

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0682

State of New Hampshire

v.

Steven M. Clark

Appeal Pursuant to Rule 7 from Judgment
of the Rockingham County Superior Court

REPLY BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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Rules

New Hampshire Rule of Evidence 4046, 7, 12

II. THE COURT ERRED BY ADMITTING EVIDENCE THAT CLARK SHOWED PORNOGRAPHIC IMAGES TO HIS MINOR NEPHEWS.

The court admitted evidence that Clark showed pornographic images to his minor nephews on two grounds: first, for “context”, and second, to counter Clark’s assertion that there were no “ripples,” or effects, from the alleged assaults of My.B. and M.B., his nieces. T1 92*. In his opening brief, Clark argued that neither of these two grounds justified admitting the evidence. DB 32–41.

The State, in its brief, advances a new rationale for admitting this evidence. According to the State, the evidence was admissible because it showed that Clark “had the opportunity to be alone with his nephews,” which, in turn, showed that he had “the opportunity to show pornography to, and assault, M.B. and My.B.” SB 32. In describing its theory of admissibility the State uses the word “opportunity” a total of eleven times. SB 15 (evidence showed that Clark had “the opportunity to commit the charged assaults”); SB 31 (evidence showed that Clark had “the opportunity to commit these crimes without anyone finding out about them”); SB 32 (evidence showed that Clark had “the opportunity to assault

* Citations to the record are as follows:

“DB” refers to the defendant’s opening brief;

“SB” refers to the State’s brief;

“T1,” T2,” etc., refer, by volume number, to the transcript of trial on July 30 to August 5, 2019.

the children without another member of the household walking into the train room and witnessing it”); SB 32 (evidence showed that Clark “had the opportunity to be alone with his nephews”); SB 32 (evidence showed that Clark had “the opportunity to show pornography to, and assault, M.B. and My.B.”); SB 34 (evidence showed that Clark had “access and opportunity”); SB 36 (evidence showed that Clark had the “opportunity to commit these crimes”); SB 36 (evidence showed that Clark “had opportunity to show [Be.B.] and Br.B pornography”); SB 37–38 (evidence showed that Clark had “the opportunity to commit these crimes without another member of the household noticing”); SB 40 (evidence showed “the defendant’s opportunity”); SB 40 (evidence showed that “the defendant had the opportunity to be alone with his nieces and nephews without interruption”).

When seeking to admit evidence over a Rule 404(b) objection, “the State is required to specify the purpose for which the evidence is offered and articulate the precise chain of reasoning by which the proffered evidence will tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity.” State v. Thomas, 168 N.H. 589, 599 (2016). If it admits the evidence, the trial court “must articulate for the record the theory upon which the evidence is admitted . . .

and explain precisely how the evidence relates to the disputed issue, without invoking propensity.” Id. at 600.

On appeal, this Court will review only the grounds upon which the trial court relied. State v. Davidson, 163 N.H. 462, 471 (2012). It “cannot parse the record after the fact to determine what items of evidence could have been admissible under the State’s [newly] proffered purposes.” Id.

“Opportunity” is a valid, non-propensity basis for admitting evidence of a defendant’s other crimes, wrongs or acts. In fact, “opportunity” is among the purposes expressly set forth in Rule 404(b). Here, however, the trial court never indicated that the evidence was admissible to show opportunity. The trial court never used the word “opportunity” in its ruling admitting the evidence, T1 92, and it did not limit the jury’s consideration of the evidence to any tendency it had to show “opportunity,” T4 785. In fact, the trial court instructed the jury that it could consider the evidence for a much broader purpose: “evaluating the credibility of [My.B.’s] testimony.” T4 785.

Davidson is analogous. There the defendant was charged with assaulting his domestic partner. Id. at 465. The trial court admitted evidence of the defendant’s prior acts and statements toward the complainant, which tended to show that he was “controlling,” on the theory that the evidence was

admissible to show the “context” of the defendant’s relationship with the complainant. Id. at 467–68.

On appeal, the State attempted to argue that the evidence was admissible to show the defendant’s “motive” or “intent.” Id. at 471. This Court, however, refused to consider those arguments because “the trial court’s ruling, that the evidence was relevant to ‘context,’ allowed admission of a broader scope of evidence than would have been permissible for the narrower purpose of establishing motive or intent.” Id.

Here, as in Davidson, the trial court admitted the evidence to show “context.” As in Davidson, the State, on appeal, seeks to justify that ruling on a narrower ground, despite the fact that the jury’s consideration of the evidence was not limited to that narrower ground. As in Davidson, this Court should refuse to consider the new, narrower grounds.

Even if this Court considers the State’s new “opportunity” rationale, it should disregard much of the evidence the State marshals in favor of it. The court issued its ruling admitting the evidence during the State’s direct examination of My.B., the State’s first witness. T1 92. The State, in its brief, now seeks to justify the court’s ruling based on events that occurred after the court made its ruling. SB 31–32 (citing defense counsel’s questions after the court ruling); SB 32 (citing Clark’s testimony after the court’s

ruling); SB 32, 36, 39 (citing defense counsel’s closing argument, given after the court’s ruling).

In reviewing a trial court’s evidentiary rulings, this Court considers only the “information . . . available to the trial court at the time it made the rulings.” State v. Plantamuro, 171 N.H. 253, 256 (2018); accord Stachulski v. Apple New England, LLC, 171 N.H. 158, 162 (2018); State v. Addison, 165 N.H. 381, 419 (2013). The purpose of this limitation is “to avoid the pitfall of justifying” the court’s ruling based on the appellant’s response to the evidence. State v. Gordon, 161 N.H. 410, 414 (2011); State v. Nightingale, 160 N.H. 569, 573 (2010); State v. Glodgett, 144 N.H. 687, 694 (2000).

Even if this Court considers events that occurred after the court made its ruling, the State is mistaken in its citation of that testimony. The State claims that Clark testified that he “was rarely alone with his nieces and nephews and lacked the opportunity to commit the charged assaults.” SB 15 (no citation to the record); see also SB 32 (“The defendant . . . claimed he only babysat alone once,” citing T4 666–67); SB 40 (“Contrary to his argument, the defendant had the opportunity to be alone with his nieces and nephews without interruption,” no citation to the record).

For its claim that Clark testified that he was rarely alone with his nephews, the State cites only pages 666–67 of the trial transcript, which appear in Volume 4. SB 32.

However, those pages reflect that defense counsel specifically asked Clark about his nieces, not his nephews. Defense counsel asked, “How often would you estimate various family members were babysitting for [the girls’ parents] -- were babysitting the three girls?” T4 666. In response to further questioning, Clark testified, “Only one time I can remember -- that I can recall that I ever babysat them alone on my own.” T4 666. Contrary to the State’s claims, Clark never testified that he was rarely alone with his nephews.

Even if this Court reaches the merits of the State’s opportunity rationale, the argument fails on its merits. Evidence that Clark showed pornography to his nephews had little tendency to prove that he had the opportunity to sexually assault his nieces, for two reasons.

First, Clark’s nephews were not his nieces. His nephews had different parents than did his nieces. Thus, evidence that Clark was alone with his nephews had little probative value in determining the extent to which he was alone with his nieces.

Second, displaying pornography on an electronic device is not the same as sexual assault. If someone interrupted Clark showing pornography on an electronic device, he would have needed only to close the window on the device, an action that would have taken a mere fraction of a second. My.B., in contrast, claimed that when Clark sexually assaulted her and M.B., Clark showed them pornography, had them take off

their clothes, and pulled down his pants. T1 47, 65–78, 80. Any interruption would have required not only that Clark close the window displaying the pornography, but that he put clothing back on both My.B. and M.B. and that he pull up his own pants, actions that would have taken much longer. For these reasons, evidence that Clark showed pornography to his nephews had little if any probative value to show that he had “the opportunity to assault [his nieces] without another member of the household walking into the train room and witnessing it.” SB 32.

The State also suggests, for the first time on appeal, that the evidence was admissible to show Clark’s *modus operandi*. SB 32 (Clark “showed pornography to his nephews in the same manner that My.B. alleged he showed it to her and M.B.”); SB 34 (evidence that Clark showed his nephews pornography “corroborate[d] My.B.’s testimony on [Clark’s] mode of operating”); SB 36 (evidence “corroborated part of My.B.’s testimony” about “the manner in which he” assaulted her and M.B.); SB 40 (evidence “corroborated My.B.’s account regarding . . . [Clark’s] mode of operating during the assaults”).

Like the State’s “opportunity” rationale, its *modus operandi*-rationale was neither raised below nor relied upon by the trial court, and the court did not limit the jury’s consideration of the evidence to this newly proposed

rationale. Thus, this Court should refuse to consider it. See Davidson, 163 N.H. at 471.

Even if this Court does consider the State's newly proffered modus-operandi rationale, it should reject it. "That a prior offense and a charged offense were committed in a unique manner so as to bear the 'signature' of the defendant may be relevant to show a defendant's modus operandi . . . and thereby tend to prove identity." State v. Whittaker, 138 N.H. 524, 529 (1994). Displaying pornography, however, does not qualify as a "unique . . . signature." Id. Additionally, the issue in this case was whether the alleged assaults occurred at all, not the identity of the perpetrator. See id. (modus operandi is not a valid basis for admitting 404(b) evidence where "the identity of the alleged perpetrator is not at issue"). As in Whittaker, the State's modus-operandi rationale here "is nothing more than proof of propensity or disposition, forbidden under Rule 404(b)." Id.

The State cursorily argues that, even if the court erred by admitting evidence that Clark showed pornography to his nephews, the error was harmless. SB 40–41. Clark argues extensively in his opening brief that the evidence was prejudicial. DB 39–41. The State's brief, however, sets forth an additional observation sufficient to defeat its harmless-error claim: this case involved "a typical credibility contest between [alleged] victim and defendant." SB 36; see also

SB 14 (“this case . . . like many sexual assault cases . . . involve[d] a ‘contest of credibility.’”). For the reasons stated in Clark’s opening brief, and because this case involved a credibility contest between My.B. and Clark, the error cannot be held harmless. See, e.g., State v. Sargent, 144 N.H. 103, 106 (1999) (in a case involving charges of sexual assault of children, the error was not harmless because the “case was essentially a credibility contest between the children and the defendant”); State v. Reynolds, 136 N.H. 325, 329 (1992) (in a case involving charges of sexual assault of a child, the error was not harmless because “the case was ultimately and essentially a credibility contest between the [alleged] victim and the defendant”).

CONCLUSION

WHEREFORE, Steven M. Clark respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

This brief complies with the applicable word limitation and contains 1,910 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Zachary L. Hingham, Assistant Attorney General, through the electronic filing system's electronic service.

/s/ Thomas Barnard
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DATED: April 28, 2021