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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-804

Filed: 17 April 2018

Cumberland County, No. 15 CRS 51067; 15 CRS 51071-74

STATE OF NORTH CAROLINA

v.

JOHN BROOKS GLOVER, Defendant.

Appeal by Defendant from judgment entered 27 February 2017 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 22 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Anna M. Davis and Special Deputy Attorney General M.A. Kelly Chambers, for the State.

Law Office of Mark L. Hayes by Mark L. Hayes, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

John Brooks Glover ("Defendant") appeals from a 27 February 2017 judgment entered after a jury convicted him of two counts of sexual offense with a child, four counts of sexual offense — parental role, five counts of indecent liberties with a child, and two counts of rape of a child.

On appeal, Defendant contends the trial court abused its discretion by allowing testimony regarding two prior confrontations between Defendant and the victim's two brothers. Defendant contends the testimony was irrelevant and prejudicial character evidence with no significant probative value. We find no error.

I. Factual and Procedural Background

On 11 May 2015, 14 September 2015, and 13 February 2017, a Cumberland County Grand Jury indicted Defendant on several counts of sexual activity by a person who assumed the role of a parent, statutory sexual offense with a child by an adult, indecent liberties with a child, first-degree statutory rape, and first-degree forcible sexual offense.[1]

On 20 February 2016, the trial court called Defendant's case for trial. On 22 February 2017, Defendant filed two motions *in limine*. First, Defendant requested the trial court to prohibit the State from introducing or eliciting any statements from witnesses regarding an incident where Defendant pointed a gun at the victim's brother, Shawn. Defendant next requested the trial court to prohibit the State from introducing or eliciting any statements from witnesses regarding a second incident where Defendant pointed a knife at the victim's other brother, Juan. Defendant contended the alleged incidents were:

> [I]rrelevant to the charges that are here, do not have anything to do with the state's victim, . . . [t]hat they tend

[1] The record is unclear which, if any, of these indictments are additional indictments or superseding indictments.

> to be more prejudicial than probative and, . . . for a jury to hear about alleged incidents that are criminal conduct would be highly prejudicial in this case in this matter.

The victim witnessed both of these incidents, and the State contended these incidents were material to the jury's understanding why the victim waited to report the alleged abuse. The State responded to Defendant's motions:

> In regard to the motion in limine . . . it's an incident that was witnessed by the victim, . . . and it is important because it's -- one of the things that she told law enforcement was that she was -- or she had disclosed that she was scared that -- of telling initially because she was scared that the defendant would harm her mother because she had seen violent acts in the past which would include the incident where the knife was pointed at Juan Hamlet. And that goes to part of the basis of her fear of the defendant and what happened to her. She also explained that she was scared of him at times even though he had not done anything to her because of the incidents she had witnessed.

The trial court ruled the victim could testify as to these two incidents. The trial court prohibited the victim's mother from so testifying:

> All right. Well, I do find that there is -- that the incidents that occurred with respect to the knife and the gun are more probative than prejudicial -- substantially more probative than prejudicial so I am going to allow [Lydia] to discuss why she was scared and did not disclose.
>
> . . . .
>
> The mother, however, Sharron Hamlet, I am going to grant the motion in limine with respect to her because I don't find that her testimony concerning the gun being pointed at Shawn Hamlet to be more -- substantially more probative

> than prejudicial -- I find that it is substantially more prejudicial than probative.

The State first called Lydia.[2] Lydia was born on 20 May 2002, and at the time of trial, she was fourteen years old. Lydia lived in an apartment complex in Fayetteville with her mother, brother, and sister. Lydia's mother had been in a relationship with Defendant from the time Lydia was four years old until 2011. Lydia referred to her relationship with Defendant during this time as "father and daughter."[3] Lydia stated: "[w]e did everything that father and daughters do. . . [w]atch T.V. together . . . cook together and going places to the park and stuff." In May 2012, Lydia's mother and Defendant separated. Lydia and her family then moved into a new apartment complex.

Soon after Lydia and her family moved, Defendant also moved into the family's new apartment. This was Lydia's idea since "[S]he didn't want [Defendant] to . . . have to sleep in his car." Sometime later, Defendant began sleeping in Lydia's room. Defendant initially slept on Lydia's floor since Lydia only had one twin bed in her room. However, a few days after moving into Lydia's room, Defendant began "laying in the bed with [her] and sleeping." Lydia explained her relationship with Defendant "was something that I think every daughter should have," but began to cry when the State asked if her relationship with Defendant ever changed. Defendant and Lydia's

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[2] We use a pseudonym to protect the identity of the juvenile and for ease of reading.

[3] Defendant is not Lydia's biological father.

relationship "went from father and daughter to boyfriend and girlfriend." Lydia recalls the "first incident," which occurred in 2013:

> I had just taken a shower and I came in my room to get dressed and he was sitting on the floor and he was rolling up a marijuana. So I am trying to get dressed so I asked him, Are you going to leave? And he said, No. So I went in the closet to get dressed. And, you know, he was still sitting on the floor doing what he was doing. By the time I get dressed, he left to go on the patio to smoke what he had rolled. And so I get in my bed and, you know, turn on the T.V. and go to sleep and I have clothes on. And as I'm sleeping, you know, feel something touching me and I wake up and he's beside me and he had his finger inside of me.

Lydia testified this type of abuse continued "pretty often" from November 2013 through November 2014.[4] Another incident occurred in the summer of 2014, when Lydia was eleven years old. In that incident, Defendant removed Lydia's pants and underwear, and attempted to "insert his penis into [Lydia's] vagina." This type of abuse occurred more than once.

Still another time, Defendant used a flashlight to inspect Lydia's body and vagina. The State asked if Lydia told her mom what was happening to her, and she responded no. Lydia then explained she refrained from telling her mother because she was scared for her family's safety. At this point, Lydia recalled an incident where

[4] Lydia was unable to estimate how many times the abuse occurred, stating "I don't want to say every day but I don't want to say every other day."

she saw Defendant pull a knife on her brother. Lydia then mentioned another incident where she witnessed Defendant pull a gun on her other brother.

> Q. And at any time did you tell your mom?
>
> A. No, ma'am.
>
> Q. Why not?
>
> A. I was more scared or -- not -- I was more scared for - -
>
> Q. Scared for who?
>
> A. My mom.
>
> Q. Why were you scared for your mom?
>
> A. Because I didn't want the defendant to do anything or get mad.
>
> Q. Okay. Was there anything that you had seen in the past that made you concerned for your mom?
>
> A. The incident -- there was an incident before.
>
> Q. And what was the incident that you saw that made you scared for your mom?
>
> A. He pulled - -
>
> . . . .
>
> He pulled a knife out at my brother and he pulled a gun out at my brother.
>
> . . . .
>
> Q. Was it the same brother?

> A. No, ma'am.
>
> Q. How soon -- when did -- based on the fact that you had seen that, you were scared for your mom. Were you scared for yourself?
>
> . . . .
>
> A. Yes, but not necessarily just my mom. Like my family as a whole.

However, Lydia did confide in others regarding Defendant and his abuse. Lydia first told her friend, Shaunte Williams ("Williams"). Subsequently, Lydia told Ms. Franceda Herbin ("Herbin"), a counselor with Cumberland County Schools.

The State next called Herbin. On 18 November 2014, Lydia approached Herbin, stating "she wanted to speak." Lydia was "tearful" and "stated that her - - her mom's ex-husband[5] had been touching her and had been having intercourse with her." Lydia named Defendant as her abuser. Lydia told Herbin Defendant was still living in Lydia's home during this time.

Williams next testified for the State. Williams was Lydia's classmate, and learned of Defendant's abuse towards Lydia when she confided in her. Williams told Lydia, "if [Lydia] d[idn]'t tell, [she] w[ould] and that she needed to tell somebody." The State asked Williams if she knew if Lydia told anyone prior to her, and Williams

[5] Defendant and Lydia's mother were never married.

did not know. Williams also stated Lydia asked her not to disclose what Lydia had told her about Defendant.

The State next called Lydia's mother, Sharron Hamlet ("Hamlet"). Hamlet was not aware of Defendant's abuse towards Lydia, even though she noticed a change in Lydia. Lydia was "acting out" more at home and at school. Hamlet thought these changes in Lydia's personality were from Lydia becoming a teenager.

The State rested. Defendant did not put on any evidence. Defendant then moved for a directed verdict. Defendant's counsel contended the State "ha[dn't] provided – even in the light most favorable to the [S]tate, . . . each and every element of the offenses alleged." In response, the State voluntarily dismissed two charges of indecent liberties against Defendant. Further, the court dismissed one count of sexual activity for Lydia's failure to "specifically describe in the time frame" that's alleged in this indictment. Nevertheless, the State contended there to be "sufficient evidence to go forward" with the other charges. The trial court denied Defendant's motion. On 27 February 2017, the jury returned the following verdict:

> [I]n file number 15 CRS 51067 on or about, between and including November 1, 2013, November 30, 2013, as to count one, guilty of sexual offense with a child under the age of 13; as to count two, guilty of sexual activity by a person who has assumed the position of a parent; as to count three, guilty of taking indecent liberties with a child.
>
> In case number 15 CRS 51071, on or about, between and including August 1, 2014 through November 30th of

> 2014, as to count one, guilty of taking indecent liberties with a child.
>
> In case number 15 CRS 51072, on or about, between and including July 1, 2014 through November the 18th of 2014, as to count one, guilty of taking indecent liberties with a child; as to count two, guilty of rape of a child by an adult; as to count three, guilty of sexual activity by a person who has assumed the position of a parent.
>
> In case number 15 CRS 51073, on or about, between and including July 1st of 2014 through November the 18th of 2014, as to count one, guilty of taking indecent liberties with a child; as to count two, guilty of rape of a child by an adult offender; as to count three, guilty of sexual activity by a person who has assumed the position of a parent.
>
> In case number 15 CRS 51074, on or about, between and including November 1, 2014 through November 30, 2014, as to count one, guilty of sexual offense with a child under the age of 13; as to count two, guilty of sexual activity by a person who assumed the position of a parent; as to count three, guilty of taking indecent liberties with a child.

During sentencing, the trial court consolidated all offenses and offered one judgment. The trial court found Defendant was a prior conviction level II, and sentenced Defendant to a term of 300 to 420 months imprisonment. Additionally, the trial court gave Defendant credit for 759 days spent in pre-trial confinement. The trial court found Defendant's offenses were reportable, since the offenses were against a minor and were sexually violent. Therefore, the trial court ordered Defendant, upon release from imprisonment, to register as a sex offender and enroll in satellite based monitoring for his natural life. Defendant gave oral notice of appeal.

II. Standard of Review

"The Court of Appeals has consistently applied an abuse of discretion standard in evaluating the admission of evidence[.]" *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158 (2012). "Exclusion of evidence on the basis of Rule 403 is within the sound discretion of the trial court, and abuse of that discretion will be found on appeal only if the ruling is 'manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision.' " *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (quoting *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993)).

However, while "[a] trial court's rulings on relevancy . . . are not discretionary and therefore are not reviewed under the abuse of discretion standard . . . [s]uch rulings are given great deference on appeal." *State v. Streckfuss*, 171 N.C. App. 81, 88, 614 S.E.2d 323, 328 (2005) (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991)).

III. Analysis

Defendant first contends the trial court erred by allowing the State to introduce Lydia's testimony regarding the incidents where Defendant threatened each of Lydia's brothers. Specifically, Defendant asserts this testimony lacks relevance. We disagree.

Rule 401 of the North Carolina Rules of Evidence 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 probable or less probable than it would be without the evidence." N.C. R. Evid. 401 (2017). Further, evidence must have "probative value which outweighs any potential prejudice to the defendant." *State v. Bunch*, 104 N.C. App. 106, 110, 408 S.E.2d 191, 194 (1991) (quoting N.C. Gen. Stat. § 8C-1, Rule 401 (1988)). Our State Supreme Court held:

> Evidence is relevant if it has any logical tendency to prove a fact at issue in a case, and in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, *to properly understand their conduct or motives*, or if it reasonably allows the jury to draw an inference as to a disputed fact.

State v. Arnold, 284 N.C. 41, 47, 199 S.E.2d 423, 426 (1973) (internal citations omitted) (emphasis added). Here, Lydia's testimony concerning Defendant's threatening of Lydia's two brothers shows Lydia's fear of Defendant and explains why she did not report Defendant's sexual abuse earlier. Our State Supreme Court has held "[e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if . . . [it] is necessary to complete the story of the crime for the jury. *State v. Agee*, 326 N.C.

542, 548, 391 S.E.2d 171, 174 (1990) (quoting *United States v. Wiliford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

More importantly, this Court has held such testimony evidence is admissible to show an abused victim's reasonable fear of a defendant, and to explain the victim's delay in reporting the crime. *See State v. Bynum*, 111 N.C. App. 845, 849, 433 S.E.2d 778, 781 (1993) (holding the trial court did not err in admitting evidence that a child was afraid of her father on the grounds the challenged evidence was "probative on the issue of her hesitancy in telling her mother of the alleged abuse"). Additionally, in *State v. Barnes*, a defendant was convicted of felonious incest with his thirteen year old daughter. 77 N.C. App. 212, 213, 334 S.E.2d 456, 457 (1985). In that case, the trial court allowed the State to ask the victim "whether she was afraid of her father." *Id.* at 216, 334 S.E.2d at 458. The victim answered in the affirmative, and proffered the testimony "that her father was mean." *Id.* at 216, 334 S.E.2d at 458. On appeal, this Court held "the [daughter's] disputed testimony was not elicited to show the bad character of defendant, but to explain why [the victim] had not told her mother about the incident. We find it relevant for th[at] purpose." *Id.* at 216, 334 S.E.2d at 458.

Here, the State, like the State in *Barnes*, offered Lydia's testimony to show Lydia's state of mind when she refrained from reporting the abuse. The State's evidence tended to show Defendant began sexually abusing Lydia in the fall of 2013,

but Lydia never reported the abuse to her mother, or told anyone at all until the fall of 2014. Lydia specifically testified the reason she did not disclose the abuse sooner was because she witnessed Defendant assault her two brothers in 2011, and feared he would harm her family, including her mother, if she reported the abuse.

However, in his brief to this Court, Defendant contends the "jury did not need the stepson[6] evidence to explain why Lydia waited to report the crime, when Lydia really did not wait long." Further, Defendant contends the stepson evidence was "chronologically remote from the allegations discussed at trial." To support this argument, Defendant offers *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988). Defendant's reliance is misplaced.

In *Jones,* the defendant argued the admission of evidence of defendant's past sexual misconduct was improper because "the prior acts [were] so remote in time" from the acts for which he was currently on trial. *Id.* at 587, 369 S.E.2d at 823. There, this Court ruled "the time period between the alleged prior acts of defendant and the acts upon which this appeal is based is of such a span that any similarity between the two acts is severely attenuated. The period of seven years 'substantially negate[s] the plausibility of the existence of an ongoing and continuous plan to engage persistently in such deviant activities.' " *Id.* at 590, 369 S.E.2d at 824. However, in the instant case, the incidents where Defendant threatened Lydia's brothers, and the

[6] "Stepson evidence" refers to the incidents between Defendant and Lydia's two brothers.

abuse Lydia underwent, were situated approximately a year apart, not seven. The testimony in the current case is also offered to show the victim's state of mind, not the defendant's common plan, as was the case in *Jones*. Thus, the "remoteness" rationale present in *Jones* is inapplicable here.

Since the State offered Lydia's testimony to show why she was hesitant to disclose Defendant's sexual abuse, we conclude the trial court properly found that evidence was relevant, and did not err in admitting the evidence for that purpose.

Defendant next contends the admission of Lydia's testimony unfairly prejudiced him under Rule 403 of the North Carolina Rules of Evidence. Defendant asserts the stepson evidence had nothing to do with any of the elements of the charges in the case at bar, since neither stepson was an alleged victim. Specifically, Defendant contends the evidence was unfairly prejudicial to him to the extent the jury convicted him based on the disputed testimony. We disagree.

Rule 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. Evid. 403 (2017). It is well settled "[w]hile all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial." *State v. Rainey*, 198 N.C. App. 427, 433-34, 680

S.E.2d 760, 766 (2009) (quoting *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994)). Rather, the North Carolina Supreme Court held "[t]he meaning of 'unfair prejudice' in the context of Rule 403 is 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *Id.* at 433, 680 S.E.2d at 766 (quoting *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986)). Furthermore, "[t]he party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. rev. denied*, 354 N.C. 223, 554 S.E.2d 650 (2001) (quoting *State v. Anthony*, 133 N.C. App. 573, 579, 516 S.E.2d 195, 199 (1999)). Thus, Defendant must carry the burden of proving the evidence was unfairly prejudicial.

In his brief to this Court, Defendant argues "[t]he prejudicial effect of the stepson evidence is similar to the evidence in *State v. White*, 331 N.C. 604, 419 S.E.2d 557 (1992)." The defendant in *White* was tried for first-degree murder, first-degree kidnapping, second-degree burglary, robbery with a dangerous weapon, and larceny of an automobile. *Id.* at 606, 419 S.E.2d at 558-59. At trial, a witness offered testimony of a sexual assault occurring seven years earlier. On appeal, this Court concluded "the peculiar circumstances of this case required that the testimony concerning defendant's alleged [previous] sexual assault of [the witness] be excluded under Rule 403." *Id.* at 616, 429 S.E.2d at 564. Defendant contends the admission

of the testimony in *White* would have "invited the jury to render its verdict based on general character evidence which was not grounded in the specific facts of that case." Defendant contends the same situation arose in the case at bar. Here, Defendant argues, as in *White*, the State used the evidence to "convince the jury that if [Defendant] had been violent towards his stepchildren in one context years prior, then he was likely violent towards Lydia in the case at bar."

In *White*, this Court stated:

> At the time that this testimony was elicited, the jury had already heard the extensive and severely damaging evidence suggesting that defendant had committed two sexual assaults . . . [a]dmitting evidence of yet another sexual assault . . . would surely have tended to exacerbate the prejudicial effect of the other sexual assault evidence and increase the probability that the jury might consider the sexual assault evidence[.]

Id. at 616, 419 S.E.2d 564. The Court in *White* ruled the evidence of defendant's prior sexual assault should be excluded because that evidence was "extensive" and "prejudicial." *Id.* at 616, 419 S.E.2d 564.

We conclude the case at bar is more analogous to *State v. Beckelheimer*, 366 N.C. 127, 726 S.E.2d 156 (2012), than *White.* There, after our State Supreme Court held certain evidence of prior bad acts comported with Rule 404(b) in a sex crime case, the Supreme Court reviewed the trial court's Rule 403 determination. *Id.* at 133, 726 S.E.2d at 160. The Court stated, "[a] review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant," and concluded

the trial court took the proper steps to carefully assess the issue and hedge against unnecessary prejudice. *Id.* at 133, 726 S.E.2d at 160-61 (quoting *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998)).

In the present case, as in *Belkelheimer*, the trial court took steps to avoid unnecessary prejudice. First, the trial court heard the testimony proffered by the State outside the jury's presence. Next, the trial court heard arguments from both sides. The trial court then asked questions in order to clarify the details and ensure it understood what evidence the State offered. The trial court also instructed the State to be concise when discussing the incidents involving Lydia's brothers. The trial court stated, "Now, when this testimony from [Lydia] comes out about the gun and the knife, I don't want there to be lengthy testimony about that, simply a statement, The reason I was scared is because of these two prior incidents." Furthermore, the trial court granted Defendant's motion *in limine* with respect to Lydia's mother. There, the trial court found, "with respect to [victim's mother] because I don't find that her testimony concerning the gun being pointed at Shawn Hamlet to be more - - substantially more probative than prejudicial - - I find that it is substantially more prejudicial than probative."

Here, the trial court balanced the probative and prejudicial value of the evidence and did not abuse its discretion. The trial court heard from both sides, ruled one witness could not speak about the incidents, and ruled the victim should limit

what she said about the incidents. The State followed the trial court's instruction and Lydia only offered the statement, "[h]e pulled a knife out at my brother and he pulled a gun out at my brother." The statement was brief, and was offered for its proper purpose to show why Lydia was scared to inform her mother of the abuse.

Because we conclude the trial court did not abuse its discretion in determining the disputed evidence's probative value was not substantially outweighed by its prejudicial effect, we conclude Defendant was not prejudiced by the admission of this evidence. *Ferguson*, 145 N.C. App. at 307, 549 S.E.2d at 893. Therefore, the trial court did not err in allowing evidence of Defendant's incident's with Lydia's brothers.

NO ERROR.

Judges DIETZ and ZACHARY concur.

Report per Rule 30(e).