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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-47

Filed 20 February 2024

Mecklenburg County, Nos. 18CRS232462, 18CRS232464

STATE OF NORTH CAROLINA

v.

LARRY MARTIN

Appeal by Defendant from Judgment entered 21 April 2022 by Judge Reggie E. McKnight in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 August 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Nicholas G. Vlahos, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Larry Martin (Defendant) appeals from a Judgment entered 21 April 2022 upon jury verdicts finding him guilty of two counts of Third-Degree Sexual Exploitation of a Minor. The Record before us tends to reflect the following:

STATE V. MARTIN

Opinion of the Court

On 1 October 2018, Defendant was indicted for two counts of Second-Degree Sexual Exploitation of a Minor and two counts of Third-Degree Sexual Exploitation of a Minor. The matter came on for trial on 18 April 2022. Prior to jury selection, the State dismissed both counts of Second-Degree Sexual Exploitation of a Minor. Prior to trial, Defendant and the trial court engaged in the following colloquy:

THE COURT: All right, [Defendant], it's come to the Court's attention this morning that -- two things that you've decided, and we'll just take them in order. Number 1, that you have decided that you would prefer to remain dressed as you are in the clothing given to you by the Mecklenburg County jail. Is that right?

DEFENDANT: Correct.

THE COURT: All right, the Court had a conversation with you yesterday and advised you to have a conversation with your current court-appointed counsel, Mr. Osho, yesterday after we got done, and then make some decisions this morning. You had an opportunity to have that conversation with Mr. Osho. Is that right?

DEFENDANT: That's correct.

THE COURT: And without going into any details about that conversation, after you've had that conversation with Mr. Osho, you've decided that it is your decision that you want to remain in your, kind of, jail attire, or the attire issued to you by the Mecklenburg County Jail. Is that right?

DEFENDANT: That is correct.

The matter proceeded to trial. The State called Officer Aaron McBroom (Officer McBroom) of the Charlotte-Mecklenburg Police Department (CMPD) to

testify. Officer McBroom was tendered and accepted as an expert witness in the field of computer forensic analysis. Officer McBroom testified to the following:

The CMPD received a cyber tip report from the National Center for Missing and Exploited Children (NCMEC). The tip indicated one of Adobe Incorporated's (Adobe) subscribers had uploaded child pornography to Adobe's cloud storage database. Along with the tip, Adobe included: the subscriber's email address; the account holder's name; the account holder's credit card information, including the account holder's billing address; and the records of the dates and times the images in question were uploaded, as well as copies of the images themselves. Officer McBroom verified that information through a program called CJLEADS, a law enforcement database that includes DMV records. Officer McBroom applied for and obtained a search warrant to obtain the official copies of Adobe's records for the subscriber, including the internet protocol address logs for the subscriber's laptop.

Officer McBroom, along with other members of the Cyber Crimes Unit of the CMPD, executed a search warrant on Defendant's apartment. Defendant's laptop was seized during the search. The Cyber Crimes Unit used software to analyze the hard drive from Defendant's laptop, and the results were compiled into a forensic examination report which was introduced into evidence by the State during trial. The report indicated a folder named "CART" was created on 21 March 2018 and contained images determined by law enforcement to be child pornography. The images were placed in the CART folder over the course of four hours on 21 March 2018. Each

image has a different timestamp, indicating each item was individually selected and placed into the CART folder.

The State introduced a DVD of some of the images found in the CART folder. The DVD contained a file labeled 5.JPEG. Officer McBroom described the image in the file as follows:

Aside from the fact that there's -- the child in this question, is prepubescent, lacks any features similar to what you would find in someone who's even started puberty, lack of breast development, lack of pubic hair, and all those things. The overall sexually suggestive nature of it, the bright red lipstick, the choker, the fishnet stockings, the nude teenager next to them, is -- all qualifies as something that would be -- the photograph would be taken for sexual gratification purposes and would exist for sexual gratification purposes.

The DVD also contained computer-generated images, ten of which were presented to the jury. Officer McBroom testified the computer-generated images depicted: (1) "a prepubescent child holding the penis of an adult"; (2) "a nude -- appears to be a prepubescent female in a -- what looks to be a well"; (3) an "adult male performing oral sex on a prepubescent female, and then, off in the background you can see that another adult is grabbing the buttocks of another -- would be presumed to be a prepubescent female."

Defendant testified in his own defense. Prior to Defendant's testimony, defense counsel asked the trial court to allow Defendant to be seated at the witness stand when the jury entered the courtroom because he was wearing a leg shackle.

The trial court allowed this request. After Defendant's testimony, defense counsel and the trial court engaged in the following colloquy:

[DEFENSE COUNSEL]: Oh, Your Honor, before my client leave[s], the DA brought to my attention that when [Defendant] was coming down to go back to his seat, that the jurors saw the shackle on his leg. And I told the DA, because he [sic] saw he's in the orange jumpsuit, I don't think that will make a big difference. If he been in street clothes, then yeah, that would make a big difference, so I just want to put on the record that I discussed that with my client. My client say hey, they knew he's in jail already, so that's part of being [in] jail.

THE COURT: All right, so we'll make sure that the record reflects that -- reflecting back at the beginning of the trial, and actually prior to the beginning of the trial during the pretrial motion, defendant had the opportunity to discuss with the [c]ourt his option to wear standardized clothing, to wear a suit or whatever he wanted. The [c]ourt gave him an opportunity pretrial, prior to beginning the trial, to discuss that with counsel overnight. He came in the next day, discussed that, advised that it was his knowing and voluntary decision that he wanted to wear clothing that he's currently in, which is the clothing given to him by the Mecklenburg County Sheriff's Department.

And that, while he was leaving the [witness] stand, the jury would've had an opportunity to witness him being shackled. So his decision to remain in Mecklenburg County custody garments, defense counsel put on the record it is most likely obvious to the jury that he is in custody.

Defendant did not object or request a limiting instruction from the trial court.

Defendant was found guilty of both counts of Third-Degree Sexual Exploitation of a Minor. On 21 April 2021, Defendant was sentenced to five to fifteen months of imprisonment. Defendant provided oral Notice of Appeal in open court.

Issues

The issues on appeal are whether: (I) the trial court abused its discretion by permitting Defendant to appear in open court in shackles; (II) the trial court erred in denying Defendant's Motion to Dismiss; (III) the trial court erred in admitting computer-generated images over Defendant's objection; and (IV) the trial court erred in admitting records produced by Adobe pursuant to a search warrant.

Analysis

I. Shackling

Defendant contends the trial court abused its discretion in allowing Defendant to appear in shackles in open court. We disagree.

"Under both the North Carolina Constitution and the Constitution of the United States, a defendant may not be visibly shackled in the courtroom in the presence of the jury unless there is a special need for restraints specific to the defendant." *State v. Allen*, 378 N.C. 286, 307, 861 S.E.2d 273, 289 (2021) (citations omitted). "[A]s a general rule, 'a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances.'" *State v. Thomas*, 134 N.C. App. 560, 568, 518 S.E.2d 222, 228 (1999) (quoting *State v. Tolley*, 290 N.C. 349, 365, 226 S.E.2d 353, 366 (1976)). "However, not every case wherein the defendant is made to wear shackles will be deemed to be fundamentally unfair." *Id.* (citing *Tolley*, 290 N.C. at 367, 226 S.E.2d at 367). Moreover, our appellate courts have repeatedly held that " 'failure to object to the shackling, . . . waives any error

which may have been committed.’ ” *Id.* (quoting *Tolley*, 290 N.C. at 369, 226 S.E.2d at 370); *see also State v. Sellers*, 245 N.C. App. 556, 558, 782 S.E.2d 86, 88 (2016).

In the case *sub judice*, Defendant failed to object to the shackling. Indeed, Defendant’s counsel stated on the record:

Oh, Your Honor, before my client leave[s], the DA brought to my attention that when [Defendant] was coming down to go back to his seat, that the jurors saw the shackle on his leg. And I told the DA, because he [sic] saw he’s in the orange jumpsuit, I don’t think that will make a big difference. If he been in street clothes, then yeah, that would make a big difference, so I just want to put on the record that I discussed that with my client. My client say hey, they knew he’s in jail already, so that’s part of being [in] jail.

The trial court responded, stating:

All right, so we’ll make sure that the record reflects that -- reflecting back at the beginning of the trial, and actually prior to the beginning of the trial during the pretrial motion, defendant had the opportunity to discuss with the [c]ourt his option to wear standardized clothing, to wear a suit or whatever he wanted. The [c]ourt gave him an opportunity pretrial, prior to beginning the trial, to discuss that with counsel overnight. He came in the next day, discussed that, advised that it was his knowing and voluntary decision that he wanted to wear clothing that he’s currently in, which is the clothing given to him by the Mecklenburg County Sheriff’s Department.

And that, while he was leaving the [witness] stand, the jury would’ve had an opportunity to witness him being shackled. So his decision to remain in Mecklenburg County custody garments, defense counsel put on the record it is most likely obvious to the jury that he is in custody.

Thus, Defendant waived appellate review of any error regarding his shackling. *See Tolley*, 290 N.C. at 369, 226 S.E.2d at 370. Therefore, in the absence of an

objection, the trial court did not err in allowing Defendant to appear before the jury in shackles.

II. Motion to Dismiss

Defendant also challenges the trial court's denial of his Motion to Dismiss one of the counts of Third-Degree Sexual Exploitation of a Minor.

We review a trial court's denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). However, "[u]pon defendant's motion for dismissal, 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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). "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. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

N.C. Gen. Stat. § 14-190.17A provides: "A person commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the

material, he possesses material that contains a visual representation of a minor engaging in sexual activity.” N.C. Gen. Stat. § 14-190.17A (2021). “There are two requirements for the offense of third degree sexual exploitation of a minor: (1) knowledge of the character or content of the material, and (2) possession of material that contains a visual representation of a minor engaging in sexual activity.” *State v. Dexter*, 186 N.C. App. 587, 595, 651 S.E.2d 900, 905-06 (2007), *disc. rev. denied*, 362 N.C. 178, 658 S.E.2d 658 (2008). The definition of “sexual activity” for purposes of third-degree sexual exploitation of a minor includes “[t]he lascivious exhibition of the genitals or pubic area[.]” N.C. Gen. Stat. § 14-190.13(5)(g) (2021). “Our appellate courts have defined the term ‘lascivious’ as ‘tending to arouse sexual desire.’” *State v. Corbett*, 264 N.C. App. 93, 100, 824 S.E.2d 875, 880 (2019) (quoting *State v. Hammett*, 182 N.C. App. 316, 322, 642 S.E.2d 454, 458 (2007) (citation and quotation marks omitted)).

Defendant contends the trial court erred in denying his Motion to Dismiss because the image at issue “is not clearly lascivious” and does not tend to arouse sexual desire.

Here, the image at issue depicts a nude prepubescent female child in bright red lipstick, a choker necklace, and fishnet stockings. The child’s genitals and pubic

area are displayed in the image.¹ The image was in the CART folder on Defendant's laptop which included another image of a child being sexually abused. Viewing the evidence in the light most favorable to the State, we conclude a reasonable jury could have found this image meets the definition of "lascivious" as "tending to arouse sexual desire." Thus, the State presented substantial evidence to support the charge of Third-Degree Sexual Exploitation of a Minor. Therefore, the trial court did not err in denying Defendant's Motion to Dismiss.

III. Computer-Generated Images

A. *Rule 404(b)*

Defendant contends the trial court erred in admitting computer-generated images depicting sexual abuse of children for the purpose of proving Defendant's intent, motive, and absence of mistake or accident pursuant to N.C. R. Evid. 404(b). We disagree.

¹ Although Defendant concedes his Motion to Dismiss was not based on constitutional grounds, Defendant, nevertheless, argues this case involves his First Amendment rights and, as such, this Court has an "obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *State v. Taylor*, 379 N.C. 589, 608, 866 S.E.2d 740, 755 (2021) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)). "This obligation supplements rather than supplants the analysis that we typically utilize when reviewing a trial court's decision." *Id.* "The same principle is applicable in matters in which we examine a trial court's decision to deny a defendant's motion to dismiss in a criminal case." *Id.* This Court has undertaken an independent review of the materials and Record at issue in this case. While not infringing on the jury's role as fact-finder, we, nevertheless, quite easily conclude—for purposes of a motion to dismiss—that a fact-finder could find the material at issue in fact constitutes child pornography unprotected by the First Amendment depicting the lascivious exhibition of a minor constituting sexual activity supporting a charge of sexual exploitation of a minor.

“We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).” *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). North Carolina Rule of Evidence 404(b) provides: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that [the person] acted in conformity therewith.” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). However, such evidence may “be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake” *Id.* Accordingly, “North Carolina Rule of Evidence 404(b) is a rule of inclusion, not exclusion.” *State v. Fink*, 252 N.C. App. 379, 390, 798 S.E.2d 537, 544 (2017) (citation omitted).

Here, Defendant testified he did not know child pornography was on his laptop. The State was required to prove beyond a reasonable doubt Defendant *knew* the character or content of the two captured images in the CART folder. “In determining whether the prior acts are offered for a proper purpose, the ultimate test of admissibility is whether the [prior acts] are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of . . . Rule 403.” *State v. Martin*, 191 N.C. App. 462, 467, 665 S.E.2d 471, 474 (2008) (alterations in original) (citation and quotation marks omitted).

The computer-generated images and the two captured images were located in the same folder on Defendant’s laptop. Each of the images depicted similar character and content—visual representations of a minor engaged in sexual activity. Further,

each image has a different timestamp—within the course of four hours on 21 March 2018—indicating each image was individually selected and placed into the CART folder. Thus, the ten computer-generated images were offered to show Defendant’s absence of mistake or accident in possessing the two captured images of child pornography that formed the basis of his convictions. Therefore, the computer-generated images were admissible under Rule 404(b). Consequently, the trial court did not err in admitting the computer-generated images.

B. Rule 403

Defendant also contends the trial court abused its discretion in admitting the computer-generated images because the images “were unduly prejudicial and likely to confuse or mislead the jury.”

After determining evidence is offered for a proper purpose and is relevant, the trial court must balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. *State v. Bynum*, 111 N.C. App. 845, 848-49, 433 S.E.2d 778, 780 (1993) (citation omitted). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2021). “Unfair prejudice . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.” *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 356 (1986) (citation and quotation marks omitted). We review a trial court’s decision to

admit or exclude evidence under Rule 403 for an abuse of discretion. *Bynum*, 111 N.C. App. at 849, 433 S.E.2d at 781 (citation omitted).

“[M]ere prejudice is not the determining factor in the Rule 403 balancing test[;]” the burden is on the defendant to prove unfair prejudice, and the trial court must make that determination. *State v. Walters*, 209 N.C. App. 158, 163, 703 S.E.2d 493, 497 (2011). “[A]ll evidence offered by the State will have a prejudicial effect on a defendant; however, the prejudicial effect will vary in degree.” *State v. Golphin*, 352 N.C. 364, 434, 533 S.E.2d 168, 215 (2000) (citations omitted).

Here, the trial court limited the number of computer-generated images the State was permitted to show the jury. Further, the trial court gave a limiting instruction regarding the computer-generated images. In doing so, the trial court demonstrated it engaged in a balancing test weighing the admissibility and probative value of the computer-generated images and any unjustly prejudicial impact of this evidence under Rule 403. *See State v. Harris*, 149 N.C. App. 398, 405, 562 S.E.2d 547, 551 (2002) (“as long as the procedure followed by the trial court demonstrates that a Rule 403 balancing test was conducted, a specific finding is not required.” (citation omitted)). Thus, we conclude the trial court did not abuse its discretion in admitting the computer-generated images over Defendant’s objection.

IV. Adobe Records

Finally, Defendant contends the trial court erred in admitting records from Adobe because: (a) the records were inadmissible hearsay; and (b) the admission of

the Adobe records violated Defendant's Sixth Amendment right to confrontation. We disagree.

A. Hearsay

The North Carolina Rules of Evidence define hearsay as “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) (2021). Hearsay is generally inadmissible at trial unless a recognized exception to the hearsay rule applies. N.C. Gen. Stat. § 8C-1, Rule 802 (2021).

Rule 803(6) establishes an exception to the general exclusion of hearsay for business records. A business record includes:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity, and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. . . . The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2021).

“ ‘There is no requirement that the records be authenticated by the person who made them.’ ” *State v. Crawley*, 217 N.C. App. 509, 516, 719 S.E.2d 632, 637-38 (2011) (quoting *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985)). “The

authenticity of such records may be established by circumstantial evidence.” *Id.* at 516, 719 S.E.2d at 637.

Defendant contends the State failed to lay a proper foundation for the admission of the records produced by Adobe under the business records exception to the hearsay rule. We disagree.

Officer McBroom testified about his knowledge of, and familiarity with, the process of receiving and investigating a cyber tip report from the NCMEC. He explained, in relevant part:

the typical process is, . . . we always send off a search warrant to the provider in question, in this case Adobe, requesting official copies of their records from that account, which include the same information plus internet protocol address logs. The internet protocol address . . . contains history of the account, every IP address that’s ever been connected to it, all the images and videos. Whatever happens to be in that, they just provide you all of that as a business record.

The State sought to admit the Adobe records pursuant to the business records exception to the hearsay rule. Indeed, when the records were produced pursuant to the CMPD’s search warrant approved by a Superior Court Judge, Adobe included a “Declaration Verifying the Authenticity of Corporate Records” signed by an Adobe employee, certifying the accuracy of the records and acknowledging the records were being produced pursuant to the search warrant. Nevertheless, Officer McBroom, who was tendered and accepted as an expert in computer forensic analysis, thoroughly demonstrated his understanding of the method by which the data was gathered,

transmitted, and stored, and the underlying basis for the Adobe records admitted into evidence. Officer McBroom's testimony provided a sufficient foundation for the admission of the Adobe records as a business record. *See Crawley*, 217 N.C. App. at 516, 719 S.E.2d at 637-38.

Even presuming the Adobe records were not admissible under the business records exception to the hearsay rule, admission of the records was harmless error. The State introduced ample evidence of Defendant's guilt through Officer McBroom's forensic examination report produced as a result of the search of Defendant's laptop. Thus, Defendant has failed to establish there was a reasonable probability of a different result had the Adobe records not been admitted into evidence. Therefore, Defendant has failed to establish prejudicial error.

B. Confrontation Clause

Defendant also contends the admission of the Adobe records violated his constitutional right to confront witnesses under the Confrontation Clause.

However, as a threshold matter:

In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10(a)(1) (2023). More specifically, our Courts consistently recognize "[c]onstitutional issues not raised and passed upon at trial will not be considered for

the first time on appeal.” *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citation omitted).

Here, Defendant objected to the admission of the Adobe records for lack of foundation to the business records exception to the hearsay rule. Defendant did not raise any constitutional ground for the exclusion of the Adobe records. Thus, Defendant has not preserved this constitutional issue for appeal. *See* N.C.R. App. P. 10(a)(1) (2023); *see also State v. Lemons*, 352 N.C. 87, 91, 530 S.E.2d 542, 544 (2000) (“While defendant clearly objected to the admission of . . . statements . . . on evidentiary grounds, we are unable to find any indication that at trial the defendant cited the Sixth Amendment or any constitutional grounds as the basis for his objection to the admission of . . . [these] statements into evidence.”); *State v. Mobley*, 200 N.C. App. 570, 572, 684 S.E.2d 508, 510 (2009) (objection on hearsay grounds did not invoke the Confrontation Clause). Furthermore, Defendant has not requested we invoke N.C.R. App. P. 2 or apply plain error to review this issue. Therefore, as the issue was not preserved for appeal, we do not address it.

Conclusion

Accordingly, for the foregoing reasons, there was no error in Defendant’s trial, and we affirm the trial court’s Judgment.

NO ERROR.

Judge WOOD concurs.

Judge MURPHY concurs in Parts I, II, III, and IV-B and concurs in result only

as to Part IV-A.

Report per Rule 30(e).