NO. COA01-1038

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA,

v. Person County
No. 00 CRS 5420

EVERETTE WALKER,
Defendant-Appellant.

Appeal by defendant from judgment entered 31 January 2001 by Judge Abraham Jones in Person County Superior Court. Heard in the Court of Appeals 15 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the State.

Gilda C. Rodriguez, for defendant-appellant.

BRYANT, Judge.

Defendant was indicted on 11 September 2000 on one count of taking indecent liberties with a child and on 29 January 2001, a jury returned a verdict of guilty. At sentencing the trial court found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense. The trial court did not find any mitigating factors. Defendant was sentenced to a term of 31 to 38 months imprisonment. Defendant appealed.

On 3 May 2000, the victim, JH, who was eight years old and in the third grade, went to defendant's house to play with defendant's seven-year-old stepdaughter, TS. Defendant was the only other

person at home. While the children were playing Pokemon, defendant asked if they were going to play Truth or Dare. TS then dared JH to pull her pants down. When JH said that she did not want to pull her pants down, defendant told her, "Yes, you better." JH became scared and pulled her pants and panties down. TS also pulled her pants and panties down. Defendant then told the girls to twist around with their pants down and they did as they were told. JH wanted to go home after the incident, but TS asked her to stay until TS's mother got home.

JH was afraid to say anything to her grandmother when she went home that night. However, after school the next day — having had problems trying to concentrate at school — JH told her grandmother about the incident. JH was afraid that defendant would hurt TS if she did not tell someone what happened. JH's grandmother contacted TS's mother, Louise, at her job and along with JH and other family members went to Louise's job site and told her what had occurred. Louise stated that defendant "had been accused before and that [Louise] felt like . . . he needed to be there to defend himself." Louise called defendant who came to her job site. When JH confronted defendant, defendant said she was lying.

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Defendant presents four assignments of error: 1) the trial court committed plain error by allowing irrelevant testimony that unfairly prejudiced defendant; 2) defense counsel's reference to defendant's prior sex offense violated defendant's right to effective assistance of counsel; 3) the trial court committed

reversible error by failing to grant defendant's motion to dismiss for insufficiency of the evidence; and 4) the trial court committed reversible error by failing to find as a mitigating factor that defendant supports his family. We disagree as to all and find no error.

I.

Defendant first argues that the trial court committed plain error by allowing irrelevant testimony that unfairly prejudiced defendant. Specifically, defendant argues that the trial court erred in admitting testimony that he had sexually abused his stepdaughter, TS; and in admitting testimony that JH felt unsafe and afraid around defendant. Because defendant asserts plain error due to his failure to object to the testimony at trial, we will apply the plain error rule to this assignment of error.

A question is properly preserved for appellate review when, *inter alia*: 1) a party presented a timely objection to the trial court stating the specific grounds for the desired ruling; and 2) the trial court ruled on the party's request. N.C. R. App. P. 10(b)(1). If not properly preserved in a criminal case, a question may nevertheless "be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4). Our Supreme Court has interpreted the application of the plain error rule as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is 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) (alteration in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Defendant first argues that the trial court erred in admitting testimony by JH and Officer Gail Shull, the investigating officer, that defendant had previously molested his stepdaughter. We disagree.

Unless otherwise provided, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (2001). Evidence is relevant if it has "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.G.S. § 8C-1, Rule 401 (2001). However, 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.G.S. § 8C-1, Rule 403 (2001). The determination of the admissibility of evidence under Rule 403 is left to the sound discretion of the

trial court. *State v. Mickey*, 347 N.C. 508, 518, 495 S.E.2d 669, 676 (1998) (citing *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)). The trial court's ruling will not be overturned on appeal for abuse of discretion unless "its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

In this case, JH testified that after she and TS pulled their clothes down and twisted around as defendant demanded, they went to TS's room and TS began to cry. JH further testified that TS

> said that, that Everette made her do that, do that before and that she didn't want to do it and she still didn't want to. She said that whenever she does it she doesn't feel right. And then, that if she told, that Everette would hurt her.

Defendant came into TS's room and asked "what was wrong" and TS replied nothing was wrong and left the room. While TS was gone, defendant told JH that the Truth or Dare incident was "just between the three of them." Defendant then told JH that he had "reached down in [TS's] pants and touched her."

Officer Shull took JH's statement at the hospital on the day after the incident, and at trial, testified and corroborated JH's testimony. JH told Officer Shull that "Everette told her that he had put his hands in [TS's] panties and touched her private parts. . . . [JH] asked [TS] was she going to allow him to do that to her and [TS] said that she couldn't help it because he made her." Defendant argues that this repeated testimony is irrelevant and prejudicial. Specifically, defendant complains that TS was not a

party to this case, yet JH was allowed to testify about indecent liberties that defendant allegedly took with TS. Defendant contends that "[s]uch testimony did not tend to make the existence of any fact that was of consequence to the determination of the action . . . more probable or less probable." We disagree.

Rule 404(b) of our Rules of Evidence prohibits evidence of other wrongs to prove a person's character in an attempt to show that the person acted in conformity therewith, but it may be admissible for other purposes, such as to show a common plan or scheme, N.C.G.S. § 8C-1, Rule 404(b) (2001), or to show defendant's unnatural lust. *See State v. Reeder*, 105 N.C. App. 343, 413 S.E.2d 580 (1992). In *State v. McCarty*, 326 N.C. 782, 392 S.E.2d 359 (1990), the defendant was convicted of rape, first-degree sexual offense, incest and taking indecent liberties with his 12-year-old daughter. At trial, the victim's 22-year-old half sister testified that the defendant had molested her for ten years. On appeal, the defendant argued that the testimony was inadmissible because it was offered to prove his character and that he had acted in conformity therewith. In holding the testimony admissible to show a common plan or scheme to molest children, our Supreme Court stated that, in sexual crime trials, the court has liberally allowed evidence of similar sex offenses. *McCarty*, 326 N.C. at 785, 392 S.E.2d at 361 (citing *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987), *appeal after remand*, 99 N.C. App. 615, 394 S.E. 2d 456 (1990), *aff'd*, 329 N.C. 764, 407 S.E. 2d 514 (1991)). We next look at whether the probative value of the testimony regarding defendant's

other wrongs is substantially outweighed by the danger of unfair prejudice, and, therefore, inadmissible under Rule 403.

"[T]he ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988); *State v. Beckham*, 145 N.C. App. 119, 550 S.E.2d 231 (2001). In this case, the testimony that defendant challenges —— that on prior occasions he either touched his stepdaughter inappropriately or had her pull her pants down and twist around —— was substantially similar to the incident at trial (indecent liberties with JH), an incident which also involved his stepdaughter. This evidence of defendant's prior acts with TS is sufficiently similar to the acts giving rise to defendant's conviction in this case to be admissible under Rule 404(b) as evidence of defendant's unnatural lust.

As to the incident for which defendant was indicted, JH testified that when TS dared her to pull down her pants and panties, she did not want to, but when defendant said "Yes, you better," she became scared and did as she was told. Defendant then made both girls twist around with their pants down. As to the prior acts, the evidence showed that TS was crying when she told JH that "[defendant] made her do that, . . . and [] she didn't want to do it and . . . if she told, . . . [defendant] would hurt her." In addition, the defendant told JH that he had "put his hands in [TS's] panties and touched her private parts." The testimony

regarding the prior acts indicated that they were not remote in time given the fact defendant's acts appeared to be ongoing and therefore more probative than prejudicial.

Even if we were to conclude that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice and therefore, inadmissible, we do not conclude that the trial court's error was so fundamental, basic, prejudicial, and so lacking in its elements that justice could not have been done. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

Defendant also argues in his first assignment of error that the trial court erred in admitting testimony regarding JH's feelings. JH testified that she felt unsafe when defendant instructed her to twist around with her pants down. She further testified that she felt afraid when she had to tell everyone what happened at defendant's home because "I didn't feel that good because I was afraid Everette would do something to me." JH's grandmother testified concerning JH's fear of defendant by stating "she was very afraid that Everette was going to hurt her."

Defendant argues that the trial court acknowledged outside the presence of the jury that the testimony was irrelevant:

> COURT: Frankly, and I understand some background and context, but it doesn't really matter how the child feels. The child could love it, the child could hate it. What matters is what the defendant was allegedly doing and is it moral and decent and what was he doing it for . . . . All these issues about how the girl felt, I'm not sure if that's relevant.

Again, we disagree.

We note at the outset that the trial court did not state that the testimony was irrelevant, but merely speculated that it might not be relevant. We find, as did the trial court, that the testimony was admissible under N.C.G.S. § 8C-1, Rule 803(3) (2001) as evidence of JH's existing mental or physical condition. A victim's state of mind can be relevant in indecent liberties cases, especially when challenged by defendant. *See State v. Thompson*, 139 N.C. App. 299, 533 S.E.2d 834 (2000) (holding that victim's fear of father and father's abuse of siblings and family cat was admissible to explain why victim never reported some incidents of sexual abuse); *State v. Bynum*, 111 N.C. App. 845, 433 S.E.2d 778 (1993) (holding that victim's fear of father was admissible to explain victim's delay in reporting incidents to mother). In *State v. Thompson*, 139 N.C. App. 299, 533 S.E.2d 834 (2000), the defendant was convicted of various sexual offenses against his daughter, including taking indecent liberties with a minor. In his defense, the defendant in *Thompson* relied on his daughter's failure to report the sexual abuse in suggesting that the abuse never occurred. The *Thompson* Court stated: "By bringing forth this defense, defendant thereby specifically made [the daughter's] state of mind relevant. The State could therefore introduce any evidence tending to explain [the daughter's] state of mind." *Id.* at 305, 533 S.E.2d at 839. Although *Thompson* is not entirely on point, we find it instructive.

In the instant case, the State's evidence tended to show that JH did not leave the house immediately after the incident and did

not tell her grandmother about it until the next afternoon. On cross examination, defendant twice challenged JH as to why she remained in the house after the incident if she felt unsafe and afraid. In response JH stated

> A: [TS] told me to stay until her mom got home. She didn't have nobody else to play with.
>
> ...
>
> Q: Even though you were scared, you wanted to stay and play?
>
> A: Yes

JH's Grandmother testified in part as follows:

> Q: Did [JH] express any fear towards anyone?
>
> A: Yes. She was very afraid that Everette was going to hurt her.

Based on the foregoing we conclude that evidence of JH's fear of defendant was relevant. "When it is relevant, any evidence tending to show the victim is afraid of her abuser,. . ., is admissible." *Thompson* at 305, 533 S.E.2d at 839. Accordingly, this assignment of error is overruled.

II.

Defendant next argues that defense counsel's reference at trial to defendant's prior sex offense violated defendant's right to effective assistance of counsel. We disagree.

The Sixth Amendment to the United States Constitution guarantees the right to assistance of counsel. *See* U.S. Const. amend. IV. The United States Supreme Court has recognized that "the right to counsel is the right to the effective assistance of

counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692, (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 25 L. Ed. 2d 763 n.14 (1970)). To prove ineffective assistance of counsel, the defendant must show two things:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687, 80 L. Ed. 2d at 693; *see State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985) (recognizing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, (1984)).

Defendant argues that he was deprived of his right to effective assistance of counsel because trial counsel allowed into evidence a reference to defendant's prior conviction. Prior to jury selection, defense counsel successfully kept out evidence of the prior conviction.[1] During the presentation of the State's evidence, JH's grandmother testified that Louise, defendant's wife, told her that "this had happened before." Defense counsel objected

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[1] The State sought to introduce evidence of defendant's prior 1983 conviction for attempted first degree sexual offense involving a four-year-old victim. After extensive discussions, the trial court ruled that evidence of the prior conviction would not be admitted except for impeachment purposes should defendant testify.

and the testimony was stricken. However, when defendant's wife took the stand as a defense witness, defense counsel asked if she told TS's grandmother that this had happened before:

> Q. You never said to her [grandmother] that [defendant had] done this before?
>
> A. No. No. I said he had been accused before and that I felt like that he needed to be there to defend himself.
>
> Q. Let's stop right there for a minute.
>
> A. Okay.
>
> Q. So what you are telling me is the statement that [TS's grandmother] made before, you never made that statement; is that correct?
>
> A. Correct.

On appeal, defendant argues, "In attempting to neutralize a prosecution witness' reference to defendant's prior conviction . . . , the defense counsel *grossly botched* the matter." (Emphasis added.). Defendant's argument that defense counsel "grossly botched" the examination of his own witness is not sufficient proof that the "'errors [were] so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Braswell* at 562, 324 S.E.2d at 248 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, (1984)). The record indicates that defense counsel kept out evidence of defendant's prior conviction, cross-examined the State's witnesses, motioned to dismiss at the close of the State's evidence and again at the close of all the evidence, and called witnesses on behalf of defendant. We do not find defense counsel's

performance deficient. Even assuming *arguendo* we found defense counsel's performance deficient, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell* at 563, 324 S.E.2d at 248. Accordingly, this assignment of error is overruled.

III.

Defendant next argues that the trial court committed reversible error by failing to grant defendant's motion to dismiss for insufficiency of the evidence. We disagree.

When a defendant moves to dismiss for insufficiency of the evidence, the trial court must determine whether: 1) there is substantial evidence of each essential element of the crime charged, or of a lesser included offense; and 2) the defendant committed the offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Gilmore*, 142 N.C. App. 465, 469, 542 S.E.2d 694, 697 (2001) (quoting *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990)). Evidence is considered in the light most favorable to the State, which is entitled to all reasonable inferences drawn therefrom. *Id.* A person is guilty of taking indecent liberties with a child if he: 1) is at least sixteen years old; 2) is at least five years older than the child victim; and 3) either willfully takes or attempts to take immoral,

improper or indecent liberties with a child under sixteen years of age to arouse or gratify the defendant's sexual desire, or willfully commits or attempts to commit a lewd or lascivious act on the child under sixteen years of age. N.C.G.S. § 14-202.1 (2001).

As to the sufficiency of the evidence, the record shows that defendant was 37 years old and the victim eight years old at the time of the incident. The evidence also showed that defendant had JH and TS play Truth or Dare and after demanding that JH pull her pants and panties down, defendant had both girls twist around. Evidence further showed that based on defendant's prior sexual actions with his stepdaughter, TS, defendant's purpose for making the girls twist around during the Truth or Dare game was to satisfy his unnatural lust. We find this to be substantial evidence of each element of the crime charged and that defendant committed the offense.

Defendant nevertheless argues that there is insufficient evidence that he willfully took or attempted to take an immoral, improper or indecent liberty with JH because JH's testimony is "riddled with inconsistencies and the only conclusion that can be reached is that it was inaccurate and incomplete . . . ."

It is well established that "[a]dmissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge." *State v. Sanchez*, 328 N.C. 247, 251, 400 S.E.2d 421, 424 (1991) (alteration in original) (quoting *State v. Walker*, 266 N.C. 269, 145 S.E.2d 833 (1966)). A close look at defendant's argument shows

he does not so much challenge factual inconsistencies in JH's testimony, but challenges the credibility of her testimony. Defendant's argument goes to credibility rather than insufficiency of the evidence. Therefore, this assignment of error is overruled.

IV.

Finally, defendant argues that the trial court committed reversible error by failing to find as a mitigating factor that defendant supports his family.

Our standard of reviewing errors in sentencing is "whether [defendant's] sentence is supported by evidence introduced at the trial and sentencing hearing . . . ." N.C.G.S. § 15A-1444(a1) (2001); *State v. Choppy*, 141 N.C. App. 32, 42, 539 S.E.2d 44, 51 (2000), *appeal dismissed and review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001). The defendant has the burden of proving by a preponderance of the evidence that a mitigating factor exists. *State v. Canty*, 321 N.C. 520, 523, 364 S.E.2d 410, 413 (1988). Therefore, the defendant must produce "substantial, uncontradicted and manifestly credible" evidence of the existence of the mitigating factor. *Id.* at 524, 364 S.E.2d at 413-14 (quoting *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 455 (1983)). The trial court has wide latitude to determine the existence of mitigating factors. *State v. Godley*, 140 N.C. App. 15, 27, 535 S.E.2d 566, 575 (2000), *review denied*, 353 N.C. 387, 547 S.E.2d 25, *cert. denied*, 532 U.S. 964, 149 L. Ed. 2d 384 (2001). On appeal, this Court will find error in the trial court's failure to find a mitigating factor "only when 'no other reasonable inferences can be

drawn from the evidence.'" *Id.* at 27, 535 S.E.2d at 575 (quoting *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988)).

At the sentencing hearing, defendant's wife testified, "This is a difficult situation for us. I'm a stay at home mom and I'm going, I'm not going back on welfare. I'm just not. I don't know what we'll do the next year, but I guess we just have to adjust and see through this." Other than this statement by his wife, defendant offered no other evidence that he supports his family. In fact, defendant's own evidence showed that his wife worked. Defendant's wife testified that on the day following the offense date of 3 May 2000 members of JH's family came to her worksite. Her statement at the sentencing hearing, less than nine months later, is difficult to reconcile with her earlier testimony. In light of the contradiction, we do not find defendant's evidence to be "manifestly credible." In the absence of additional credible evidence in support of the mitigating factor, we cannot conclude that the trial court erred in failing to find as a mitigating factor that defendant supports his family. Accordingly, this assignment of error is overruled.

Based on the foregoing, we hold that defendant received a fair trial, free of prejudicial error.

NO ERROR.

Judges WALKER and McCULLOUGH concur.

Report per Rule 30(e).