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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-468

Filed: 18 February 2020

Catawba County, No. 13 CRS 52508, 13 CRS 4784-87

STATE OF NORTH CAROLINA

v.

WILLIAM HOWARD LAIL, III

Appeal by defendant from judgments entered 14 November 2017 by Judge Forrest D. Bridges in Catawba County Superior Court. Heard in the Court of Appeals 21 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Sherri H. Lawrence, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.*

TYSON, Judge.

William Howard Lail, III (“Defendant”) appeals from judgments entered upon a jury’s verdicts finding him guilty of second-degree murder, two counts of felonious child abuse, and two counts of misdemeanor child abuse. We find no error.

I. Background

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Law enforcement and emergency medical personnel responded to a call for assistance due to a possible cardiac arrest on 3 May 2013, at 619 25th Street Northwest in Longview. Defendant stood in the doorway of the house, screaming, “help, he’s not breathing.” J.S., a 20-month-old infant, was found laying on the floor inside of the house. He had no pulse and his body was very cold to the touch. First responders observed burn marks, multiple bruises, and “a grayish blue color or tone” to his skin.

First responders determined the child was deceased. Defendant became very upset, screaming, “no, no, no.” Defendant returned to his nearby residence at 629 25th Street Northwest and law enforcement officers followed. One officer described Defendant’s residence as having “a lot of trash throughout the house,” and smelling of feces and urine. Another officer described the events and scene as “the most traumatic thing I’ve ever had to witness.”

Kyle Sigmon, Defendant’s neighbor, was outside of 629 25th Street Northwest and holding K.S., the three-year-old sister of J.S. Sigmon had taken K.S. from Defendant, while Defendant was waiting for police to respond to his call. K.S. was dirty, wearing only a soiled diaper, and had multiple bruises and burns all over her body. She was transported to the hospital by ambulance.

Whitney Weathers, the children’s mother, had left the children with Defendant, while she worked at a restaurant less than two miles away. Weathers

had moved in with Defendant after leaving her husband, the children's biological father, due to domestic abuse. During the time Weathers lived with Defendant, her children called him, "Daddy." Weathers walked home from work after Defendant had called her, screaming and crying, "oh, my God, I'm so sorry, and so sorry. Get home now. You've got to get home now. I'm so sorry."

Catawba County DSS Investigator Kari Whisnant interviewed K.S. in a hospital examination room approximately twenty to thirty minutes after her arrival by ambulance. Two North Carolina State Bureau of Investigation ("SBI") agents were present in the room with them. Whisnant observed several burns and bruises over the majority of K.S.' body. Whisnant asked K.S. basic questions to build a rapport with her. Then she asked K.S. about her injuries and who had hurt her. K.S. replied, "Daddy."

Dr. Jerri McLemore, a pathologist at Wake Forest Baptist Medical Center in Winston-Salem, performed an autopsy on J.S. Dr. McLemore concluded the cause of J.S.' death was presumed drowning, with the burn and blunt force injuries as significant contributory factors. Dr. McLemore counted approximately 135 to 140 bruises or scrapes and multiple healing burns on J.S.' body. She also noted two acute rib fractures, which may have resulted from "aggressive CPR."

Defendant was indicted for first-degree murder and four counts of felonious child abuse inflicting serious injury. Two counts of child abuse were alleged for

burning J.S. and K.S., and two counts were alleged for serious bruising to each child. Weathers, the children's mother, was charged with and pled guilty to five child abuse and neglect charges.

A. Weathers' Testimony

At trial, Weathers testified Defendant had previously hit her children. She previously noticed bruises to the children and asked Defendant about them. She testified Defendant told her the children had hurt themselves by climbing and falling or running into things.

Weathers also testified Defendant would fasten the children into car seats and leave them at home alone. Defendant also instructed Weathers to do the same. When K.S. figured out how to get out of her car seat, Defendant would put the children into a closet and push a heavy metal box in front of the closet door or instruct Weathers to do the same.

Weathers had tried to take her children and leave Defendant at least two times. She testified Defendant threatened to shoot her family, law enforcement, "or anybody that came and got us" if she tried to leave him. Defendant owned several guns, which Weathers testified Defendant would put to her head when she threatened to leave him.

Approximately a week and a half to two weeks prior to J.S.' death, Weathers returned home from work and discovered the children had burns all over their bodies.

Defendant initially told Weathers the burns were a diaper reaction, but eventually explained the children had been in the bathtub and he had forgotten to turn on the cold water while he had taken the trash out. Weathers testified she wanted to take the children to the hospital, but Defendant would not allow her and insisted on purchasing cream for the burns instead.

Weathers testified J.S. would sometimes sleep on a toddler mattress in the bedroom, but after the burns Defendant would sometimes place him inside the bathtub without a diaper “so whenever he peed and pooped it didn’t get in the burns” as it would if he was wearing a diaper.

On the morning of 3 May 2013, Weathers testified she, Defendant, and K.S. went to the methadone clinic to get Defendant’s methadone. Defendant instructed Weathers to leave J.S. at home on the couch. They stopped at a restaurant to eat breakfast on the way home. Weathers brought some food home for J.S. He had not eaten much since the burns and would not eat that morning. Defendant took Weathers to work around 10:00 a.m., then returned home to the children.

#### B. Defendant’s Testimony

Defendant testified he, Weathers, and her children moved in with each other in 2012. He said Weathers was the primary caretaker for the children, but he also provided “some” care for them. Defendant testified he had seen Weathers hit the children multiple times with different objects, including belts, a plastic coat hanger,

and a wooden spoon. Defendant admitted he had previously spanked both children and had hit K.S. one time with a belt and a broken plastic coat hanger.

Defendant testified Weathers would sometimes leave the children home alone, and he would return home to find J.S. in the crib and K.S. fastened in a car seat. Defendant had raised his concerns about this treatment with Weathers, but testified he “sadly” did nothing about it. Defendant denied ever putting the children inside a closet. He testified he would sometimes see Weathers place them inside a closet, or he would come home and find the children in the closet, but he never did anything about it. Defendant repeatedly denied bruising J.S.

Defendant testified to his version of the events surrounding the children’s burns. He had placed the children in the bathtub and turned the water on when he heard the trash truck outside. He left the children in the bathtub with the water running from the spigot and ran outside to take out the trash. Defendant estimated he remained outside for forty-five seconds to a minute, but he could not specifically recall.

Defendant saw K.S. standing outside the bathroom pointing to her leg when he went back inside. He could hear J.S. crying. He went into the bathroom and saw water running from both the spigot and the showerhead. He could see steam coming from the water and knew the water had irritated J.S.’ bottom, but he testified he did not realize the extent of their injuries or that “the water could actually get that hot.”

Defendant testified he turned both knobs of the bathtub off and checked the temperature. He determined the water was warm, but not hot to the point of burning, and put the children back in the bathtub to continue bathing them. Defendant testified J.S. continued to cry and he noticed K.S.' forehead and leg were red. He then dressed the children and took them with him to pick Weathers up at work.

Defendant noticed the skin on K.S.' forehead "was peeling" and "looked really dry" after they all returned home. Weathers noticed this as well, and Defendant told her what had happened. Defendant admitted, "I don't know for certain that I didn't leave the water too hot," but added, "I don't know that the water was adjusted while I was out."

Defendant testified he told Weathers they should go to the hospital but that she was concerned with DSS and her ongoing custody dispute with the children's biological father. Defendant told Weathers he had previously treated burns with ointment and bandages, and Weathers told him "she didn't want to take the kids to the doctor" if he knew how to treat the burns. Defendant purchased aloe, peroxide, pain relief medicine, and bandage wraps, and he and Weathers treated the children's burns.

Defendant testified that Weathers noticed that J.S.' diaper would "stick to his bottom" and that she wanted to let him sleep in the bathtub. Defendant admitted he had been "selfish" and "should have taken [the children] to the doctor."

Defendant testified he had initially put both children in the bathtub on the morning of 3 May 2013 to clean their dirty diapers. He proceeded to give them a bath. After the bath, Defendant got K.S. out of the tub, blow-dried her hair, and put a new diaper on her. Defendant noticed a neighbor walking over to his apartment, so he took out some trash and spoke with his neighbor outside. Defendant testified he left J.S. standing in the bathtub in water up to his knees.

Defendant admitted he “made a horrible mistake” leaving J.S. alone in the bathtub on 3 May 2013. Defendant testified he made some phone calls with his computer once he came back inside, before checking on J.S. J.S. was laying face-up in the bathtub with his head towards the spigot when Defendant did check on him.

Defendant took J.S. out of the tub and attempted CPR on him. Defendant testified water came out of J.S.’ mouth. Defendant was unsure if he was performing CPR properly and tried unsuccessfully to use his computer to call 911. Defendant called Weathers, asked her to call the police, and told her to come home. Defendant carried J.S. outside, screaming for help. He went to his neighbors’ home and asked them if he could call the police on their phone. He continued to attempt CPR on J.S. until first responders arrived.

### C. Adjudication

The jury convicted Defendant of second-degree murder, two counts of felonious child abuse for the serious bruises, and two counts of misdemeanor child abuse for



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the burnings. The trial court determined Defendant had a prior record level I for the felonies and level III for the misdemeanors.

The trial court sentenced Defendant to: an active sentence of 157 to 201 months for second-degree murder; consecutive active sentences of 25 to 42 months for the two felony child abuse counts; and, consecutive active sentences of 150 days for the two misdemeanor child abuse counts; and entered its judgments on 14 November 2017.

Defendant did not enter any notice of appeal. Defendant filed a petition for writ of certiorari with this Court on 16 May 2018. This Court allowed Defendant's petition on 4 June 2018.

II. Jurisdiction

This Court reviews Defendant's criminal judgments by writ of certiorari granted on 4 June 2018 pursuant to N.C. Gen. Stat. § 15A-1444(g) (2019).

III. Issues

Defendant argues the trial court erred by admitting: (1) K.S.' statement that "Daddy" had hurt her; (2) evidence that Defendant was threatening and controlling; (3) testimony about a video showing Defendant saying, "you shouldn't f--k with me"; and, (4) testimony about a video showing Defendant asking K.S. to speak profanities. Defendant also argues the State's closing argument was grossly improper and cumulative errors denied him a fair trial.

IV. K.S.' Statement

Defendant argues the trial court erred by admitting K.S.’ statement to Whisnant that “Daddy” had hurt her, on two grounds: (1) its admission violated his constitutional rights under the Confrontation Clause of the Sixth Amendment to the Constitution of the United States; and (2) the statement was inadmissible hearsay. Defendant does not contest K.S.’ statement was a misidentification, and concedes he was the man to whom K.S. had referred as “Daddy.”

A. Standards of Review

Assertions of constitutional errors are reviewed *de novo* on appeal. *State v. Ortiz-Zape*, 367 N.C. 1, 10, 743 S.E.2d 156, 162 (2013). Under a *de novo* review, this Court “considers the matter anew and freely substitutes its own judgment” for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation omitted).

“The trial court’s determination as to whether an out-of-court statement constitutes hearsay is reviewed *de novo* on appeal.” *State v. McLaughlin*, 246 N.C. App. 306, 324, 786 S.E.2d 269, 283 (2016) (citation omitted), *disc. review denied*, 368 N.C. 919, 787 S.E.2d 29 (2016).

“[E]videntiary error does not necessitate a new trial unless the erroneous admission was prejudicial.” *State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009) (citations omitted), *cert. denied*, 559 U.S. 1074, 176 L. Ed. 2d 734 (2010).

N.C. Gen. Stat. § 15A-1443 provides, in pertinent part:

- (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.
- (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

N.C. Gen. Stat. § 15A-1443(a)-(b) (2019).

#### B. Confrontation Clause

Defendant argues the admission of K.S.' statement violated his right to confront witnesses against him under the federal and state Constitutions. U.S. Const. amend. VI, XIV; N.C. Const. art. I, § 23.

##### *1. Preservation*

As a threshold issue, the State contends Defendant waived this argument by not raising it at trial. The State is incorrect. Defendant objected before Whisnant initially testified to K.S.' answer, which the trial court sustained. The trial court dismissed the jury to conduct a *voir dire* of Whisnant's testimony, during which this constitutional issue was extensively argued and ruled upon by the trial court. When the jury returned, Defendant's counsel again objected before Whisnant testified to

K.S.’ statement, citing “confrontation and hearsay.” Defendant properly preserved, and did not waive, this argument for appellate review.

*2. Analysis*

The “testimonial statements of a witness who is absent from trial may be admitted only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.” *Ortiz-Zape*, 367 N.C. at 6, 743 S.E.2d at 159 (citing *Crawford v. Washington*, 541 U.S. 36, 59, 158 L.Ed.2d 177, 197 (2004)). While the Supreme Court of the United States did not define “testimonial” in *Crawford*, it noted, “[w]hatever else the term covers, it applies at a minimum . . . to police interrogations.” *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203.

“In the end, the question is whether, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony.” *Ohio v. Clark*, \_\_ U.S. \_\_, \_\_, 192 L. Ed. 2d 306, 315 (2015) (citation, alterations, and internal quotation marks omitted).

Defendant argues Whisnant’s questioning of K.S., as a DSS abuse investigator—while SBI agents were present in the hospital room—was primarily to create an incriminating substitute for K.S.’ trial testimony. The State argues Whisnant’s primary purpose was to ensure K.S.’ safety, well-being, and protection. We need not decide this issue. Presuming Defendant can show the admission of this

testimony was a constitutional error, the State has met its burden to show any such error was harmless beyond a reasonable doubt.

Defendant does not contest the basic physical facts of this case. Defendant admits he was the sole custodian of both children during both the day the children were burned and the day J.S. drowned. Defendant admits he left the children unattended in the bathtub on each occasion. Factually, Defendant only contests that he bruised the children and that he intentionally burned the children.

As stated by Defendant's counsel at oral argument, the issue for the jury at trial was Defendant's state of mind: whether he had acted intentionally, recklessly, or negligently. The jury's verdict did not convict Defendant of first-degree murder based upon malice, premeditation and deliberation, nor based upon torture of J.S.

The jury's verdict did not find Defendant guilty of second-degree murder on the basis of malice consisting of either express hatred, ill-will or spite, nor find malice arising from a condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. Rather, the jury found Defendant guilty of second-degree murder on the basis of malice consisting of the commission of inherently dangerous acts in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty.

The jury also did not convict Defendant of felonious child abuse, requiring his intentional acts, for the two counts involving the burns on K.S. and J.S. The jury

instead convicted Defendant of non-felonious child abuse for those two counts, requiring a finding that Defendant inflicted serious physical injury to the children other than by accidental means. The State has shown by Defendant's own admissions and by unchallenged expert testimony that he acted recklessly, if not intentionally, with respect to K.S.' injuries and those leading to J.S.' death. The State has also shown Defendant's infliction of serious physical injury to the children was not accidental, with respect to the child abuse charges.

*a. Dr. Summer's Testimony*

Dr. Kenneth Summer was tendered and received by the trial court as an expert witness in pediatrics. He examined K.S. the morning after her admission to the hospital. Dr. Summer testified he saw "remarkable burns that were visible from across the room" all over her body, as well as multiple bruises. Dr. Summer described the burns as "a very unusual pattern in a large distribution" and "remarkable" among the children's burns he had examined.

He testified to the typical burn patterns he sees in accidental cases, specifically those in "bathtub type scalds and burns." Based on his medical training, expertise and experience, and observations and examinations of K.S., Dr. Summer testified to a reasonable degree of medical certainty that K.S.' burns were in "a very unusual pattern that's not typical for the types of burns" he sees and "did not fit any of the typical accidental burns that [he] had had experience with."

Dr. Summer added:

the other concerning factor was seeing bruises in non-usual places. You see a lot of bruises in toddlers, but they tend to be like on the shins where they run into things, or crawl over toys. When you see them across the back, and backs of legs, that's not typical at all. So, yes, these did not add up to me. And in my opinion, this was non-accidental trauma.

...

Any of us that can move, and we're exposed to hot water, we're going to automatically back up, get out of the way of that. So, she had extensive burns that she would've have had to have been exposed to that water for at least several seconds, maybe closer to five to ten to get that degree of burn.

Dr. Summer also testified that K.S.' burns contradicted Defendant's theory that perhaps K.S. had accidentally turned up the water temperature herself. Her burns were "not typical of a bathtub, or shower type injury," and were inconsistent with her standing up under the showerhead and turning the knob. Dr. Summer further testified: "To be honest, I'm not sure if this is just water. . . . [T]his looks so unlike any other burn I've seen. . . . I've seen children from too hot of water both intentionally, and unintentionally. And these patterns are unlike any of those that I've seen."

*b. Dr. McLemore's Testimony*

Dr. McLemore, who performed the autopsy, also disagreed with Defendant's explanation of J.S.' burns: "The explanation that I had was that the older sibling may

have turned on the shower head. The burns, the pattern of distribution of the burns does not make sense for that type of explanation.” Dr. McLemore also disputed Defendant’s explanation of the children’s bruises: “The blunt force injuries, the bruises, and the little scraps on the back that look like a patterned injury, I can’t -- to me they’re not consistent with a fall against something.”

*c. Dr. Cooper’s Testimony*

Dr. Sharon Cooper was tendered, accepted, and admitted by the trial court as an expert witness in forensic and developmental pediatrics with an expertise in child abuse. Dr. Cooper reviewed both J.S.’ and K.S.’ records and concluded both children’s injuries “were non-accidental injuries.” Dr. Cooper specifically testified J.S.’ burns, primarily to his buttocks and thighs, were “not consistent with [Defendant’s explanation] at all.” She explained:

If a child is burned from very hot water that comes out of the faucet, or from the shower, the child will be burned in what’s referred to as a Christmas tree distribution, where the water comes down over the child’s body from the top part of the child’s body down. And almost all of the burns would be on the anterior part of the child’s body, the chest, and the abdomen.

If the child stepped into a tub where hot water had been turned on and water had accumulated, and the child just climbed into a tub not knowing that, we know that accidental burns of that nature are typically associated with burns on the foot, as the child’s foot first enters the water. Then as the child tries to lift their foot back up, they fall forward into the water. And we see a splash



distribution of burns, again, on the front part of the body typically.

When we see burns that are really focused in the buttocks area, and the upper thighs of a child, particularly on the back of the thighs and nowhere else, not on the hands, not on the soles of the feet, not on the abdomen, a lot of research has been done to explain how burns happen that way. And the most common way that that occurs is, that the child is held by the feet and the upper part of their body and they are immersed into the hot water. In other words, they are sort of dipped, if you will, or placed in hot water, because only that part of the body gets burned as compared to the hands, and the feet, and the face, etc.

So, that's a very classic type of burn distribution. And it's well described in the literature within the category of abusive burns.

*d. Harmless Error*

The State's experts' testimonies, unchallenged on appeal by Defendant, establish beyond a reasonable doubt that the bruises and burns suffered by K.S. and J.S. were not the result of recklessness or negligence. Defendant does not contest the fact he was the sole custodian of K.S. and J.S. when they were burned, or when J.S. drowned. Defendant's explanations of the purportedly accidental causes of the burns and the bruising are refuted and disproven by the State's unchallenged, expert testimony.

Defendant admits to the basic physical facts and the State's testimony proves the minimum required mental state to support each conviction. Even if Defendant can show constitutional error in the admission of Whisnant's testimony about K.S.'

response of “Daddy” hurting her, the State carried its burden to show any such purported error was harmless beyond a reasonable doubt. Defendant’s argument is overruled.

C. Hearsay

Defendant also argues K.S.’ statement was inadmissible hearsay and not within any exception thereto. *See* N.C. Gen. Stat. § 8C-1, Rule 802 (2019). Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019).

The trial court admitted K.S.’ statement under the hearsay exception for excited utterances. *See* N.C. Gen. Stat. § 8C-1, Rule 803(2) (2019) (defining an excited utterance as a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition”).

“To qualify as an excited utterance, the statement must relate to ‘(1) a sufficiently startling experience suspending reflective thought and (2) [be] a spontaneous reaction, not one resulting from reflection or fabrication.’” *McLaughlin*, 246 N.C. App. at 324, 786 S.E.2d at 283 (alteration in original) (quoting *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988)).

“Although the requirement of spontaneity is often measured in terms of the time lapse between the startling event and the statement, . . . the modern trend is to

consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement.” *State v. Smith*, 315 N.C. 76, 87, 337 S.E.2d 833, 841 (1985) (citation and internal quotation marks omitted). Our Supreme Court has recognized, “in cases involving young children, the element of trustworthiness underscoring the excited utterance exception is primarily found in the lack of *capacity* to fabricate rather than the lack of time to fabricate.” *Id.* at 88, 337 S.E.2d at 842 (emphasis original) (citation and internal quotation marks omitted). “Spontaneity and stress are the crucial factors.” *Id.*

The State argues the events of 3 May 2013 were sufficiently startling to qualify K.S.’ response as an excited utterance. On the day she was interviewed by Whisnant, K.S. had witnessed her brother’s death and Defendant’s panicked reaction, met many first responders and law enforcement officers, been transported via ambulance to the hospital, been administered medication for the pain of her burns, was being interviewed by a DSS investigator she had never met, and was in the presence of at least one police officer.

Defendant concedes in his reply brief that K.S. “was likely stressed when making her statement” to Whisnant, but argues the startling experience causing the stress at the time of the statement must also be the subject of the statement. This assertion would require our analysis to begin the count from the date of K.S.’ burns,

and put K.S.' statement at the hospital to Whisnant that "Daddy" had injured her approximately ten to fourteen days after the injuries in question occurred.

Even were we to agree with Defendant's assertions that the trial court erred in admitting K.S.' statement as an excited utterance, he cannot demonstrate prejudice to be awarded a new trial. He has admitted to the basic underlying physical acts. He asserts no argument of misidentification in K.S.' referring to him as "Daddy." We have already determined the State has shown harmless error beyond a reasonable doubt in this case. Defendant's argument asserting prejudice is overruled.

#### V. Other Evidentiary Errors

Defendant raises three other evidentiary arguments. Defendant argues the trial court erred by admitting: (1) evidence that Defendant was threatening and controlling; (2) testimony about a video showing Defendant stating, "you shouldn't f--k with me"; and, (3) testimony about a video showing Defendant prompting K.S. to speak profanities.

##### A. Standards of Review

Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court. This Court will find an abuse of discretion only upon a showing that the trial court's ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.

*State v. Ford*, 245 N.C. App. 510, 515-16, 782 S.E.2d 98, 103 (2016).

When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look

to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

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

Although “a trial court’s rulings on relevancy [under Rule 401] technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.”

*State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991).

In criminal cases, evidentiary errors not objected to at trial are not preserved and are generally waived, but may be reviewed for plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). On plain error review, a criminal defendant must show the alleged error was a:

*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.

*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis original) (citations, alterations, and internal quotation marks omitted).

## B. Analysis

*1. Threatening and Controlling*

Defendant argues the trial court erred in admitting Weathers' testimony that Defendant had held a firearm to her head and threatened to kill her if she left him. Defendant also argues the same error with respect to testimony by Weathers' friend, Amy Deal, that Defendant texted and called Weathers while the two women were at the mall. The trial court held *voir dire* examinations of both proffered testimonies and ruled upon their relevance under Rule 401 and admissibility under Rules 403 and 404.

On Weathers' testimony, the trial court considered three lines of questioning the State sought to introduce and ruled only the testimony about Defendant threatening Weathers with a firearm would be admissible. The trial court determined that testimony was not offered under Rule 404(b) to show Defendant's bad character, but rather to show "why she did not leave [D]efendant, why she remained in the home with him, why she did not seek medical attention for the injuries that have been suffered by the children, and why she remained in an abusive relationship in the face of all those circumstances."

The trial court determined this testimony was relevant and admissible under Rule 401, and not unduly prejudicial under Rule 403. "Every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of

such evidence is for the jury.” *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989).

The circumstances of Defendant’s relationship with Weathers, and why she had allowed him to be the sole custodian of her children periodically, throws light upon the crimes alleged against Defendant. The trial court neither erred under Rule 401 nor has been shown to have abused its discretion under Rule 403 in ruling this testimony admissible and not unduly prejudicial.

As related to Deal’s testimony, the trial court allowed her to “generally describe the nature of those communications for [the] purposes of describing the response by Weathers,” but did not allow her to testify to specifics of what was said. This decision was made in part because Deal had testified she could not remember specific statements precisely, and in part because the messages themselves were not available to the court.

Defendant’s counsel also agreed with the trial court “for her to describe [Weathers], but not to go into detail about anything my client said.” “A defendant is not prejudiced by . . . error resulting from his own conduct.” N.C. Gen. Stat. § 15A-1443(c) (2019). Defendant will not now be heard to challenge the limited admissibility of testimony to which he agreed at trial. Defendant’s arguments are overruled.

*2. Video of Defendant with a Firearm*

Defendant next asserts the trial court erred in admitting testimony about a video of Defendant shooting a firearm with his friend in which he says, “this is why you shouldn’t f--k with me.” Defendant argues the video was irrelevant and the testimony about it was improper and prejudicial impeachment evidence.

Defendant’s counsel’s objection was lodged before the trial court excused the jury and held a *voir dire*. Counsel’s objection to the video challenged only the relevance of this line of questioning. “This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court.” *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003) (citing N.C. R. App. P. 10(b)(1)). Defendant’s argument concerning this evidence as improper impeachment testimony is waived. *See id.*

After conducting a *voir dire*, in which the video was shown to Defendant and he answered questions about it, the trial court ruled it would allow the State to cross-examine Defendant about the video, but would not allow the State to publish the video to the jury. Defendant has not shown the trial court erred in allowing this limited testimony under the deference afforded a trial court’s relevancy rulings. *Wallace*, 104 N.C. App. at 502, 410 S.E.2d at 228. Defendant’s argument is overruled.

### *3. Video of K.S. Speaking Profanities*

Defendant also argues the trial court plainly erred in admitting into evidence a video of Defendant prompting K.S. to speak profanities. Defendant did not object



to either the admission or publication of this video at trial. Defendant's counsel only objected to some of the State's cross-examination questions to Defendant about the already-published video.

Defendant has not preserved this issue for appellate review and asserts on appeal the trial court committed plain error in admitting this video. Presuming *arguendo*, without deciding, the admission was erroneous, under plain error review Defendant has not shown this asserted error was "so basic, so prejudicial, so lacking in its elements that justice cannot have been done" to award a new trial. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Defendant's argument is overruled.

## VI. Closing Arguments

### A. Standards of Review

[C]ounsel will be allowed wide latitude in the argument of hotly contested cases. Counsel for each side may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his or her side of the case. Decisions as to whether an advocate has abused this privilege must be left largely to the sound discretion of the trial court.

*State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984) (citations omitted).

Our Supreme Court also stated: "The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted).

In cases where no objections are made,

[t]he 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.

*Id.* at 133, 558 S.E.2d at 107 (citation omitted).

#### B. Analysis

Defendant argues the State's closing argument was grossly improper. Defendant cites multiple instances of the State's alleged improprieties in closing argument, some of which were objected to at trial and some were not.

##### *1. Referencing Video of K.S. Speaking Profanities*

Defendant first asserts the trial court abused its discretion by allowing the State to argue, over his objection, that he saved a "horrible video where he's making [K.S.] say horrible things." Defendant argues these remarks were improper because: (1) they were not supported by evidence; (2) the video was impeachment evidence and not substantive evidence; and, (3) they encouraged the jury to convict Defendant based upon his supposed bad character.

The prosecutor's remarks were supported by evidence admitted at trial. Defendant testified he only "guess[ed]" that he saved the video on his mobile phone,

but he admitted that law enforcement officers had downloaded the contents of his computer and phone, from which the State obtained the video. As noted above, Defendant failed to object to the introduction of this video into evidence.

The State asserts the prosecutor's statements regarding the video were not offered to prove Defendant's bad character, but to show the environment which Defendant had created for these young children as a father-figure and to show his relationship with and his treatment of the children. The prosecutor argued facts that were properly admitted into evidence, that Defendant had made and kept the video, and drew reasonable inferences therefrom about the nature of his relationship with these young children. *See id.* Although presenting Defendant in a negative light, without an objection, Defendant has failed to show the trial court abused its discretion by not interposing itself during these remarks by the State to the jury.

*2. Alleging Defendant Hit Both Children*

Defendant also asserts the trial court abused its discretion in allowing the State to argue Defendant used a belt to hit both children. Defendant admitted at trial to hitting K.S. with a belt one time, but had denied hitting J.S. with a belt. Defendant objected three times during this portion of the State's argument. While the trial court overruled his first objection, it sustained both his second and third objections.

The court also admonished the State before the jury to “move on to something else” after sustaining Defendant’s third objection. Defendant has failed to show the trial court abused its discretion or he suffered prejudice to award a new trial, especially when the trial court sustained his latter objections and admonished and redirected the State’s closing arguments to the jury on this issue.

*3. Analogizing Defendant’s Behavior*

Defendant also objected to the State’s comparison of his leaving twenty-month-old J.S. unattended in the bathtub to throwing a child who does not know how to swim into a ten-foot-deep lake. Defendant asserts the trial court abused its discretion and prejudiced him by not excluding this closing argument. Defendant admitted he had left J.S., a young toddler, unattended in the bathtub who drowned. The State analogized that fact in evidence and drew from it reasonable inferences by means of comparison. *See id.* The State argued within the bounds of N.C. Gen. Stat. § 15A-1230(a) (2019) to assert this comparison. Defendant has not shown any abuse of discretion by the trial court in overruling this objection to award a new trial.

*4. Referencing Defendant’s Character*

Finally, Defendant asserts the State made improper and repeated references to Defendant’s bad character during its closing argument. Defendant cites references to vulgarity and misquotation of Weathers’ testimony about Defendant threatening her. None of the specific remarks Defendant cites in his brief to support this

argument elicited any objections from his counsel during the State's closing argument.

Defendant has failed to show the State's remarks were so grossly or extremely improper to conclude the trial judge "abused his discretion in not recognizing and correcting *ex mero motu* . . . argument[s] that defense counsel apparently did not believe [were] prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996). Without an objection, the trial judge is not a standby or second-chair counsel for Defendant or the State. Defendant's arguments are overruled.

#### VII. Cumulative Error

"Cumulative errors lead to reversal when taken as a whole they deprived the defendant of his due process right to a fair trial free from prejudicial error." *Wilkerson*, 363 N.C. at 426, 683 S.E.2d at 201 (alterations and internal quotation marks omitted). As analyzed above, the State has shown Defendant's guilt by overwhelming evidence, unchallenged on appeal. Defendant has not shown cumulative errors, if any, deprived him of his due process right to a fair trial free from prejudicial errors. Defendant's argument is overruled.

#### VIII. Conclusion

Presuming *arguendo*, and without deciding, Defendant can show a Constitutional error under the Sixth Amendment in violation of his Confrontation

Clause rights, the State carried its burden to show the asserted error, if any, was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b). Defendant does not contest the basic physical facts of the main incidents that occurred on appeal, and the State's unchallenged expert witness testimony establishes the minimum requisite state of mind and actions to uphold Defendant's convictions. In light of the State's harmless error showing above, Defendant has also not shown prejudice from the trial court's ruling K.S.' statement that "Daddy" had hurt her was admissible, presuming error under our existing precedents interpreting the excited utterances exception to the rule against hearsay, and as specifically applied to statements made by young children to award a new trial *See McLaughlin*, 246 N.C. App. at 324, 786 S.E.2d at 283. Defendant cannot show prejudice to award a new trial as a result of alleged evidentiary errors he challenges on appeal. *See* N.C. Gen. Stat. § 15A-1443(a).

Defendant cannot show the trial court abused its discretion in allowing any portions of the State's closing argument he challenged and preserved, both at trial and on appeal. *See Jones*, 355 N.C. at 131, 558 S.E.2d at 106. Defendant has not shown the trial court committed reversible error by failing to intervene *ex mero motu* on the allegedly improper closing remarks to which Defendant's counsel did not object. *Id.* at 133, 558 S.E.2d at 107.

Defendant has failed to show the purported cumulative errors, taken as a whole, deprived him of his due process right to a fair trial free from prejudicial errors.

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*See Wilkerson*, 363 N.C. at 426, 683 S.E.2d at 201. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no reversible errors to award a new trial. *It is so ordered.*

NO ERROR.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).