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NO. COA 11-110
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

STATE OF NORTH CAROLINA

v.

Wayne County
No. 08 CRS 3370

WILLIAM JACKSON NEAL, JR.

Appeal by defendant from convictions entered 27 April 2010 by Judge Arnold O. Jones, II, in Wayne County Superior Court. Heard in the Court of Appeals 30 August 2011.

Attorney General Roy Cooper by Assistant Attorney General Anita LeVeaux, for the State.

Marilyn G. Ozer, for defendant.

ELMORE, Judge.

On 27 April 2010, William Jackson Neal, Jr. (defendant) was convicted of 1) first degree statutory rape, 2) first degree statutory sex offense, 3) first degree burglary, and 4) indecent liberties with a child. On 28 April 2010, the trial court sentenced defendant to 1) life imprisonment on the first degree statutory rape charge, 2) life imprisonment on the first degree

statutory sexual offense, 3) life imprisonment on the first degree burglary charge, and 4) ten years on the charge of indecent liberties with a minor. All convictions to run consecutive to one another. After careful consideration, we find no error in the judgments of the trial court.

On 21 August 1987, a man climbed through the second-floor balcony of an apartment and raped an N.C. State student. The rape occurred during the early morning hours, while one of the student's roommates was in another room of the apartment. The man held a knife to the student's throat, and he removed her clothing. The man told her not to make a sound or he would kill her. The student reported the rape to the Raleigh police. She described the man as a white male, with dirty-blond hair, a beard, a mustache, and a strong country accent. The student was taken to Rex Hospital, and a rape examination was completed. The examination indicated that the student received no physical injury from the rape.

Defendant was identified as a suspect. Defendant was initially considered a suspect because he had been arrested in the area and charged with three counts of peeping tom. Defendant was later acquitted of the peeping tom charges.

Two pubic hairs were found on the student's comforter. Raleigh police took a pubic hair sample from defendant. These hairs were found to be consistent with the hairs found on the comforter. On 21 August 1987, defendant was indicted. Prior to trial, the student planned to move to Charleston to begin work, and she did not wish to testify. The student hired an attorney, and she instructed the attorney to request that all charges against defendant be dropped. On 22 February 1990, the charges against defendant were dropped.

On 4 September 1987, a man climbed through the window of an apartment and raped a twelve-year-old girl. The rape occurred during the early morning hours, while the girl's brother and mother were in another room in the apartment. The man held a knife to the girl's throat, and he removed her clothing. The man told the girl to be quiet, and he would not hurt her. The girl described the man who raped her as a white male, with dusty-brown hair, a beard, and a mustache. The girl was taken to a hospital where a rape examination was completed. The examination indicated that the girl received no physical injury from the rape. The girl's nightgown was collected as evidence. A nurse at the hospital attached a safety pin to the right

armpit of the nightgown, so that the nightgown could later be identified at trial.

In 1989, Dwayne Dail was arrested and convicted of the rape of the twelve-year-old-girl. Sometime in 2007, the Actual Innocence Commission (the commission) sought to have the girl's nightgown tested for DNA. The commission contacted the Wayne County Clerk of Court and the Goldsboro Police Department in an attempt to locate the nightgown. The commission was informed that all of the evidence from the case had been destroyed. However, the nightgown was later found in a secondary storage room at the Goldsboro Police Department. This storage room was referred to as "the bike room." The bike room is a large, concrete block reinforced room, with a concrete floor and a steel door. There are three keys to the door. Each key is held by a different crime scene officer. The bike room is not climate controlled. A majority of the evidence located in the bike room was transferred there in 2004. At that time, the evidence being transferred was labeled with a bar code. The bar codes were then entered into the police PISTOL system. However, not all of the evidence that received a bar code was added into the PISTOL system. The nightgown was found in a sealed bag, on a different shelf than the other evidence from the case. On the

bag was a sticker from the Wayne Memorial Hospital, as well a bar code. At the time the nightgown was located, it had not been entered into the PISTOL system. The officer who located the nightgown later entered it into the system. DNA testing was conducted on the nightgown, and the testing revealed that Dwayne Dail was innocent. The DNA sample extracted from the nightgown was entered into the Combined DNA Indexing System (CODIS), an FBI database. The CODIS search indicated a match with the DNA profile of defendant.

On 5 May 2007, defendant was indicted for offenses against the twelve-year-old-girl. He was indicted with 1) one count of first degree burglary, 2) one count of first degree statutory sex offense, 3) one count of first degree statutory rape, and 4) one count of indecent liberties. The trial occurred during the 19 April 2010 session of Wayne County Superior Court.

In a pretrial motion, defendant sought to have the DNA evidence suppressed, based on an inadequate chain of custody of the nightgown. The trial court denied the motion to suppress. At trial, the State sought to introduce evidence of the 21 August 1987 rape of the student. Defendant objected to this evidence, and the trial court overruled defendant's objection. The student then took the stand and testified to the details of

her rape. She also testified that she has a degree in speech, with an emphasis on voices and dialects, and that she could identify defendant as her assailant by his accent. Next, the State asked several questions of a police officer that elicited testimony concerning defendant's peeping tom charges. Defendant objected to this line of questioning. The trial court sustained the objection, and instructed the jury to disregard the officer's answer. Defendant then made a motion for a mistrial. The trial court denied the motion. The State called Karen Hughes, an SBI forensic DNA analyst, as a witness. Hughes testified that in her opinion, defendant was the only source of the DNA discovered on the nightgown. Defendant objected as follows:

Q. Do you have an opinion as to whether or not you can identify Mr. Neal as the person whose sperm was on the gown of [the girl] to the exclusion of every human being on earth?

[DEFENDANT]: Objection.

THE COURT: Overruled.

A. Yes, it is my opinion that it is scientifically unreasonable to expect that the partial DNA profile obtained from the sperm fraction of the cutting from the victim's nightgown came from anyone other than William J. Neal unless he has an identical twin.

During closing arguments, the State said "her (Hughes') opinion was, to the exclusion of every other human being on earth . . . William Neal's sperm was on that gown, with the exception of the possibility of there being an identical twin."

On 27 April 2010, defendant was found guilty of each offense charged. On 28 April 2010, the trial court sentenced defendant to 1) life imprisonment on the first degree statutory rape charge, 2) life imprisonment on the first degree statutory sexual offense charge, 3) life imprisonment on the first degree burglary charge, and 4) ten years on the charge of indecent liberties with a minor. Defendant appeals from these convictions.

Defendant first argues that trial court erred when it admitted evidence concerning the rape of the student on 27 August 1987. Specifically, defendant argues that in admitting evidence of a dismissed charge, the trial court abused its discretion, as the evidence should had been excluded under Rules 401, 402, 403, and 404. Defendant also argues that since this evidence was admitted in error, the evidence deprived him of a fair trial in violation of his constitutional rights to due process. We disagree.

Under Rule 401, evidence is relevant if it has the tendency to make the existence of any fact of consequence more probable or less probable. N.C. Gen. Stat. § 8C-1, Rule 401 (2011). All relevant evidence is admissible, unless it is subject to a specific exclusion. N.C. Gen. Stat. § 8C-1, Rule 402 (2011). Evidence of a prior bad act is relevant "only if the jury can conclude by a preponderance of the evidence that . . . the defendant was the actor." *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991) (quotations and citations omitted).

Here, evidence was presented to the jury that two pubic hairs were found on the student's comforter, and that these two pubic hairs matched pubic hair taken from defendant. Furthermore, the student testified that she recognized defendant's voice, and that she was certain defendant was the man who raped her on 27 August 1987. She also testified that she has a degree in speech, with an emphasis on voices and dialect.

Therefore, sufficient facts were presented to the jury for the jury to find that defendant was the actor. The evidence of the rape of the student on 27 August 1987 was relevant evidence.

In addition, the evidence was properly admitted under Rule 404 and Rule 403. Rule 404 states:

(b) Other crimes, wrongs, or acts. -- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

N.C. Gen. Stat. § 8C-1, Rule 404 (2011). Rule 404(b) is a rule of inclusion. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). "When prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991) (citation omitted). Whether to exclude evidence under Rule 403 "is within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *State v. Hyde*,

352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (quotations omitted).

Here, the State offered evidence of the 27 August rape of the student for a proper purpose. The State indicated in a pretrial motion that it was offering the evidence to prove a common plan or scheme and identity. These purposes are listed in the statute. Therefore, this Court must next determine if 1) the rape of the student was sufficiently similar to the rape of the girl and 2) if the rape of the student was too remote in time.

First, the State listed eighteen similarities of the rapes. These similarities include that: 1) both rapes occurred in the early mornings, 2) both rapes occurred in apartment complexes, 3) both rapes involved entrance through a balcony or window, 4) both rapes involved a knife, 5) both rapes involved the assailant telling victims "don't say a word and I won't hurt you," 6) both rapes involved the assailant disrobing the victim, and 7) the victims of both rapes identified an assailant with similar features. Therefore, we conclude that the State offered sufficient evidence to prove that the circumstances of the rape of the student were similar to the circumstances of the rape of the twelve-year-old girl.

Defendant argues that the similarities between the two rapes are generic and therefore, insufficient to admit under Rule 404(b). Again, we disagree. When prior bad acts are offered for a proper purpose, the primary consideration of whether to admit the evidence turns upon Rule 403.

"We review the trial court's decision to admit the evidence pursuant to Rule 403 for an abuse of discretion. An [a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record."

State v. Peterson, 361 N.C. 587, 602-03, 652 S.E.2d 216, 227 (2007) (quotations and citations omitted).

Therefore, this Court will not analyze the similarities between the two rapes and attempt to determine whether the similarities are generic. Instead, this Court will only look at the facts that were presented to the trial court, and determine whether the trial court's decision was supported by those facts. Here, the State presented a list of eighteen similarities to the trial court. Therefore, we conclude that the trial court had sufficient facts upon which to make a reasoned decision, and the decision of the trial court will be left undisturbed.

Second, we conclude that the rapes were not too remote. "[W]hen otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor." *State v. Badgett*, 361 N.C. 234, 243, 644 S.E.2d 206, 212 (2007) (citation omitted). This rule indicates that when determining if the offenses are too remote, the time between the offenses themselves must be measured. Here, the rape of the student occurred on 21 August 1987, and the rape of the twelve-year-old girl occurred on 4 September 1987. These two offenses occurred within approximately two weeks of each other. The fact that defendant was on trial twenty-two years later is irrelevant when determining remoteness. Here, the rapes occurred within a two week time-period, and therefore the rapes were not too remote in time.

We conclude that all of the requirements for admitting evidence of a prior offense were met here. The State indicated a proper purpose for admitting evidence of the rape of the student. The State also offered eighteen similarities of the rapes to the trial court. Furthermore, evidence was presented to the trial court to show that the rapes occurred only two weeks apart. Accordingly, since the evidence was not admitted

in error, the evidence did not deprive defendant of a fair trial or deprive him of his constitutional rights to due process.

Defendant next argues that the trial court's instruction to the jury, to disregard questions concerning allegations of defendant being a peeping tom, was insufficient to cure the violation of his right to an unbiased jury. Defendant further argues that the trial court erred in denying his motion for a mistrial based on this violation. We disagree.

"Where the court properly withdraws incompetent evidence from the consideration of the jury and instructs the jury not to consider it, error in its admission is cured in all but exceptional circumstances, and there is a presumption on appeal that the jury followed such instruction unless prejudice appears or is shown by appellant." *State v. White*, 298 N.C. 430, 433, 259 S.E.2d 281, 284 (1979) (quotation and citation omitted).

Here, the State called an officer of the Raleigh Police Department as a witness. The State asked the officer questions concerning his work in the area around the time the rape occurred. The State asked the officer if there was a reason why he was conducting surveillance in the area. The officer began to answer regarding a peeping tom in the area. Defendant objected, and the trial court sustained defendant's objection.

Next, the trial court instructed the jury to disregard the officer's answer. Since the trial court offered a curative instruction, this Court will presume on appeal that the jury followed the instruction unless defendant showed prejudice. Defendant argues that there is a "reasonable possibility that, had the error not been committed, a different result would have been reached at trial." However, defendant provides no argument regarding how a different result would have been reached. Therefore, this Court will presume that the jury followed the curative instructions.

We conclude that the trial court's instruction to the jury was sufficient to cure the alleged violation of defendant's right to an unbiased jury. Defendant has presented no argument to rebut the presumption that the jury followed the curative instructions.

Furthermore, the trial court did not err in denying defendant's motion for mistrial. A trial court must declare a mistrial if:

there occurs during the trial . . . conduct inside or outside the courtroom [that results] in substantial and irreparable prejudice to the defendant's case. Mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict. The decision to grant or deny a

mistrial lies within the sound discretion of the trial court and is entitled to great deference since [the trial court] is in a far better position than an appellate court to determine the effect of any [misconduct] on the jury.

State v. Taylor, 362 N.C. 514, 537-38, 669 S.E.2d 239, 260 (2008) (quotations and citations omitted).

As we have previously discussed, this Court presumes that the jury followed the curative instruction. Therefore, this Court presumes that the evidence elicited from the officer had no effect on the jury. Thus, we conclude that the trial court did not err in denying defendant's motion for mistrial.

Defendant next argues that the trial court erred by admitting the testimony of Hughes. Specifically, defendant argues that the State's use of Hughes' testimony, that defendant was the only source of the DNA, in their closing argument was a "prosecutor's fallacy" and that the testimony was inadmissible under Rule 702 of the Rules of Evidence. We disagree.

A prosecutor's fallacy is:

the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample. In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at

the crime scene (source probability), then he has succumbed to the prosecutor's fallacy.

McDaniel v. Brown, __ U.S. __, __, 175 L. Ed. 2d 582, 588 (2010) (quotations and citations omitted). Based on this rule, defendant argues that a prosecutor's fallacy occurs when a prosecutor elicits testimony that confuses source probability with random match probability. That situation did not occur here.

Here, Hughes testified that "it is my opinion that it is scientifically unreasonable to expect that the partial DNA profile obtained from the sperm fraction of the cutting from the victim's nightgown came from anyone other than William J. Neal unless he has an identical twin." This specific testimony did not contain any numerical probability, therefore it is impossible that the jury here confused any source probability with random match probability. Furthermore, the State did not misrepresent this testimony to the jury, because during closing arguments the State repeated the testimony essentially verbatim. Therefore, we conclude that a prosecutor's fallacy did not occur here.

Furthermore, the testimony of Hughes was properly admitted under Rule 702. "Expert testimony is admissible if scientific, technical or other specialized knowledge will assist the trier

of fact to understand the evidence or to determine a fact in issue." *State v. Campbell*, 359 N.C. 644, 667, 617 S.E.2d 1, 16 (2005) (quotations and citations omitted). Furthermore, "[t]he trial court has broad discretion in determining whether to admit the testimony of an expert." *Id.*

When reviewing the ruling of a trial court concerning the admissibility of expert opinion testimony, the standard of review for an appellate court is whether the trial court committed an abuse of discretion. An [a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

State v. Ward, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (quotations and citations omitted).

Here, Hughes is an FBI forensic DNA analyst. She was called to provide opinion testimony to the jury concerning the DNA evidence. The State's case relied heavily on DNA evidence, since defendant was charged with the rape only after the CODIS search indicated a match with his DNA profile. The scientific knowledge of Hughes was offered to assist the jury to understand this DNA evidence. Based on these facts, we conclude that the trial court's decision to admit the expert opinion testimony was the result of a reasoned decision.

This Court notes that the testimony of Hughes perhaps encroached upon the province of the jury. However, we do not find the decision of the trial court to admit her testimony despite this fact to be prejudicial error. Here, defendant had the opportunity to 1) cross-examine Hughes and 2) offer opinion testimony from his own expert witness. Therefore, even though the testimony of Hughes appears to have surpassed the confines of appropriate opinion testimony of an expert, defendant was presented with ample opportunity to contradict or discredit her testimony. Accordingly, we conclude that the trial court did not err in admitting the expert testimony of Hughes.

Lastly, defendant argues that the DNA evidence should not have been admitted, because the chain of custody of the nightgown was not adequately established. Specifically, defendant argues that the commission was told repeatedly that the evidence had been destroyed, when in fact the evidence had been moved to the bike room. Therefore, the chain of custody of the nightgown was not adequately established. We disagree.

This Court has stated that a two-pronged test must be satisfied before evidence is admitted: 1) the item offered must be identified as being the same object involved in the incident, and 2) it must be shown that the object has undergone no

material change. *State v. Campbell*, 311 N.C. 386, 388-89, 17 S.E.2d 391 (1984). "A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." *Id.* (quotations and citation omitted). A trial court's determination to admit evidence is reviewed for an abuse of discretion. *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635 (2000). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

Here, the trial court conducted a pre-trial hearing for defendant's motion to suppress the DNA evidence. At that hearing, the State presented the following evidence: 1) the girl's nightgown was blue with a safety pin attached to the right armpit; 2) Nurse Karen Sutton placed a safety pin in the right armpit of the girl's nightgown so that she could identify the nightgown at a subsequent trial; 3) Nurse Karen Sutton placed the nightgown in bag; 4) a sticker from Wayne Memorial Hospital was attached to that bag with the victim's name, her patient ID number, and the date; 5) the bag was sealed with

tape; 6) the nightgown was later located in the bike room; 7) the safety pin was still attached to the right armpit; 8) the nightgown was in the same bag; 9) the Wayne Memorial Hospital sticker was still attached to the bag; 10) the bag was sealed.

Next, the trial court made several findings. The trial court found that: 1) no evidence was presented to indicate that the nightgown had undergone any material change; 2) the nightgown had remained sealed from the time it was obtained in 1987; 3) the nightgown was not tampered with; 4) no evidence was presented to indicate that the nightgown had undergone any alteration.

Therefore, we conclude that the decision of the trial court was supported by sufficient facts. The State presented evidence to support each prong of the two-prong test. The trial court made a reasoned decision to admit the DNA evidence, and this Court will not reverse the decision of the trial court.

In sum, we conclude that there was no error in the judgments of the trial court.

No error.

Judges MCGEE and HUNTER, JR., Robert N. concur.

Report per Rule 30(e).