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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-394

Filed: 2 January 2018

Wake County, No. 14 CRS 218566

STATE OF NORTH CAROLINA

v.

DANIEL ALAN LIVERMAN

Appeal by defendant from judgments entered 18 July 2016 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 5 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lauren M. Clemmons, for the State.

Gillette Law Firm PLLC, by Jeffrey William Gillette, for defendant-appellant.

DAVIS, Judge.

Daniel Alan Liverman ("Defendant") appeals from his convictions for statutory rape of a person who is 13, 14, or 15 years old and statutory sex offense with a person who is 13, 14, or 15 years old. On appeal, he contends that the trial court erred in admitting into evidence portions of letters written by him while in jail awaiting trial on the grounds of relevance and undue prejudice. After a thorough review of the

record and applicable law, we conclude that Defendant received a fair trial free from error.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: In June of 2014, "Kerry"[1] was sitting in her mother's car in the parking lot of a Food Lion in Zebulon, North Carolina when Defendant drove up and began speaking to her from his vehicle. At that time, Kerry was 14 years old, and Defendant was 32. They exchanged phone numbers, and Defendant drove away.

That night, they began texting each other. Later that month, Kerry invited Defendant over to her house. Defendant performed oral sex on her in the living room of the residence, and the two also had sexual intercourse in Kerry's mother's bedroom.

Over the course of the next month, Kerry continued to text Defendant regularly and occasionally went on dates with him. Defendant took Kerry to an amusement park and the mall and also went with her to downtown Raleigh to watch fireworks on the Fourth of July. In addition, he brought her to his home in Bailey, North Carolina, where they had sexual intercourse and performed oral sex on each other.

Kerry did not initially inform her mother, "Karen," of her relationship with Defendant. Instead, when she went out with him, Kerry falsely told her mother she was spending time with a friend named Victoria. In July 2014, however, Karen

[1] Pseudonyms are used throughout this opinion to protect the identities of the minor child and her family members.

discovered that Kerry was seeing Defendant although she did not know the nature of their relationship. After Kerry told her mother that the relationship was platonic, Karen permitted her to continue seeing Defendant with the understanding that if Karen "suspected anything physical or sexual was going on, [she] would immediately . . . call the authorities."

On the morning of 11 August 2014, Kerry invited Defendant over to her house while she was home alone and her mother was at work. Defendant performed oral sex on her, and they had sexual intercourse. Later that day, Karen came home for her lunch break and found Kerry standing in front of her bedroom door wearing only a tank top. Upon opening the bedroom door and seeing Defendant in Kerry's bedroom, Karen called the police. Shortly thereafter, officers from the Zebulon Police Department arrived and arrested Defendant. On 9 September 2014, he was indicted by a Wake County grand jury on four counts of statutory rape of a person who is 13, 14, or 15 years old and four counts of statutory sex offense with a person who is 13, 14, or 15 years old.

While awaiting trial, Defendant was incarcerated in the Wake County Detention Center. On 7 November 2015, Defendant wrote two letters from jail. One was addressed to Kerry, and the other was addressed to her mother. In his letter to Kerry, Defendant stated that she and her mother would "determine[ ] [his] future"

and encouraged her not to testify at his trial. Defendant further wrote that "if you get on the stand and say I touched you in any way I will never see the light of day."

In his letter to Karen, Defendant apologized for what he had put her and her family through and asked for Karen's "blessing and consent to marry [Kerry]." He also wrote that "[Kerry] and I never needed sex to make each other happy."

In addition, Defendant sent Kerry a birthday card and letter dated 23 February 2016. He once again urged Kerry not to testify at his trial. Defendant wrote that if Kerry did testify she should "tell them you lied about it because you tried to do something with me that day and I refused so when you felt rejected by me you made up the story."

Defendant filed a motion in *limine* in Wake County Superior Court on 7 July 2016 seeking to suppress the letters written by Defendant pursuant to Rules 401, 402, and 403 of the North Carolina Rules of Evidence. On 11 July 2016, a hearing was held before the Honorable Reuben F. Young to address various pre-trial matters. At the hearing, the trial court denied Defendant's motion in *limine*.

Defendant's trial began later that day. At trial, the State entered into evidence the letters written by Defendant to Kerry and her mother in their entirety. On 18 July 2016, the jury convicted Defendant of one count of statutory rape of a person who is 13, 14, or 15 years old and one count of statutory sex offense with a person who is 13, 14, or 15 years old. The trial court sentenced Defendant to two terms of

imprisonment of 240 to 348 months to be served consecutively. Defendant gave oral notice of appeal.

Analysis

As an initial matter, the State questions whether Defendant has properly preserved the issues he seeks to raise on appeal. Specifically, the State notes that Defendant objected at trial to the admissibility of the letters at issue in their entirety rather than only to the specific portions he now challenges on appeal.

Our Supreme Court has held that "[w]hen testimony or a document is inadmissible only in part, the objection should specify the objectionable part; and if it is not so confined, it is not error to overrule it." *State v. Jarrette*, 284 N.C. 625, 647, 202 S.E.2d 721, 736 (1974) (citation and quotation marks omitted), *vacated in part on other grounds*, 428 U.S. 903, 49 L. Ed. 2d 1206 (1976). Furthermore, in *State v. Brockett*, 185 N.C. App. 18, 647 S.E.2d 628, *disc. review denied*, 361 N.C. 697, 654 S.E.2d 483 (2007), we ruled that where a defendant objected at trial to the admission of a phone conversation transcript in its entirety — rather than objecting only to the irrelevant portions of the transcript — "he did not properly preserve his argument as to these issues on appeal." *Brockett*, 185 N.C. App. at 27, 647 S.E.2d at 635.

Here, defense counsel objected during trial to the admissibility of the first letter to Kerry by arguing that "there's tons of things in this letter that are not – it's not relevant to anything" and that "there's all sorts of irrelevant stuff that's in here."

The trial court overruled Defendant's objection, and the first letter was admitted in its entirety as State's Exhibit 1. Defense counsel subsequently objected to the admissibility of the second letter to Kerry, and a bench conference was held after which the trial court overruled Defendant's objection and allowed the letter to be admitted in its entirety as State's Exhibit 2. However, even assuming *arguendo* that Defendant's argument was properly preserved, we hold that the trial court did not err in overruling his objections to the admission of these letters.

First, Defendant argues that portions of the letters he sent to Kerry from jail lacked relevance and were therefore inadmissible under Rules 401 and 402. Second, he contends that these portions of the letters should have been excluded pursuant to Rule 403.[2]

Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C. R. Evid. 401. Irrelevant evidence, conversely, is evidence "having no tendency to prove a fact at issue in the case." *State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368, *appeal dismissed and disc. review denied*, 332 N.C. 348, 421 S.E.2d 157 (1992). Rule 402 provides that relevant evidence is generally admissible at trial while irrelevant evidence is inadmissible. N.C. R. Evid. 402. "Although a trial court's rulings on

[2] Defendant does not challenge on appeal the admission of his letter to Kerry's mother.

relevancy are not discretionary and we do not review them for an abuse of discretion, we give them great deference on appeal." *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 223, 642 S.E.2d 712 (2007).

Our Supreme Court has held that "an attempt by a defendant to intimidate a witness in an effort to prevent the witness from testifying or to induce the witness to testify falsely in his favor is relevant to show the defendant's awareness of his guilt." *State v. Mason*, 337 N.C. 165, 171, 446 S.E.2d 58, 61 (1994) (citation, quotation marks, and brackets omitted). Similarly, in *State v. Rainey*, 198 N.C. App. 427, 680 S.E.2d 760, *appeal dismissed and disc. review denied*, 363 N.C. 661, 686 S.E.2d 903 (2009), this Court ruled that where a defendant appeared to be coordinating an alibi with third parties and discussing the intimidation of witnesses in taped conversations, those conversations were relevant to his guilt. *Id.* at 433, 680 S.E.2d at 766.

Here, the portion of State's Exhibit 1 at issue states as follows:

> They're preparing to set a trial date in December so what you and [Karen] say is what determines my future life (free or locked up). If you and [Karen] do not show up to trial (you will be subpeoned [sic]) they will likely send a sheriff to pick you both up at home and/or work and take you both to the trial. If they cannot find you they may dismiss charges . . . . All I know is that if you get on the stand and say I touched you in any way I will never see the light of day. My family would be more than willing I'm sure to pay for [Karen] and you and [your sister] to take a mini-vacation (all inclusive) on the trial date to be out of town.

The challenged portion of State's Exhibit 2 reads as follows:

> Help me get free and back to you. I need you and my life is totally in your hand. Don't feel bad because what you say from here out matters more. They're gonna subpena [sic] you and [Karen] to show up at trial and testify. If y'all don't show up for 3 trial dates they will more than likely dismiss charges but don't count on dodging them. They will send cops to get you and [Karen]. Whatever happens and you get on the stand and say we did (even just oral) then it's an automatic 20 years to life sentence for me. If you tell them you lied about it because you tried to do something with me that day and I refused so when you felt rejected by me you made up the story so I'd get in trouble as payback for rejecting you and that you thought if you came clean about lying that you would get in big trouble and maybe have to go to juvenile detention then they can't do anything. Just stick to that NO MATTER WHAT.

Thus, in these letters, Defendant urged Kerry — the State's principal witness against him — not to testify at his trial. Alternatively, Defendant suggested that Kerry perjure herself by reciting a fabricated story that he hoped would result in his acquittal. Therefore, the challenged portions of the letters are clearly relevant to show Defendant's awareness of his own guilt. *See Mason*, 337 N.C. at 171, 446 S.E.2d at 61.

Second, Defendant argues that any probative value of these portions of the letters was substantially outweighed by the danger of unfair prejudice to him and that, for this reason, the trial court should have excluded them under Rule 403. Pursuant to Rule 403, the trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. Evid. 403. It is well established that "[a]pplication of the Rule 403 balancing test remains entirely within the inherent authority of the trial court." *Warren v. Jackson*, 125 N.C. App. 96, 98, 479 S.E.2d 278, 280, *disc. review denied*, 345 N.C. 760, 485 S.E.2d 311 (1997). Hence, a trial court's ruling based on its application of this balancing test will not be disturbed on appeal absent a clear showing that the trial court abused its discretion. *Schmidt v. Petty*, 231 N.C. App. 406, 410, 752 S.E.2d 690, 693 (2013) (citation omitted).

In *State v. Moses*, 316 N.C. 356, 341 S.E.2d 551 (1986), our Supreme Court considered a Rule 403 challenge to an incriminating letter from the defendant to the victim's mother. *Id.* at 357-58, 341 S.E.2d at 552. The defendant in *Moses* was charged with raping an 11-year-old girl, and in a letter to the victim's mother written prior to his indictment he promised never to "bother" the child again. *Id.* at 358, 341 S.E.2d at 552. In rejecting the defendant's contention that the probative value of the letter was substantially outweighed by its prejudicial nature, the Court held that "[t]he fact that it would prejudice the defendant because it would tend to convince the jury of his guilt is a reason for admitting, not for excluding, the evidence. Its probative value for the purpose admitted is great because it is an admission by the defendant himself." *Id.* at 359-60, 341 S.E.2d at 553.

Likewise, in *State v. Mackey*, 241 N.C. App. 586, 774 S.E.2d 382, *appeal dismissed and disc. review denied*, 368 N.C. 426, 778 S.E.2d 280 (2015), the defendant raised a Rule 403 challenge to testimony that he provided a fellow gang member with the names of witnesses that he did not want testifying against him and that he had instructed the gang member to "mark certain potential witnesses for execution." *Id.* at 597, 774 S.E.2d at 389. We held that while the testimony was "certainly prejudicial to defendant, the danger of *unfair* prejudice did not *substantially* outweigh its probative value." *Id.* at 598, 774 S.E.2d at 391 (citation omitted).

Here, as in *Moses*, the reason that the evidence challenged by Defendant is prejudicial is because it is also highly probative of his guilt. Accordingly, the admission of these letters was not an abuse of the trial court's discretion under Rule 403.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges ZACHARY and BERGER concur.

Report per Rule 30(e).