was required to cross-examine Sergeant Kellum about Mr. Reed's role in these events. But again, the State chose to rely solely upon Sergeant Kellum and not to call Mr. Reed as a witness. The burden of proof is on the State; the defendant has no burden of proof. *See generally State v. Womble*, 292 N.C. 455, 459, 233 S.E.2d 534, 537 (1977) (“[N]o burden is placed upon a defendant to prove or disprove any of the elements of the crime[.]”). And as discussed above, our Supreme Court has consistently held that the defendant's evidence may -- indeed, must -- be considered in connection with a motion to dismiss at the close of all the evidence where it supplements rather than contradicts the State's evidence. *See Bates*, 309 N.C. at 535, 308 S.E.2d at 262-63. Thus, the fact that defense counsel opted to let the jury hear from Mr. Reed directly on this issue in no way precluded his testimony from being considered in a ruling on the motion to dismiss.

Consistent with the State's evidence, Mr. Reed testified that defendant went to use the bathroom for approximately five to ten minutes and sometime during that period of time, Mercadiez wandered away from the house and drowned in the backyard pool. The State's evidence at trial showed that defendant left Mercadiez for a period of five to ten minutes without defendant's supervision. However, the State did not offer any evidence affirmatively establishing that defendant had failed to secure adult supervision for Mercadiez, but rather only evidence that she herself was

not watching Mercadiez. Thus, defendant introduced evidence consistent with that offered by the State; that is, evidence that she was not personally supervising Mercadiez while she was in the bathroom.

Critically, however, defendant's consistent evidence rebutted the inference raised by the State that she had failed to ensure her child was being properly supervised while she went to the bathroom. *See generally id.* at 535, 308 S.E.2d at 263. ("The court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence."). The additional evidence introduced in defendant's case-in-chief through Mr. Reed's testimony, including that: (1) before defendant walked to the bathroom, she confirmed that he would be watching the children, and (2) after defendant had entered the bathroom he left Mercadiez unattended, did not in any way contradict the evidence presented by the State during its case. Defendant's evidence merely clarified where Mr. Reed was in the house and what he was doing during the key events leading up to Mercadiez's death. Consequently, consideration of this evidence is *necessary* in determining whether defendant's motion to dismiss should have been granted. *See id.* at 535, 308 S.E.2d at 262 ("We have consistently held that on a motion to dismiss, the court must consider the defendant's evidence which explains or clarifies that offered by the State.").

Turning back to the relevant statute, North Carolina General Statute § 14-318.2(a), while defendant was in the bathroom, her only affirmative act was to say, “Can’t I [use the bathroom] in peace?” Defendant did not ask Mr. Reed to do anything, much less request that he stop watching Mercadiez; rather, Mr. Reed unilaterally decided to step in and remove the children from the bathroom while leaving Mercadiez. It cannot be rationally inferred that defendant, simply by making this statement, engaged in conduct that would subject her to criminal liability under North Carolina General Statute § 14-318.2(a). *See* N.C. Gen. Stat. § 14-318.2(a). Accordingly, defendant’s consistent evidence rebutted the inference raised by the State’s evidence that she “create[d] or allow[ed] to be created a substantial risk of physical injury[.]” *Id.*

Thus, after reviewing the State’s evidence and defendant’s evidence that is not in conflict therewith, we conclude that there was not substantial evidence that defendant “create[d] or allow[ed] to be created a substantial risk of physical injury . . . to [Mercadiez] by other than accidental means[.]” *Id.* Because an essential element was missing from misdemeanor child abuse, *see id.*, the trial court erred in denying her motion to dismiss the charge. *See Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711. We thus vacate defendant’s conviction for misdemeanor child abuse.

2. Consideration of Only the State’s Evidence

Although, as discussed above, defendant's motion to dismiss should have been granted upon consideration of both the State's evidence and defendant's evidence, the motion should also have been granted even without consideration of defendant's evidence. The dissent takes the position that defendant's evidence should not have been considered, and that defendant's motion should have been denied. We will therefore address why we believe that even without consideration of defendant's evidence, the trial court still erred in denying defendant's motion to dismiss the charge of misdemeanor child abuse. Even assuming *arguendo*, that defendant's evidence did contradict the State's evidence and thus should not be considered, *see generally Bates*, 309 N.C. at 535, 308 S.E.2d at 262, the State still did not present "substantial evidence . . . of each essential element of the offense charged[.]" *Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711.⁴

To determine what conduct may fall within the "by other than accidental means" element of North Carolina General Statute § 14-318.2(a), we will examine some cases which have found sufficient purposeful conduct pursuant to North Carolina General Statute § 14-318.2(a). In *State v. Fritsch*, the Supreme Court

⁴ We note that the dissent fails to address an element of each of the crimes at issue. As to North Carolina General Statute § 14-318.2(a) it fails to address that the act must be "by other than accidental means[.]" N.C. Gen. Stat. § 14-318.2(a). As to North Carolina General Statute § 14-316.1, it includes only the first portion of the definition of neglect under North Carolina General Statute § 7B-101(15): "does not receive proper care, supervision, or discipline . . ." N.C. Gen. Stat. § 7B-101(15). It omits the final phrase "from the juvenile's parent[.]" The dissent concedes that Mr. Reed was present at the house during the relevant time period but still considers his presence to be irrelevant.

determined there was sufficient evidence of misdemeanor child abuse, *see* 351 N.C. 373, 382, 526 S.E.2d 451, 457 (2000), where “the victim suffered from cerebral palsy and severe mental retardation, functioning at the level of an infant[,]” and

[o]n 4 October 1995 the DSS observed that the victim appeared emaciated; that her arms and legs were in a fetal position; that she looked and smelled bad; that she had crusted dirt between her toes and various folds of her skin; that her left foot was swollen; and that she had pressure sores on her right foot, right ear, back, and the back of her head at the hairline. When questioned about the victim’s physical condition, defendant responded that the pressure sores were actually ant bites that had not healed. The DSS then told defendant to take the victim to the doctor for a medical evaluation. On or about 19 October 1995, the victim was treated for an ear and upper respiratory infection; and the physical examination was rescheduled. However, defendant missed two scheduled appointments to have the victim physically examined. Despite numerous calls and visits to defendant’s home and a mailed certified letter requesting contact, the DSS was unable to contact defendant until 18 December 1995. On 19 December 1995 the DSS stressed to defendant that the victim needed a physical evaluation and that she needed to be back at the Center. On 20 December 1995 the DSS substantiated neglect for lack of proper care and lack of proper medical care of the victim by defendant based on observations made at the Center on 4 October 1995 and defendant’s continued failure to take the victim to a doctor for a physical examination. The victim died on 1 January 1996 before case workers were scheduled to visit defendant’s home.

On 2 January 1996 Dr. John Leonard Almeida, Jr., a pathologist, performed an autopsy of the victim’s body. The autopsy revealed that the victim weighed eighteen pounds at her death and that the victim’s stomach contained approximately a quart of food. Dr. Almeida opined that the underlying cause of the victim’s death was starvation malnutrition.

Id. at 374-76, 526 S.E.2d at 451-54 (quotation marks omitted).

In *State v. Church*, this Court found substantial uncontroverted evidence of misdemeanor child abuse where

Travis' face was burned while he was under defendant's supervision and no other adults were present Competent medical evidence at trial was that Travis' facial burn was well-circumscribed, or perfectly round. The burn looked like the child's face had been immersed in a bowl or cup of liquid. There were not any areas that looked as though there had been dripping, running, or motion. Instead, it appeared that something had been placed or held against the child's face. The medical evidence also included an opinion that Travis suffered from battered child syndrome and an opinion that he had been abused.

99 N.C. App. 647, 654-55, 394 S.E.2d 468, 473 (1990).

In *State v. Woods*, this Court concluded there was sufficient evidence that "created or allowed to be created a substantial risk of physical injury, upon or to her child by other than accidental means, in violation of the third distinct offense described in G.S. 14-318.2(a)" where the evidence showed the "defendant's husband had repeatedly abused this child during the several weeks prior to 12 October, and that the defendant was aware of this deplorable and dangerous situation but took no effective action to stop or prevent the abuse until 12 October[.]" though defendant was not actually charged with that offense, 70 N.C. App. 584, 587-88, 321 S.E.2d 4, 7 (1984) (brackets omitted). And in *State v. Armistead*, this Court determined that though some evidence was erroneously admitted there was "ample uncontradicted

evidence” that the “defendant intentionally inflicted some physical injury on his child. The force used was at least sufficient to draw blood and leave visible signs of the injury for several days[,]” and thus defendant was properly convicted of misdemeanor child abuse. 54 N.C. App. 358, 359-60, 283 S.E.2d 162, 164 (1981).

In *State v. Mapp*, this Court determined there was sufficient evidence of misdemeanor child abuse where

[t]he evidence clearly shows that defendant was the mother of the child and the child was less than 16 years of age. Dr. Ronald Kinney, a physician with a specialization in treating abused children, testified for the State. The doctor stated that the deceased child was the victim of the battered child syndrome; that the term meant that the child had suffered nonaccidental injuries; and that the injuries were caused by the child’s custodian.

45 N.C. App. 574, 581-82, 264 S.E.2d 348, 354 (1980) (quotation marks omitted).

Church, *Woods*, *Armistead*, and *Mapp*, all involved evidence of the purposeful physical abuse of a child or at least knowing about such abuse and not taking action to prevent or stop it; they have little in common with this case. *See Church*, 99 N.C. App. at 655, 394 S.E.2d at 473; *Woods*, 70 N.C. App. at 587, 321 S.E.2d at 7; *Armistead*, 54 N.C. App. at 360, 283 S.E.2d at 164; *Mapp*, 45 N.C. App. at 582, 264 S.E.2d at 354. *Fristch* is also distinguishable because it involved a child dying of “starvation malnutrition” over the course of months of improper care against the advice of DSS. 351 N.C. at 374-76, 526 S.E.2d at 452-54. While the defendant’s conduct in *Fristch*, *see id.*, may not rise to the level of intentionally beating a child, it

is certainly a form of purposeful, long-term abuse.

Therefore, this case is most apposite to *State v. Watkins*, ___ N.C. App. ___, 785 S.E.2d 175 (2016). Because *Watkins* is the only precedential case that bears any similarities to this case, we repeat the facts verbatim:

At approximately 1:30 p.m. on 28 January 2014, Defendant drove with her 19-month-old son, James, to the Madison County Sheriff's Office to leave money for Grady Dockery ("Dockery"), an inmate in the jail. The temperature at the time was 18 degrees, and it was windy with accompanying sleet and snow flurries.

After parking her SUV, Defendant left James buckled into his car seat in the backseat of the vehicle and went into the Sheriff's Office. While inside, Defendant got into an argument with employees in the front lobby. Detective John Clark ("Detective Clark") was familiar with Defendant based on prior complaints that had been made about Defendant letting her toddler run loose in the lobby and into adjacent offices while she visited inmates in the jail. Detective Clark entered the lobby and told Defendant that by order of Chief Deputy Michael Garrison she was not supposed to be on the property and that she needed to leave.

Defendant and Detective Clark argued for several seconds, and then he escorted her to her vehicle in the parking lot. Defendant was inside the building for at least six-and-a-half minutes. Detective Clark testified that from where Defendant was positioned in the lobby she could not see her vehicle, which was parked approximately 46 feet away from the front door.

When Detective Clark was within 10 feet of Defendant's vehicle, he noticed a small child sitting alone in the backseat. Defendant acknowledged that the child was hers. Detective Clark observed that the vehicle was not running and that the driver's side rear window was rolled more than halfway down. He testified that it was very, very cold and windy and the snow was blowing. He

stated that snow was blowing onto his head, making him so cold I wanted to get back inside. He noticed that the child, who appeared to be sleeping, had a scarf around his neck. Before walking back into the building, Detective Clark told Defendant to turn on the vehicle and get some heat on that child.

Id. at ___, 785 S.E.2d at 176 (quotation marks omitted).

In *Watkins*, a jury convicted the defendant of misdemeanor child abuse, and she appealed arguing the trial court should have allowed her motion to dismiss. *See id.* at ___, 785 S.E.2d at 177. This Court’s opinion in *Watkins* focuses heavily on whether there was a “substantial risk of physical injury[;]” but the ultimate determination was that

[g]iven the harsh weather conditions, James’ young age, and the danger of him being abducted (or of physical harm being inflicted upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that Defendant created a substantial risk of physical injury to him by other than accidental means.

Id. at ___, 785 S.E.2d at 178.

While foreseeability is not an element of misdemeanor child abuse, it is difficult to engage in an analysis of when behavior crosses the line from “accident” to “nonaccidental” without consideration of it; furthermore, an “accidental cause” is “not foreseen[.]” Black’s Law Dictionary 15 (5th ed. 1979). In *Watkins*, the defendant was aware of the harsh weather conditions, that the window was rolled down, and that she was leaving her child unattended in a public space; in other words, defendant

engaged in the purposeful conduct of leaving her child in the circumstances just enumerated; which is purposeful action that crosses the “accidental” threshold as “physical injury” in this case is very foreseeable, whether by hypothermia or abduction. *Id.* at ___, 785 S.E.2d at 178. From a commonsense standpoint, most, if not all parents, know there are inherent and likely dangers in leaving a child entirely alone in an open car in freezing weather in a public parking lot.

Turning to this case, the State’s evidence never crossed the threshold from “accidental” to “nonaccidental.”⁵ The known danger here was an outdoor pool. The only purposeful action defendant took, even in the light most favorable to the State, was that defendant went to the bathroom for five to ten minutes. In choosing to go to the restroom, defendant did not leave her child in a circumstance that was likely to create physical injury. This Court in *Watkins* deemed it to be “a close one,” but the actions of the defendant in *Watkins* are far more active and purposeful in creating the dangerous situation than defendant’s actions here. *See id* at ___, 785 S.E.2d at 178. If defendant’s conduct herein is considered enough to sustain a conviction for misdemeanor child abuse, it seems that any parent who leaves a small child alone in

⁵ The statistics cited by the dissent come from the CDC’s statistics labelled as “*Unintentional Drowning*” and certainly they are disturbing; yet they are irrelevant to this case. (Emphasis added). These “Unintentional Drownings” arise in many different types of situations, including some with supervision by parents, lifeguards, or others. Most importantly, most “*unintentional drownings*” would likely also be described as “accidental drownings,” and the issue here is whether the acts were “by *other than* accidental means.” N.C. Gen. Stat. § 7B-101(15) (emphasis added).

her own home, for even a moment, could be prosecuted if the child is injured during that time, not because the behavior she engaged in was negligent or different from what all other parents typically do, but simply because theirs is the exceedingly rare situation that resulted in a tragic accident.⁶ The State did not present substantial evidence that defendant's conduct caused injury to Mercadiez "by other than accidental means[.]" N.C. Gen. Stat. § 14-318.2(a); *see Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711 ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). Therefore, the trial court also erred in failing to allow defendant's motion to dismiss the charge of misdemeanor child abuse even without consideration of defendant's evidence.

B. Contributing to the Delinquency of a Juvenile

Defendant was also convicted of contributing to the delinquency of a juvenile pursuant to North Carolina General Statute § 14-316.1. North Carolina General Statute § 14-316.1 provides:

Any person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7B-101 and G.S. 7B-1501 shall be guilty[.]

⁶ We agree with the dissent that the State's theory was that *defendant*, and only defendant, failed to personally supervise Mercadiez, but the State failed to address one element of the crime, since it failed to show that defendant also left Mercadiez without supervision from her *other parent* to prove neglect under North Carolina General Statute § 7B-101(15). *See* N.C. Gen. Stat. § 7B-101(15).

N.C. Gen. Stat. § 14-316.1 (2013). Based on the facts of this case, the jury was instructed only on the issue of neglect. North Carolina General Statute § 7B-101 defines a “[n]eglected juvenile” as one “who does not receive proper care, supervision, or discipline from the juvenile’s parent[.]” N.C. Gen. Stat. § 7B-101(15) (2013).

Thus, North Carolina General Statute § 14-316.1

requires two different standards of proof. First, the State must show, beyond a reasonable doubt, that Defendant knowingly or willfully caused, encouraged, or aided the juvenile to be in a place or condition whereby the juvenile could be adjudicated neglected. Second, adjudication of neglect requires the State to show, by clear and convincing evidence, that a juvenile is neglected.

State v. Stevens, 228 N.C. App. 352, 356, 745 S.E.2d 64, 67, *disc. review denied*, 367 N.C. 256, 749 S.E.2d 886 (2013). Thus, we must consider whether defendant “knowingly or willfully cause[d], encourage[d], or aid[ed the] juvenile . . . to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated[.]” N.C. Gen. Stat. § 14-316.1, neglected, and under these facts the neglect alleged was that Mercadiez did “not receive proper care, supervision, or discipline from the juvenile’s parent[.]” N.C. Gen. Stat. § 7B-101(15).

The flaw in the State’s case is that defendant was not the only “parent” involved. *Id.* Essentially, the State’s theory at trial was that it did not matter that Mr. Reed was present; in other words, the State’s theory hinges on the theory that fathers are *per se* incompetent to care for young children. However, Mr. Reed was a

“parent[,]” and thus he had an equal duty to supervise and care for Mercadiez. *Id.* The evidence does not show that defendant “knowingly or willfully” left Mercadiez “in a place or condition[,]” N.C. Gen. Stat. § 14-316.1, where she would “not receive proper care [or] supervision” from a “parent[,]” N.C. Gen. Stat. § 7B-101(15). There is no evidence that defendant reasonably should have known that Mr. Reed was in any way incompetent to supervise Mercadiez when she went to the bathroom.

Furthermore and once again, even assuming *arguendo* that defendant’s direct evidence of Mr. Reed’s express agreement to watch Mercadiez while defendant went to the bathroom should not be considered, the State’s evidence alone supports an inference that Mr. Reed was present and competent during the relevant time periods, and thus the evidence still does not show that defendant “knowingly or willfully” left Mercadiez “in a place or condition[,]” N.C. Gen. Stat. § 14-316.1, where she would “not receive proper care [or] supervision” from a “parent[,]” N.C. Gen. Stat. § 7B-101(15). Therefore, defendant’s motion to dismiss should have been granted. *See generally Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711.

IV. Misuse of 404(b) Evidence

Although we have already determined that defendant’s motions to dismiss should have been granted, either with or without consideration of defendant’s evidence, there are two other issues which defendant has raised on appeal and which are addressed by the dissent: (1) the trial court erred in denying defendant’s motion

in limine to exclude the evidence of Sadie's death because it was not an appropriate use of evidence under North Carolina Rule of Evidence 404(b) regarding prior crimes and bad acts *and* it should have been excluded pursuant to North Carolina Rule of Evidence 403 because the probative value of the evidence did not substantially outweigh the unfair prejudice, and (2) the State went so far beyond the scope of the allowed purposes of the admitted 404(b) evidence in its arguments to the jury that it amounted to plain error in defendant's trial. Considering the extent of the evidence regarding Sadie Gates's death and the use of the evidence, we believe we should address these issues as well. As noted below, evidence of Sadie's death was stressed as much or more than that of Mercadiez, and thus without substantive consideration of that evidence by the jury, it is difficult to understand how the defendant was convicted. For the reasons stated below, even if defendant did not prevail on the motions to dismiss, she would be entitled to a new trial based on the misuse of the evidence of Sadie's death by the State.

Before her trial began, defendant filed a motion to exclude the evidence regarding the death of Sadie. The State argued that the evidence was proper under North Carolina Rule of Evidence Rule 404(b). Rule 404(b) allows for the admission of prior "crimes, wrongs, or acts" to show "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) (2013). Ultimately, the trial court

found in its order that the evidence of Sadie's death could be used *solely* as evidence under Rule 404(b) because

[t]here are sufficient similarities between the two events [Sadie's and Mercadiez's deaths] to support the State's contention that the former incident is evidence that shows (1) knowledge on the part of the defendant of the dangers and possible consequences of failing to supervise a young child who has access to or is exposed to bodies of water; (2) *absence of accident*; and (3) explains the context of her statements at the scene and later to law enforcement.

(Emphasis added).

[W]hen 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, as it did here, 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, 159 (2012). The three reasons enumerated by the trial court are proper reasons to allow in the evidence of Sadie's death pursuant to the plain language of Rule 404(b).⁷ See N.C. Gen. Stat. § 8C-1, Rule 404(b).

⁷ While the jury instructions in this case were not raised as an issue on appeal, we will briefly note the conflict within these instructions. In accordance with the Rule 404(b) order, the jury was instructed they could not use the evidence regarding Sadie as substantive evidence, but that they could use it for evidence of "absence of accident[.]" While the trial court did not err in the traditional sense by instructing the jury pursuant to the language of Rule 404(b), in this particular case the language

As to North Carolina Rule of Evidence 403, this rule precludes evidence unless “its probative value is substantially outweighed by the danger of unfair prejudice[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2013). “‘Unfair prejudice’ within its context [of Rule 403] means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.” N.C. Gen. Stat. § 8C-1, Rule 403 Commentary (2013). It is difficult to fathom evidence more likely to lead to an emotional decision than the death of a child; however, though this Court under *de novo* review may have come to an alternate conclusion, as our review is abuse of discretion, *see Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159, we cannot say that “the trial court’s ruling is so arbitrary that it could not have been the result of a reasoned decision.” *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (citation and quotation marks omitted). Therefore, the trial court did not err in allowing in the evidence regarding Sadie’s death.

But that does not end our analysis. Defendant also argues that the State went so far beyond the scope of the proper use of the admitted 404(b) evidence in its

of Rule 404(b) mirrored the element of misdemeanor child abuse which was most highly contested — “by other than accidental means” — which was an element the jury must find to convict defendant of misdemeanor child abuse. N.C. Gen. Stat. § 14-318.2(a). Thus the instructions told the jury that they could use the evidence of Sadie’s death to show “absence of accident[.]” but the jury was also instructed that the evidence could not be used for the elements which included “by other than accidental means[.]” *Id.* The confusion arises because typically, the 404(b) evidence is used to show that the defendant acted intentionally, but here, the State was not seeking to show that defendant intentionally killed Mercadiez. There is no way that the jury could have understood this fine legal distinction between “absence of accident” and “by other than accidental means.” *Id.* But the jury instructions were not raised or argued as an issue on appeal so we do not address it, other than noting how it compounded the problems with the use of the evidence of Sadie’s death.

arguments to the jury that it amounted to plain error in defendant's trial. Because defendant's argument hinges on the admission of evidence during the trial, it is appropriate for plain error review. *See State v. Wolfe*, 157 N.C. App. 22, 33, 577 S.E.2d 655, 663 ("[T]he plain error doctrine is limited to errors in jury instructions and the admission of evidence."), *appeal dismissed and disc. review denied*, 357 N.C. 255, 583 S.E.2d 289 (2003).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Sessoms, 226 N.C. App. 381, 382, 741 S.E.2d 449, 451 (2013) (citation omitted).

After a thorough review of the transcript, we believe that the State used the evidence of Sadie's death far beyond the bounds allowed by the trial court's order. By our count, the State mentioned Sadie to the jury by name 12 times in its opening; by comparison, Mercadiez, the actual child this case was about, was mentioned 15. Even more concerning, during the State's direct examination Mercadiez is mentioned 33 times, while Sadie is mentioned 28.⁸ Lastly, during closing, the State mentions

⁸ If we include all references in questioning or testimony during the State's case in chief by both the State and defendant rebutting the State's inferences, Sadie was mentioned 32 times and Mercadiez 45 times.

Mercadiez 15 times to the jury and Sadie 12 times, with the State asserting that the “bottom line” hinged on Sadie:

So the bottom line is this. It does not matter how she got into the pool. She got into the pool and drowned, and the defendant, Amanda Reed, was not watching her. She failed to supervise her and ensure her safety. She failed to supervise her daughter, *just like she failed to supervise Sadie Gates.*

(Emphasis added.)

Turning solely to the legal questions before us, here, the State mentioned Sadie Gates almost as many times to the jury as the child who had actually died in this case. While Mercadiez was often being discussed by pronouns -- as was Sadie, for that matter -- and we have not counted those, it is clear what the jury must have gathered from hearing Sadie’s name more than 52 times, as compared to 63 for Mercadiez, only to finally be left with Sadie’s tragic death as their “bottom line[.]” The State’s use of the evidence regarding Sadie went far beyond showing that defendant was aware of the dangers of water to small children or any other proper purpose as found by the trial court. This case is the “exceptional case” where “a fundamental error occurred at trial” establishing “prejudice that, after examination of the entire record . . . had a probable impact on the jury’s finding that the defendant was guilty” and “seriously affect[ed] the fairness” of this case. *Id.* Therefore, on this issue, defendant would be entitled to a new trial, but as noted above, we have reversed defendant’s convictions based upon her motions to dismiss.

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We are not, as the dissent suggests, relying solely upon the number of references to Sadie, nor are we taking a single statement out of context. The State repeatedly suggested that the jury rely improperly upon Sadie's death to find defendant guilty. Here are some other examples:

Had the defendant not been responsible for Sadie Gates's death, had she not been warned of the dangers of leaving a child unsupervised by Julie Dorn, then you would not be sitting here today, deciding this case. Will Reed can come in here and try to take the blame, and they can try to put it on a sibling. They can talk about how good a parent Amanda Reed is, and they can show all the appropriate emotions and responses for a parent that has lost a child, but she cannot avoid responsibility any longer. She cannot continue to shift the blame. *It did happen again. Another child left under her care and her supervision, another child that drowned and died.*

. . . .
. . . Two children, two, under her care, left unsupervised by her, who got out of the house and into the water and drowned. Her inactions, her lack of supervision, without question, demonstrate a grossly negligent omission. Sadie Lavina Gates, born 2/23/2009. Date of death: 9/27/2010. Cause of death: drowning. Place of injury: pond. Location: 3390 Burgaw Highway. Sadie Gates.

Mercadiez Kohlinda Reed, born 9/14/2011. Date of death: 5/11/2013. Cause of death: drowning. Place of injury: residence. Location: 313 Forest Grove Avenue, Jacksonville.

. . . .
. . . Two children, the same age, both girls, left unsupervised, out of the house, drowned in water. You know what the common denominator is that everyone has overlooked, what's not on either one of those death certificates right there in front of you? What's the common denominator? Her. Amanda Reed is the common denominator. She is the one. And just as she was

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responsible for the death of Sadie Gates, so, too, is she responsible for the death of Mercadiez Reed. Not a sibling, not Will Reed, but her. She is the person that can and should be held criminally responsible for her daughter's death, because she is the only person who knew of the dangers, who had been negligent before, and who acted in a grossly negligent manner.

....
In the beginning, I told you there were six questions: who? What? Where? When? How and why? I want to talk about the one question [defendant's counsel] didn't talk about. Why. Isn't that what the case is all about? *Why? You know why. You know why. Sadie Gates's death was caused by the defendant's lack of supervision and care. Mercadiez Reed's death was caused by the same lack of supervision and care.*

(Emphasis added.)

We have considered the totality of the evidence and arguments, and the specter of Sadie's death permeated the entirety of the State's case-in-chief. Although some portions of the State's argument were, as noted by the dissent, within the proper scope of use of the evidence, others, as we have cited above, were not. By referencing only the portions of the State's argument that stayed within the Rule 404(b) bounds, the dissent takes the use of the evidence out of context. Considering the argument as a whole, the prosecution clearly used the evidence of Sadie's death far beyond the purposes for which the trial court admitted the evidence and essentially argued that defendant has a propensity to leave two-year-old girls unattended, resulting in death by drowning; this is the use forbidden by Rule 404(b). See N.C. Gen. Stat. § 8C-1, Rule 404(b).

V. Conclusion

In certain cases, “we must bear in mind Lord Campbell’s caution: ‘Hard cases must not make bad law.’” *Hackos v. Goodman, Allen & Filetti, PLLC*, 228 N.C. App. 33, 43, 745 S.E.2d 336, 343 (2013) (citation and quotation marks omitted). Here, the death of Mercadiez was tragic, as was Sadie’s death, but the law does not support the charges against defendant with an appropriate consideration of the actual evidence in *this* case. The trial court erred in denying defendant’s motion to dismiss both charges, and defendant’s convictions are vacated.

VACATED.

Judge DAVIS concurs with separate opinion.

Judge STEPHENS dissents.

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DAVIS, Judge, concurring.

I concur in the result reached by the majority and in the bulk of its analysis. However, I write separately to note the areas of the majority's opinion as to which I disagree.

With regard to the trial court's denial of Defendant's motion to dismiss at the close of the evidence, I agree with the majority that because the evidence introduced during Defendant's case-in-chief did not in any way contradict the State's evidence, the trial court was required to consider Defendant's evidence in ruling on the motion to dismiss. For the reasons discussed by the majority, this evidence establishes that Defendant did not leave Mercadiez without adult supervision for the limited time period during which Defendant was not personally supervising Mercadiez because she had left to use the bathroom.

However, I do not join the majority's alternative analysis in which it determines that even if Defendant's evidence is *not* considered, Defendant would still be entitled to have her convictions vacated. To the contrary, I agree with the dissent that based exclusively on the State's evidence, the denial of Defendant's motions to dismiss would have been proper.

Furthermore, I part company with the majority on the appropriate definition of the phrase "by other than accidental means" in N.C. Gen. Stat. §14-318.2(a). In my view, the manner in which the majority interprets this phrase would prevent a

defendant from *ever* being convicted of N.C. Gen. Stat. §14-318.2(a) on a theory of negligence, a result that cannot be squared with the plain language of this statutory provision or with our Court's recent decision in *State v. Watkins*, __ N.C. App. __, 785 S.E.2d 175 (2016).

Finally, while the issue is technically moot in light of our holding that Defendant's convictions must be vacated, I also agree with the section of the majority's analysis addressing whether — in the absence of our decision to vacate her convictions — Defendant would be entitled to a new trial due to the extent to which the State's arguments improperly focused on *Sadie's* death. Even assuming *arguendo* that the trial court did not err in deeming evidence of Sadie's death admissible pursuant to Rule 404(b) and not unduly prejudicial under the balancing test of Rule 403, this evidence was admitted for limited purposes by the trial court. However, in my view, the manner in which the Rule 404(b) evidence was actually used by the State in its arguments grossly exceeded these limited purposes for which the evidence was originally admitted. As the majority's analysis explains, it is difficult — if not impossible — to read the transcript and conclude that Defendant received a fair trial.

STEPHENS, Judge, dissenting.

Applying our well-established standard of review to the trial court’s denial of defendant’s motion to dismiss, I conclude that the State offered sufficient evidence of defendant’s failure to properly supervise Mercadiez to submit the case to the jury. Further, I would find no error in the admission of Rule 404(b) evidence or in the trial court’s failure to intervene *ex mero motu* in the State’s closing argument. For the reasons discussed below, I would hold that defendant received a trial free from error. Accordingly, I respectfully dissent.

I. Relationship between the State’s and the defense’s evidence on supervision

I agree with the majority opinion that, in ruling on a defendant’s motion to dismiss, the “defendant’s evidence may be considered on a motion to dismiss where it clarifies and *is not contradictory to the State’s evidence* or where it rebuts permissible inferences raised by the State’s evidence *and is not contradictory to it.*” *State v. Reese*, 319 N.C. 110, 138-39, 353 S.E.2d 352, 368 (1987) (citations omitted; emphasis added), *overruled on other grounds by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997); *see also State v. Barnett*, 141 N.C. App. 378, 382-83, 540 S.E.2d 423, 427 (2000) (holding that “the trial court is not to consider [a] defendant’s evidence rebutting the inference of guilt except to the extent that it explains, clarifies or is not inconsistent with the State’s evidence”) (citation and internal quotation marks omitted), *affirmed per curiam*, 354 N.C. 350, 554 S.E.2d 644 (2001). I reach a different result from the

majority because, in my view, defendant's evidence regarding the events immediately before Mercadiez drowned *was contradictory* to the State's evidence on the same point.

The majority opinion notes that, “[w]hile the State’s case did not emphasize the fact that Mr. Reed was also home with defendant at the time of Mercadiez’s drowning, the evidence the State offered did indicate that he was at the house during the relevant period of time.” I fully agree.⁹ The uncontradicted evidence was that Mr. Reed was *in the home* at the time of Mercadiez’s drowning, just as the uncontradicted evidence was that defendant herself was also *in the home* at the time. The critical issue regarding defendant’s criminal responsibility for the death of her daughter, however, is not what adults were *in the home* at the time Mercadiez found her way into the pool, but rather, what adult, if any, was *supervising* Mercadiez. On that critical issue, the State’s evidence showed that defendant left her 19-month-old baby in the care of nine-year-old Sarah. I simply do not agree with the majority’s assertion that the acknowledged presence of Mr. Reed *somewhere* inside a multi-room house, without any evidence that he could hear or see Mercadiez as she played *outside* on the side porch with other children, was in any way relevant to the question of who was *supervising* Mercadiez when she wandered away to her death. The majority

⁹ I disagree, however, with the majority’s apparent assertion that the *only* way to establish a conflict between the State’s evidence and defendant’s evidence would have been for the State to offer evidence placing Mr. Reed in a different location inside the house from the location Mr. Reed described.

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further contends that Mr. Reed’s testimony for the defense—*that he was in the living room when defendant went to the bathroom and that defendant specifically asked him to supervise Mercadiez*—was not inconsistent with, and merely clarified, the State’s evidence. A careful reading of the trial transcript belies this characterization of the evidence presented by the State and the defense.

The only evidence offered by the State about what happened in the minutes leading up to the drowning came from Sergeant Michael Kellum of the Jacksonville Police Department (“JPD”). After testifying in detail about the Reeds’ home and its appearance after Mercadiez’s death, Kellum briefly discussed the interview he conducted with defendant.

Q Did you ask [defendant] to explain to you what she had been doing in the moments leading up to this incident?

A Yes, sir.

Q What did she tell you?

A That she was in the bathroom.

Q Did she tell you how long she had been in the bathroom?

A Yes. She estimated, I believe, it was five to ten minutes.

[discussion of which bathroom defendant used]

Q What happened then, or what did she explain to you happened then?

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A She said that she came out of the bathroom and she saw the oldest daughter, or the older daughter, playing in that—or in the house, and she had earlier seen the infant, Mercadiez, with—playing with the older daughter. So she asked the older daughter where Mercadiez was, and she—the daughter indicated that she had brought her inside and put her inside the living room, earlier. And she—according to her interview, she immediately started looking for the child, inside the house, going room to room, trying to find the house—or trying to find the child, and then went out the front door and around the house, trying to find the child, until she went out the master bedroom door overlooking the pool, and saw the baby floating in the pool.

[discussion of how Mercadiez was retrieved from the pool and 911 was called]

Q You said she indicated that she had been in the bathroom for five to ten minutes.

A Yes, sir.

Q Did you ask her about that?

A No. She provided that, previously. During the interview, she had provided that she had begun menstruating and was—that's why she was in the bathroom.

[discussion of the time defendant spent in the bathroom]

Q Okay. And I guess she acknowledged to you that Mercadiez was not with her, at that time?

A That's correct.

Q And based on what [defendant]—did [defendant] explain to you where Mercadiez was, at that time?

A She had—when she went into the bathroom, she had seen Mercadiez playing on the side concrete porch by the side door, with the other girls, that being [Sarah] and [Sarah’s] friends from down the street.

Q And those are minors,¹⁰ as well, right?

A Yes, sir.

Q Did she acknowledge to you that [Sarah] told her when she brought Mercadiez back into the house?

A She—once she came out of the bathroom and asked [Sarah] what—she saw [Sarah] without Mercadiez, asked [Sarah] where Mercadiez was. [Sarah] said she had put her in the living room.

In sum, on direct examination, the State’s evidence was that: (1) Mercadiez was playing outside with Sarah and other children when (2) defendant went to the bathroom where (3) she remained for five to ten minutes because she was menstruating and, when she came out of the bathroom, (4) defendant encountered Sarah inside the house without Mercadiez and (5) asked Sarah where her youngest sister was.¹¹ Kellum did not offer *any testimony* about what Mr. Reed was doing,

¹⁰ Sarah was nine years old at the time.

¹¹ This account of his interview with defendant is substantially similar to Kellum’s testimony at a pretrial hearing on the admission of Rule 404(b) evidence:

Q And based on your conversations with [defendant], what was your understanding about where [defendant] was and what she was doing immediately prior to this incident?

A She indicated that she was in the bathroom and that a couple of the girls were—some of the other kids in the house were trying to

where he was in the house, or whether defendant asked him to watch Mercadiez when she went to the bathroom.

On cross-examination of Kellum, defendant had the opportunity to clarify the critical question of what happened in the moments before defendant went to the bathroom. However, defendant's trial counsel did not ask Kellum whether defendant mentioned asking her husband to watch Mercadiez when she went to the bathroom nor did he ask whether Mr. Reed mentioned being asked to watch Mercadiez during Mr. Reed's interview with Kellum. Defendant's trial counsel did not even ask whether Mr. Reed or defendant had mentioned Mr. Reed's presence in the living room at the time defendant went to the bathroom.¹² Indeed, the *only* questions defense

talk to her through the bathroom door. She came—once she came out of the bathroom, she indicated that she saw [Sarah], which was one of the other children in the house, and that was when they realized [Mercadiez] was missing. She asked [Sarah] where the child was, and then the search began to find the child.

¹² I find the majority opinion's characterization of the direct examination of Kellum as "the State's strategic decision to forego calling as a witness the only adult in the house during the relevant time period other than defendant[.]" an unsupported assumption regarding the prosecution's motive. Certainly, the State was focused on proving its case against defendant, but it is equally as reasonable to assume that the prosecutor (and Kellum) were likely very surprised that defendant's trial counsel elected not to ask Kellum on cross-examination whether, during Kellum's interviews with the Reeds, defendant or Mr. Reed mentioned that defendant asked Mr. Reed to watch Mercadiez when defendant went to the bathroom. The failure of defense counsel to undertake this line of inquiry is difficult to understand in that, at a pretrial hearing regarding the admissibility of Rule 404(b) evidence, defendant's trial counsel cross-examined Kellum about the interview and Kellum testified:

According to her statement that she made on the day she was interviewed in the office, she indicated to [Mr. Reed] that she needed to use the restroom; her stomach was bothering her and she was beginning her menstrual cycle. She went to the bathroom, . . . which is near the den/kitchen area. She said that the kids . . . began talking to her through the door, and [Mr. Reed] shooed them away from the

counsel asked about Kellum's interviews with defendant and Mr. Reed sought to clarify how Mercadiez got outside onto the side porch:

Q Well, as you remember this interview, did [defendant and Mr. Reed] tell you the same thing about what happened that day?

A Yes, sir.

[discussion of when the interviews took place]

Q And in response to some of [the prosecutor's] questions, you indicated that their belief was that the child went from the side porch, through the locked gate.

A Yes, sir.

door back to their rooms. When she walked out of the bathroom, she saw [Sarah] in the kitchen and asked where the daughter was, or where [Mercadiez] was, and [Sarah] indicated that she had brought [Mercadiez] into the house 15 minutes prior.

At the same hearing, Kellum described his interview with Mr. Reed on cross-examination as follows:

Q You interviewed Mr. Reed the night of this incident at the hospital, correct?

A I did.

Q Mr. Reed, would you say, told you the same or consistent story regarding his whereabouts that day, where the child was on the night of the accident, as he did three days later?

A Yes, sir. It was quite a bit more limited due to his obvious grief, but, yes, there were little or no inconsistencies.

Q And Mr. Reed also indicated that [defendant] left the child with him in the living room when she went to the bathroom, right?

A He indicated she used the bathroom.

Of course, none of this testimony from the pretrial hearing was evidence at trial, and thus, it was not part of the trial court's consideration when ruling on defendant's motion to dismiss.

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Q And that the child had been out there with her older sister, [Sarah].

A Yes, sir.

[discussion of the ages of the other children in the home that day]

Q Okay. Do you remember how they told you Mercadiez got outside?

A That she had—[Sarah] was playing with them and had taken her outside, I believe.

[discussion of the layout of the Reeds' home]

Q During your interview with Mr. Reed, you discussed how Mercadiez got outside.

A We discussed the movements of the family that day, yes, sir.

Q Okay. And per your recollection, what did he tell you about that?

[THE STATE]: Objection.

THE COURT: Sustained.

Q You talked to [defendant] about it.

A About the movements of the children during the day? Yes, sir.

Q Did she give you any indication of how the child got outside?

A No, sir, not that I recall. The children were in and out, playing, all during the day. . . .

I am not, as the majority opinion suggests, “arguing that defense counsel was *required* to cross-examine . . . Kellum about Mr. Reed’s role in these events.” (Emphasis added). I am simply observing that the State presented its version of the events leading up to Mercadiez’s drowning, and I fully agree with the majority’s observation that, in doing so, “the State chose to rely solely upon . . . Kellum and not to call Mr. Reed as a witness.” Defendant had no duty whatsoever to cross-examine Kellum on any point *unless* she wished to elicit evidence contradictory to the State’s version of how Mercadiez came to be unsupervised and find her way tragically into the backyard pool. To recap, the State’s evidence about the critical minutes before the drowning was that defendant reported leaving Mercadiez outside on the side porch with Mercadiez’s nine-year-old sister, Sarah, while defendant went to the bathroom for five to ten minutes. In addition, Kellum testified that defendant told him she realized Mercadiez was missing when she saw Sarah inside without the toddler and that defendant immediately asked *Sarah* where Mercadiez was. According to Kellum’s account of the interview, defendant did not mention asking Mr. Reed to watch Mercadiez, seeing Mr. Reed when she left the bathroom, or asking Mr. Reed where Mercadiez was, as might be expected if defendant had left Mercadiez in Mr. Reed’s care. Therefore, I reject defendant’s argument that the State offered no evidence of a lack of supervision by defendant.

Mr. Reed was the only witness to testify for the defense, and, as noted *supra*, his testimony “may be considered . . . [only] where it clarifies and *is not contradictory to the State’s evidence* or where it rebuts permissible inferences raised by the State’s evidence *and is not contradictory to it.*” *See Reese*, 319 N.C. at 139, 353 S.E.2d at 368 (citations omitted; emphasis added). Mr. Reed’s account of the events during the critical time period was as follows:

A . . . I went back over here and continuously, you know, helped her with the laundry, and then I went out and sat down on the—once the laundry was done, I sat on the couch—well, when she was finishing up, I sat on the couch.

. . . .

Q From there, you could see out the door [onto the side porch]?

A From there, you can see out the door.

Q Did you see Mercadiez?

A Yes.

Q You had your eye on her from sitting right there?

A Yep.

Q And after you sat down, tell me what happened from there.

A I sat down from there, and that’s when [defendant] said, you know, I have to use the bathroom, you got this? And I said, yes.

Q You got this?

A You got this.

Q What does that mean?

A To me, it means you got what's going on in the house, everything that's going on.

Q Referring to the children?

A Referring to the children, whatever.

Q And [defendant] left?

A To go use the bathroom, yes.

[discussion of which bathroom defendant was using]

Q Tell me what happened, from there.

A Like anything, I was sitting there. I said, yes. She left to go to the bathroom. I was sitting—not even a couple minutes later, I mean, I heard—

[discussion of why defendant was going to the bathroom]

Q And I'm sorry, I just wanted—if you will, so she goes to the bathroom.

A Right. While she was in the bathroom, like anything, and then I was sitting over here, and Mercadiez is up front in the yard with—the side porch with [Sarah], I heard, “Can't I [use the bathroom] in peace?”

Q And that was [defendant]?

A That was [defendant], yes.

Q What was that about?

A While she was in the bathroom, the two younger [children were] in there, bothering her. And from there, like anything, I mean, just when I heard that, I got up. When I was walking by, walking by this area right here, I got up, walked around, was walking right through here, that's when I looked over to the front door, which is this way, and I saw Mercadiez sitting down on the porch with [Sarah], playing in the flower—the flower pot that was in the picture, she was playing in the flower pot.

Q Where did you go from there?

A I went into the—the bathroom where she was located, where [defendant] was located, and grabbed the two girls from there.

[discussion of which two girls were bothering defendant]

Q And at that point, [defendant] was sitting on the toilet?

A Yes, she was sitting on the toilet.

Q And what did you do with those two little girls?

[discussion of Mr. Reed setting up a movie for the two girls]

A I checked on [another child], and then I walked back up through the hallway. When I was walking up through the hallway, [defendant] got done using the bathroom and came out.

Q So you essentially met her in the hallway?

A Met her in the hallway, yes.

Q She's in front of you. Which way did she go?

A She went through the—through the hallway, into the kitchen.

[discussion of how close defendant and Mr. Reed were in the hallway]

A When I got into the kitchen, like anything, well, she walked up, and she walked towards the middle of the counter right there, by the middle of the counter, and then [Sarah] walked in. And when [Sarah] walked in, the first thing [defendant] said is, “where is Mercadiez?”

Thus, Mr. Reed’s account was that (1) he was with defendant in the living room already supervising Mercadiez when defendant announced that she was going to the bathroom and asked Mr. Reed to watch the toddler; (2) he heard defendant call out in frustration because two other children were in the bathroom bothering her; (3) he left the living room for several minutes to settle the other children in front of a movie; and (4) he met defendant in the hallway as she left the bathroom.¹³ Mr. Reed’s version of events is plainly not consistent with the State’s evidence that defendant left Mercadiez outside on the side porch with Sarah while defendant went to the bathroom for five to ten minutes and that, when defendant returned to the living room, she was surprised to encounter Sarah inside without Mercadiez. Accordingly, in considering the merits of defendant’s motion to dismiss for insufficiency of the

¹³ This is the “*actual evidence from defendant’s case[,]*” as quoted above and summarized here, that, in my view, “*contradicts the State’s evidence[,]*” quoted at length and summarized on the third through sixth pages of this dissent. (Emphasis added).

evidence, neither the trial court nor this Court should consider Mr. Reed's testimony regarding the events immediately preceding the drowning.

I find *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983), the primary case relied upon in the majority opinion, easily distinguishable. The defendant in *Bates*, having been convicted of felony murder and robbery with a dangerous weapon as a result of an admitted altercation with another man, argued on appeal that "the trial court erred in denying his motion to dismiss the armed robbery charge[, which was also the predicate felony supporting his felony murder conviction] for insufficiency of the evidence." *Id.* at 533, 308 S.E.2d at 262. "Specifically, [the] defendant argue[d] that the State ha[d] not shown by substantial evidence a taking of the victim's property with the intent to permanently deprive him of its use." *Id.* at 534, 308 S.E.2d at 262. As noted in the majority opinion, the State's evidence concerned the scene of the crime, including the condition of the victim's and the defendant's bodies, and the location of the victim's and the defendant's personal possessions. *Id.* at 534-35, 308 S.E.2d at 262-63. There were no witnesses to the fight, but the defendant testified about the events which led up to the altercation and his account of how the victim was killed. *Id.* at 535, 308 S.E.2d at 263. Importantly, both the "[d]efendant's testimony and the physical evidence reveal[ed] that a brutal fight took place between" the defendant and victim. *Id.* On the only point of dispute—whether the defendant had robbed the victim—"[t]he State relie[d solely] on the fact that the deceased's

property was found some distance from his body to establish a taking by [the] defendant[.]" while the "[d]efendant testified that he never saw [the victim's] possessions nor was he aware of how they came to be strewn around the area." *Id.* at 534, 535, 308 S.E.2d at 262, 263. Our Supreme Court, in holding the evidence was insufficient to survive the defendant's motion to dismiss, observed that, "[w]hen [the] defendant's explanatory testimony is considered along with the physical evidence presented by the State, the logical inference is that the [victim] lost these items of personal property during the struggle with [the] defendant." *Id.* at 535, 308 S.E.2d at 263. In other words, there were *not* two possible accounts of the crime presented. Instead, the State's evidence was entirely a description of the physical crime scene—the "what" of the altercation—while the defendant's evidence concerned the "how" and "why" of the fight. The State's evidence would have supported an inference of robbery, but the defendant's evidence provided an explanation that rebutted the inference of robbery by permitting an innocent inference from the State's crime scene evidence.

Here, in contrast, the State and defendant each presented a distinct "story" of how Mercadiez came to be unsupervised such that she could wander away and drown. The State's evidence was that defendant was watching Mercadiez play outside on the side porch with her sister when defendant left the living room and spent several minutes in the bathroom where she could not supervise Mercadiez and that the

toddler was not with her older sister when defendant returned from the bathroom. Defendant's evidence was that her husband was already watching Mercadiez when defendant asked him to supervise the toddler while she went to the bathroom for several minutes only to find Mercadiez missing when defendant and her husband both returned to the living room.¹⁴ Unlike in *Bates*, the question here is not whether an inference permitted by the State's evidence is rebutted by the clarifying evidence of the defendant which supports a more likely inference. It is whether the jury believed the State's theory of the case, to wit, that defendant left Mercadiez unsupervised when she went to the bathroom, or whether they believed defendant's account that she left her child in the care of her husband. Simply put, both versions of the moments before the tragic drowning cannot be true. Thus, the State's evidence is inconsistent with defendant's evidence and could not be considered by the trial court or by this Court in evaluating the sufficiency of the evidence against defendant. *See Reese*, 319 N.C. at 139, 353 S.E.2d at 368 (stating that a defendant's evidence "may be considered . . . [only] where it clarifies and *is not contradictory to the State's evidence* or where it rebuts permissible inferences raised by the State's evidence *and is not contradictory to it*" (citations omitted; emphasis added)). However, in order to fully address defendant's argument that the trial court erred in denying her motion

¹⁴ In my opinion, these contrasts between the State's and defendant's evidence are a "coherent argument [about] why Mr. Reed's testimony should be disregarded."

to dismiss, her contentions that the trial court erred in admitting certain Rule 404(b) evidence must also be considered.

II. Admission of Rule 404(b) evidence

I agree with the ultimate determination in the majority opinion that the trial court did not err in admitting, pursuant to Rules 403 and 404(b) of the North Carolina Rules of Evidence, evidence regarding the previous drowning of another toddler left in defendant's care. However, because a more thorough discussion of the evidence and the basis for its admission is helpful in understanding why (1) defendant's motion to dismiss was properly denied and (2) the trial court did not err in failing to intervene *ex mero motu* in the State's closing argument, I write separately on this issue.

As noted by the majority, during the investigation of Mercadiez's death, JPD officers learned about the 22 September 2010 death of 19-month-old Sadie Gates, who had wandered away and drowned in a rain-filled creek while in defendant's care. Defendant was convicted of involuntary manslaughter in connection with that incident and was still on probation at the time of Mercadiez's death. In addition, investigators received a report from a neighbor of the Reeds regarding an incident that occurred about a month before Mercadiez's death. The neighbor had been driving past the Reeds' home and noticed two children, one a toddler and the other about three or four years old, playing at the edge of the curb next to the street. Concerned for the children's safety, the neighbor stopped her car and knocked on

defendant's door, which was answered by a five- or six-year-old child. When defendant eventually came to the door, the neighbor pointed out the unsupervised young children in the yard, and defendant went to retrieve them.

In June 2014, the State filed a motion *in limine* regarding the admissibility of the neighbor's report of unsupervised young children in defendant's yard and the 2010 drowning of Sadie Gates. In July 2014, defendant filed her own motion *in limine*, arguing that the admission of evidence of those events was barred by Rule 404(b). Following a hearing, on 23 September 2014, the trial court entered an order denying defendant's motion *in limine* to exclude evidence of the 2010 drowning. The court deferred ruling on the admissibility of the neighbor's testimony until trial, ultimately allowing the neighbor to testify about the unsupervised children seen in defendant's yard about a month before Mercadiez drowned.

On appeal, defendant argues that the trial court erred in admitting testimony under Rules 403 and 404(b) about the 2010 drowning of Sadie Gates.¹⁵ I disagree.

As our Supreme Court has observed:

When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings

¹⁵ Although the subsection caption of defendant's brief alleges that the trial court erred in denying her motion *in limine* and admitting evidence regarding both the 2010 drowning *and* the incident when defendant's children were left unsupervised in her front yard, defendant only presents an argument regarding the evidence of Sadie Gates' drowning. Accordingly, defendant's assertion that the trial court erred in admitting evidence about the unsupervised children is deemed abandoned on appeal. See N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

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). . . .

Rule 404(b) is a clear general rule of *inclusion*. The rule lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. This list is 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. . . .

Though it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity. Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them. We do not require that the similarities rise to the level of the unique and bizarre.

State v. Beckelheimer, 366 N.C. 127, 130-31, 726 S.E.2d 156, 159 (2012) (citations and internal quotation marks omitted; italics added; emphasis in original).

Here, the trial court summarized the similarities between the 2010 and 2013 drownings in its seven-page order as follows:

There are sufficient similarities between the two events to support the [S]tate's contention that the former incident is evidence that shows (1) knowledge on the part of [defendant] of the dangers and possible consequences of failing to supervise a young child who has access to or is exposed to bodies of water; (2) absence of accident; and (3) explains the context of her statements at the scene and later to law enforcement.

Both events arose out of the supervision of children who were nineteen months old. [Defendant] was babysitting

Sadie Gates who had been left with [defendant] on September 22, 2010 by her mother. A creek which had become swollen due to rainfall was located within 25 yards of [defendant's] home. In places the water was five feet deep. Any barrier to keep the child away from this hazard had become ineffective. The property did not have a fence between the house and the creek. At the probable time of the incident [defendant] was engaged in caring for another child or watching a television program with her estranged husband who was in the home. The time period that the child was not being attended to by [defendant] had been estimated to be between five and fifteen minutes. The child was able to get out of the house through an unsecured door and off of a porch with ineffective child barriers.

In the May [11], 2013 case, the victim was [defendant's] nineteen[-]month[-]old daughter, Mercadiez Reed. She was able to leave the home through an unsecured door and gain access to an above ground swimming pool that was about four feet deep. [Defendant's] husband and her children were in or about the home when the victim wandered out of the house. [Defendant] told law enforcement officers that she was in the bathroom for about five to ten minutes when the child probably left the home to go outside. She advised law enforcement that she did not watch the children in the pool because she was uncomfortable due to the previous incident.

Defendant contends that the thirteen findings of fact in the order were “inadequate and incomplete” and thus failed to support the trial court’s conclusions of law that the 2010 and 2013 drownings were sufficiently similar to permit admission of the 2010 evidence under Rule 404(b). Specifically, defendant contends that the 2010 drowning of Sadie Gates lacked any similarity to the 2013 drowning of Mercadiez on

“the most important issue, supervision[.]”¹⁶ Defendant misperceives the requirements for admission of prior bad acts under Rule 404(b) and the purpose for which the State sought to offer the evidence here.

Defendant notes that while she admitted leaving the victim of the 2010 drowning completely unsupervised, there was voir dire testimony at the pretrial hearing that she left Mercadiez in the same room as Mr. Reed before Mercadiez’s drowning.¹⁷ I would conclude that this difference pales in comparison to the numerous similarities between these tragic events. As the trial court noted, both incidents involved (1) 19-month-old children (2) who were being supervised by defendant (3) in her home (4) while her husband and other children were present (5) who drowned (6) in nearby bodies of water (7) after getting out of defendant’s home, and (8) when defendant had stepped away from the child’s immediate presence for a period of approximately five to ten minutes. Further, the evidence was not offered to *prove* that defendant failed to supervise Mercadiez, but rather, *inter alia*, to show defendant’s *knowledge* “of the dangers and possible consequences of failing to supervise a young child who has access to or is exposed to bodies of water[.]” Whether defendant’s husband was with Mercadiez when defendant left the room before her

¹⁶ On appeal, defendant does not argue that the two incidents lacked temporal proximity. See *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159.

¹⁷ As noted *supra*, unlike at the trial itself, the defense elicited testimony from Kellum about Mr. Reed’s presence in the living room when defendant went to the bathroom on cross-examination at the pretrial hearing.

daughter escaped from the house and drowned is irrelevant to the issue of defendant's *knowledge* of the possible consequences of leaving a toddler with unsupervised access to an open source of water. Defendant's knowledge of such danger, in turn, was highly relevant to the jury's determination of her (1) culpable negligence, an element of involuntary manslaughter; (2) reckless disregard for human life, an element of felonious child abuse; and (3) willfully or knowingly allowing a child to be in a situation where the child could be adjudicated neglected, an element of contributing to the neglect of a juvenile. *See, e.g., State v. Fritsch*, 351 N.C. 373, 379-80, 526 S.E.2d 451, 456 (2000), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000); *see also* N.C. Gen. Stat. § 14-316.1 (2015) (defining contributing to delinquency by a parent as "knowingly or willfully caus[ing] . . . any juvenile . . . to be in a place or condition . . . whereby the juvenile could be adjudicated . . . neglected"). For these reasons, I agree with the majority that the trial court properly concluded that evidence of the 2010 drowning was admissible under Rule 404(b).

Nonetheless, North Carolina's Rules of Evidence provide that even relevant

evidence may . . . be excluded under Rule 403 if the trial court determines 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. We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when 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. Whaley, 362 N.C. 156, 159-60, 655 S.E.2d 388, 390 (2008) (citations and internal quotation marks omitted).

Defendant's appellate argument regarding Rule 403 is simply that evidence of the 2010 drowning was so lacking in probative value that it was outweighed by the obvious prejudice of evidence that another toddler had previously drowned while in defendant's care. While I agree that it was prejudicial, as explained *supra*, the evidence of the 2010 drowning was also highly probative of the issues before the jury in this case. The trial court noted in its order that it had performed the required Rule 403 balancing test in regard to the 2010 drowning and determined that the probative value of the evidence was not outweighed by unfair prejudice.

My conclusion that this was a reasoned decision is further supported by the trial court's decision to defer ruling until trial on admission of the neighbor's testimony about unsupervised children in defendant's yard and its ruling that evidence about defendant's possible drug use on the date of the 2010 drowning was inadmissible under Rule 403. I see no abuse of discretion in the admission of evidence about the 2010 drowning, and, accordingly, I agree with the statement in the majority opinion that this argument by defendant lacks merit.

III. Motion to dismiss for insufficiency of the evidence

I would also overrule defendant's arguments that the evidence at trial was insufficient to support her convictions for misdemeanor child abuse and contributing to the delinquency of a juvenile by neglect.

Taken together the State's evidence at trial shows that defendant knew (1) how quickly unsupervised toddlers in general could wander away into dangerous situations, (2) that two of her young children, including a toddler who appears to have been Mercadiez, had wandered unsupervised to the edge of the street only the month before, (3) that some of defendant's older children were in the habit of leaving gates open which allowed younger children to wander, (4) how attractive and dangerous open water sources like her backyard pool could be for toddlers, and (5) that defendant had previously been held *criminally responsible* in the death of a toddler she was babysitting after that child was left unsupervised inside defendant's home for five to fifteen minutes, managed to get outside, and wandered into a creek where she drowned. Despite this knowledge, defendant still chose to (6) leave toddler Mercadiez outside on a side porch (7) supervised only by other children (8) while defendant spent five to ten minutes in a bathroom where she could not see or hear her youngest child.

Regarding her conviction for misdemeanor child abuse, I agree with the assertion in the majority opinion that the most factually analogous case to defendant's is *State v. Watkins*, __ N.C. App. __, 785 S.E.2d 175 (2016). In *Watkins*,

the defendant appealed from the denial of her motion to dismiss a charge of misdemeanor child abuse. *Id.* at ___, 785 S.E.2d at 176. The defendant was charged after her son “James, who was under two years old, was left alone and helpless—outside of [the d]efendant’s line of sight¹⁸—for over six minutes inside a vehicle with one of its windows rolled more than halfway down in 18-degree weather with accompanying sleet, snow, and wind.” *Id.* at ___, 785 S.E.2d at 178.

Given the harsh weather conditions, James’ young age, and the danger of him being abducted (or of physical harm being inflicted upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that [the d]efendant “created a substantial risk of physical injury” to him by other than accidental means. *See* N.C. Gen. Stat. § 14-318.2(a).

[The d]efendant acknowledges that her actions “may not have been advisable[] under the circumstances” but argues nevertheless that “this was not a case of child abuse.” However, the only question before us in an appeal from the denial of a motion to dismiss is whether a reasonable juror could have concluded that the defendant was guilty based on the evidence presented by the State. If so, even if the case is a close one, it must be resolved by the jury. *See State v. Franklin*, 327 N.C. 162, 170, 393 S.E.2d 781, 786-87 (1990) (“Although we concede that this is a close question . . . the State’s case was sufficient to take the case to the jury.”); *State v. McElrath*, 322 N.C. 1, 10, 366 S.E.2d 442, 447 (1988) (upholding trial court’s denial of motion to dismiss even though issue presented was “a very close question”).

¹⁸ The evidence was conflicting on this point. The “[d]efendant testified that from where she was standing in the Sheriff’s Office she ‘could look directly into my car and see my kid[.]’ ” while the detective who was the primary witness for the State “testified that from where [the d]efendant was positioned in the lobby she could not see her vehicle, which was parked approximately 46 feet away from the front door.” *Id.* at ___, 785 S.E.2d at 176, 177.

Id. (emphasis omitted). Mercadiez and James were each left unsupervised by their mothers for a similarly short length of time—five to ten and six minutes, respectively. However, the actual danger to which Mercadiez, who was awake and mobile, was exposed during that time was significantly greater than that faced by James, who was sleeping and confined. While leaving her toddler partially exposed to cold and snowy weather for six minutes was certainly a poor decision by James’s mother, it was unlikely to result in death and did not result in any actual injury to him. Indeed, the law enforcement officer who spotted James sleeping in his mother’s car did not feel the need to check the child’s well-being before the defendant left the scene.¹⁹

As for the other risk suggested by this Court in *Watkins*, I would note that the best available statistics indicate that drownings are far more common than nonfamily abductions. In 2015, the National Center for Missing and Exploited Children²⁰ “assisted law enforcement with more than 13,700 cases of missing children[,]” approximately 1% of which were nonfamily abductions. *See* The National Center for Missing & Exploited Children, <http://www.missingkids.com/KeyFacts> (last visited

¹⁹ The detective testified that he “noticed that [James], who appeared to be sleeping, had a scarf around his neck. Before walking back into the building, [the detective] told [the d]efendant to turn on the vehicle and ‘get some heat on that child.’” *Id.* at ___, 785 S.E.2d at 176.

²⁰ “The National Center for Missing & Exploited Children opened in 1984 to serve as the nation’s clearinghouse on issues related to missing and sexually exploited children. Today NCMEC is authorized by Congress to perform 22 programs and services to assist law enforcement, families and the professionals who serve them.” The National Center for Missing & Exploited Children, <http://www.missingkids.com/About> (last visited July 6, 2016).

July 6, 2016). The resulting estimate of 137 nonfamily child abductions annually is dwarfed by the approximately 700 children under age 15 who drown in non-boating-related incidents each year. See Centers for Disease Control and Prevention, <http://www.cdc.gov/homeandrecreationalsafety/water-safety/waterinjuries-factsheet.html> (last visited July 6, 2016) (“From 2005-2014, there were an average of 3,536 fatal unintentional drownings (non-boating related) annually in the United States About one in five people who die from drowning are children 14 and younger.”).²¹ Indeed, “[d]rowning is responsible for more deaths among children [ages] 1-4 than any other cause except congenital anomalies (birth defects).” *Id.* For children ages 1-4 years, home swimming pools are the most common location for drownings. *Id.* In addition, “[f]or every child [age 14 and under] who dies from drowning, another five receive emergency department care for nonfatal submersion injuries.” *Id.* Thus, I take issue with the majority opinion’s characterization of Mercadiez’s drowning as “the exceedingly rare situation that resulted in a tragic accident.”²² The primary

²¹ The Centers for Disease Control and Prevention is part of the Department of Health and Human Services. See <http://www.cdc.gov/about/organization/cio.htm> (last visited July 6, 2016).

²² I would further note the defendant in *Watkins* was prosecuted even though her child suffered no harm at all, and, apparently, slept peacefully through the six-minute period when he was subjected to substantial *risk* of physical injury. See *Watkins*, __ N.C. App. at __, 785 S.E.2d at 176.

distinction I see between this case and *Watkins* is that Mercadiez was exposed to far greater risk when she was left unsupervised and subsequently drowned.²³

I find wholly unpersuasive the argument that *Watkins* and defendant's case are distinguishable on the basis of (1) the purposeful action of the parent in each case and (2) the foreseeability of the potential harm to the unattended child:

In *Watkins*, the defendant was aware of the harsh weather conditions, that the window was rolled down, and that she was leaving her child unattended in a public space; in other words, [the] defendant engaged in the purposeful conduct of leaving her child in the circumstances just enumerated; which is purposeful action that crosses the “accidental” threshold as “physical injury” in this case is very foreseeable, whether by hypothermia or abduction. From a commonsense standpoint, most, if not all parents, know there are inherent and likely dangers in leaving a child entirely alone in an open car in freezing weather in a public parking lot.

(Citation omitted).

²³ The majority opinion dismisses as “irrelevant” these statistics regarding unintentional drownings, asserting that “most *unintentional* drownings would likely also be described as ‘accidental drownings,’ and the issue here is whether the acts were by *other than* accidental means.” (Internal quotation marks omitted). However, section 14-318.2, our misdemeanor child abuse statute, makes it a crime for the parent of a child under age 16 to “allow[] to be created a substantial risk of *physical injury*, upon or to such child *by other than accidental means*” N.C. Gen. Stat. § 14-318.2(a) (2015) (emphasis added). Thus, it is the *creation* of the risk, rather than any actual harm that may befall a child, that must be “by other than accidental means” *Id.* Here, the State’s evidence was that defendant decided to leave Mercadiez playing outside without adult supervision while defendant went into a bathroom for five to ten minutes. That decision to walk out of eyesight and earshot of her toddler, which created the risk to Mercadiez, was not an accident, but a conscious, intentional choice. As for the CDC’s statistics, I would assume that an *unintentional* drowning refers to any drowning that is not *intentional*, *i.e.*, the result of either suicide or homicide.

First, I do not understand how a parent who left her sleeping child in a car for six minutes while she went into a sheriff's office "engaged in the purposeful conduct of leaving her child in [those] circumstances[.]" but a parent who left her child playing outside near a swimming pool for five to ten minutes while she went into a bathroom did not. Both cases appear to me to involve "the purposeful conduct of leaving [a] child in the circumstances" which the State argued were dangerous. If evidence that a defendant left her sleeping toddler strapped in his car seat alone in a car parked in front of a sheriff's office in cold weather for six minutes was sufficient for "a reasonable juror [to find] that [the d]efendant created a substantial risk of physical injury to him by other than accidental means[.]" *see Watkins*, __ N.C. App. at __, 785 S.E.2d at 178 (internal quotation marks omitted), I have no trouble concluding that evidence that a defendant who left her toddler outside without adult supervision for five to ten minutes at a home with an outdoor swimming pool and a pool security gate often left open by other children in the family was likewise sufficient to withstand a motion to dismiss.

Second, regarding foreseeability, I believe that, in addition to being aware of the dangers of child abduction and hypothermia, "[f]rom a commonsense standpoint, most, if not all parents, know there are inherent and likely dangers in leaving a child" outside without supervision near a backyard swimming pool. Further, *even if most parents are not aware* of the grave danger of drowning for unsupervised young

children, *defendant was undeniably aware* of the risk, given that she was still on probation for her conviction of involuntary manslaughter in connection with Sadie Gate's death at the time of Mercadiez's drowning. As noted *supra*, defendant was also aware that the gate to the backyard pool was often left open by other children in the home and that two of her younger children had recently been able to wander to the edge of the street while they were at home and in defendant's care.

Finally, I take issue with the assertion in the majority opinion that, if we do not find error in the trial court's denial of defendant's motion to dismiss, "any parent who leaves a small child alone in her own home, for even a moment, could be prosecuted if the child is injured during that time, not because the behavior she engaged in was negligent or different from what all other parents typically do, but simply because [hers] is the exceedingly rare situation that resulted in a tragic accident."²⁴ Defendant left her toddler outside on a side porch without adult supervision, not for a moment, but for five to ten minutes. Further, the evidence in this case is that defendant knew the risk of a young child drowning when left unsupervised, knew her own young children had a tendency to wander in the yard, and knew her swimming pool was not always securely enclosed, yet still left Mercadiez outside unsupervised for five to ten minutes.

²⁴ See footnote 14, *supra*.

As noted in the majority opinion, defendant's conviction for contributing to the delinquency of a minor was based upon the theory that she "knowingly or willfully cause[d Mercadiez] . . . to be in a place or condition" where she "could be adjudicated . . . neglected as defined by G.S. 7B-101[,]” *see* N.C. Gen. Stat. § 14-316.1, to wit, that Mercadiez did “not receive proper care, *supervision*, or discipline[,]” *see* N.C. Gen. Stat. § 7B-101(15) (2015) (emphasis added), from defendant in the moments before she wandered unsupervised into the backyard pool and drowned. For all of the reasons discussed *supra*, I can hardly conceive of a more textbook definition of failure to properly supervise one's toddler than to leave her outside without supervision for five to ten minutes at a home with a backyard swimming pool and a security gate that is often left ajar.

Further, I reject the assertion in the majority opinion that the State's theory of the case was “that fathers are *per se* incompetent to care for young children” and that the evidence was insufficient because the State produced “no evidence that defendant reasonably should have known that Mr. Reed was in any way incompetent to supervise Mercadiez when [defendant] went to the bathroom.” The State's theory of the case had nothing to do with fathers in general nor with Mr. Reed in particular. Rather, as is clearly shown by the evidence it presented, the State's theory was that *defendant* left Mercadiez outside with Sarah and her young friends while *defendant* spent five to ten minutes in a bathroom where *defendant* could not see Mercadiez,

even though *defendant* was aware that young children left unsupervised could quickly wander into danger such as the family's backyard pool. As discussed in section I of this dissent, when ruling on defendant's motion to dismiss, the trial court could not consider Mr. Reed's testimony that defendant left Mercadiez with him when she went to the bathroom, and, thus, Mr. Reed's competence to supervise Mercadiez was simply irrelevant.

In sum, taken in the light most favorable to the State, I conclude that there was substantial evidence that defendant knowingly "create[d] or allow[ed] to be created a substantial risk of physical injury" to Mercadiez, *see* N.C. Gen. Stat. § 14-318.2(a), and allowed Mercadiez to be in a situation where she was not properly supervised. *See* N.C. Gen. Stat. § 14-316.1. While this "evidence [may] not rule out every hypothesis of innocence[,] . . . a reasonable inference of defendant's guilt may be drawn from the circumstances, and, thus, it was for the jury to decide whether the facts, taken singly or in combination, satisf[ied it] beyond a reasonable doubt that the defendant [was] actually guilty." *See Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation, internal quotation marks, and emphasis omitted). Accordingly, I would hold that the trial court did not err in denying defendant's motion to dismiss.

*IV. Failure to intervene ex mero motu during the State's closing argument*²⁵

In a related argument, defendant contends that the trial court should have intervened *ex mero motu* to strike the prosecutor's comment during closing argument that "just as she was responsible for the death of Sadie Gates, so, too, is [defendant] responsible for the death of Mercadiez Reed."²⁶ Specifically, defendant contends that, with this remark, the State was urging the jury to ignore the trial court's Rule 404(b) instruction regarding the purpose for which evidence of the 2010 drowning was received. I am not persuaded.

As an initial matter, I address the proper appellate standard of review for defendant's argument regarding the State's closing remarks to the jury. The majority opinion frames defendant's argument as "that the State went so far beyond the scope of the proper use of the admitted 404(b) evidence in its arguments to the jury that it amounted to plain error in defendant's trial[.]" Asserting that this argument "hinges on the admission of evidence during the trial," the majority applies plain error review. While plain error review may be applied to unpreserved evidentiary issues, as

²⁵ Although the caption of this portion of defendant's brief states that "THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING THE STATE TO ARGUE N.C.G.S. 8C-404(b) EVIDENCE OUTSIDE ITS BASIS FOR ADMISSION[.]" the text of the argument cites only case law regarding "improper closing arguments that fail to provoke [a] timely objection[.]" correctly noting the proper standard of review as stated in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002).

²⁶ This statement is the only portion of the State's closing argument cited by defendant in her brief. Defendant does quote one other statement made by the State, but notes that it occurred during a hearing on defendant's pretrial motions and thus the jury did not hear it. Accordingly, we need not consider its propriety.

discussed in section II of this dissent *supra*, defendant *did object* to the admission of evidence regarding Sadie Gates' drowning under Rules of Evidence 403 and 404(b). *See Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 158-59 (discussing the appropriate standard of review applied to appellate arguments under Rule 403—abuse of discretion—and Rule 404(b)—*de novo*). More importantly, as noted in footnotes 17 and 18 and discussed further below, defendant's sole argument is that the trial court erred in failing to intervene *ex mero motu* to a single remark made during the State's closing argument. Plain error review is not appropriate for such appellate arguments. *See State v. Wolfe*, 157 N.C. App. 22, 33, 577 S.E.2d 655, 663 (2003) ("[T]he plain error doctrine is limited to errors in jury instructions and the admission of evidence."), *disc. review denied and appeal dismissed*, 357 N.C. 255, 583 S.E.2d 289 (2003).

Instead, the correct

standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Jones, 355 N.C. at 133, 558 S.E.2d at 107 (citation omitted). “[C]ounsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence.” *State v. Richardson*, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697 (1996), *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). Further, such “*comments must be viewed in the context in which they were made* and in light of the overall factual circumstances to which they referred.” *State v. Call*, 349 N.C. 382, 420, 508 S.E.2d 496, 519 (1998) (emphasis added).

In addition to applying an incorrect standard of review, the majority opinion mischaracterizes defendant’s argument on appeal regarding the State’s reference to the death of Sadie Gates in its closing argument to the jury. In support of her contention of gross impropriety in the State’s closing argument, defendant argues that:

The State’s . . . argument in essence encouraged the jury to *ignore the trial court’s instructions regarding the 404(b) evidence*, and the basis upon which it was received, i.e., defendant’s knowledge of not supervising a minor child, and to find the defendant guilty because it had happened to another child in [defendant’s] care. . . . To suggest to the jury that it ignore a judge’s instructions is grossly improper. Knowing the extent of the dispute as to whether the 404(b) [evidence] should have been allowed into evidence, the court upon hearing the State’s argument should have stopped the argument of the State and reminded them that the evidence of [the] prior incident involving Sadie Gates was not to be considered to show a propensity on defendant’s part, and she was therefore

guilty again, as the State was encouraging the jury to so find. “Just as she was responsible for the death of Sadie Gates, so, too, is she responsible for the death of Mercadiez Reed.”

(Emphasis added). Thus, defendant’s argument is simple and straightforward: that when the challenged remark—“Just as she was responsible for the death of Sadie Gates, so, too, is she responsible for the death of Mercadiez Reed”—was made, the trial judge, *ex mero motu*, “should have stopped the argument of the State and reminded them that the evidence of [the] prior incident involving Sadie Gates was not to be considered to show a propensity on defendant’s part”

The majority opinion does not directly address defendant’s argument, instead undertaking a review of the State’s opening statement and direct examination of its witnesses, in addition to portions of its closing argument not challenged by defendant, and focusing on the number of times the State mentioned Sadie’s and Mercadiez’s names during the trial. In support of its conclusion that “the State used the evidence of Sadie’s death far beyond the bounds allowed by the trial court’s order[.]” the majority suggests that, because Sadie’s name was used almost as frequently as Mercadiez’s name was across the State’s opening statement, case-in-chief, and closing argument, “[t]he State’s use of the evidence regarding Sadie went far beyond showing that defendant was aware of the dangers of water to small children or any other proper purpose as found by the trial court.” The majority opinion cites no authority for the proposition that the frequency of reference to evidence admitted under Rule

404(b) throughout a trial is a pertinent consideration in assessing the alleged gross impropriety of a single comment made during a closing argument, or, indeed, on any legal issue. I would simply note that, in considering the appropriate use of Rule 404(b) evidence and in determining whether a prosecutor's remark was so grossly improper that a trial court erred in failing to intervene *ex mero motu*, precedent requires that we consider the *purpose* and *nature* of statements rather than their *frequency*. See *Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 159; see also *Jones*, 355 N.C. at 133, 558 S.E.2d at 107-08.

I believe an analysis of defendant's actual argument on appeal can lead only to a conclusion that the State, far from making a grossly improper argument, specifically cautioned the jury against letting its emotions get in the way of a proper consideration of the evidence before it. A review of the challenged remark *in context* reveals that, while the court did not interrupt the prosecutor to remind the jury of the limited purposes for which the Sadie Gates evidence could be considered, the *prosecutor* did give the jury an explicit reminder, essentially repeating the limiting instruction given by the trial court:

And just as she was responsible for the death of Sadie Gates, so, too, is she responsible for the death of Mercadiez Reed. Not a sibling, not [Mr.] Reed, but her. She is the person that can and should be held criminally responsible for her daughter's death, because she is the only person who knew of the dangers, who had been negligent before, and who acted in a grossly negligent manner.

Because of Sadie Gates's death, she had knowledge of the dangers of failing to supervise a child. She knew that if you didn't watch a child, bad things can happen and the child can die. Sadie's death gave her direct, firsthand knowledge of that, and also put a greater responsibility on her to ensure that no child under her care is left unsupervised, in a dangerous situation.

Now, you're not here to decide her responsibility for Sadie Gates's death, and that evidence has not been presented to you to anger or inflame you, or prove that she's a bad parent. It's been offered to you, and should be considered by you, for the limited purpose of showing that she had direct knowledge of the dangers of failing to supervise a child who has access to water. It is important, because it shows her conduct rose to the level of gross carelessness or recklessness that amounted to the heedless indifference of safety and rights of others.

(Emphasis added).²⁷ In my view, when read in context, the comment defendant challenges can *only* be interpreted as part of the State's argument that the 2010 drowning death of Sadie Gates was evidence of defendant's *knowledge* of the dangers of leaving a toddler near an accessible source of water, which as noted *supra* was offered to prove essential elements of both felonious child abuse and involuntary manslaughter. In light of the State's emphasis on the knowledge the 2010 drowning gave defendant about the danger of open water sources to very young children and

²⁷ The majority asserts that, "[b]y referencing only the portion of the State's closing argument that stayed within the Rule 404(b) bounds, it is the dissent [that] is taking the use of the evidence out of context." To the contrary, I focus on this portion of the State's closing statement because it includes the remark actually challenged by defendant and the context necessary to address her appellate argument. See, e.g., *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (*per curiam*).

its explicit reminder of the limited purpose for which the jury could consider that evidence, the challenged remark was not improper, let alone “so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.” See *Jones*, 355 N.C. at 133, 558 S.E.2d at 107. I would overrule this argument.

V. Conclusion

I would hold that the trial court did not err in denying defendant’s motions to dismiss, admitting evidence of Sadie Gates’ drowning, or failing to intervene *ex mero motu* in the State’s closing argument.