

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-179

NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

STATE OF NORTH CAROLINA

v.

Wake County
No. 09 CRS 6970

DAVID SCOTT HODGE

Appeal by defendant from judgment entered 17 June 2010 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 29 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.

Gilda C. Rodriguez for defendant-appellant.

BRYANT, Judge.

Where evidence was sufficient to show a common plan or scheme, the trial court did not err in admitting the evidence under Rule 404(b) and Rule 403. Where defendant fails to show that trial counsel's performance was deficient or prejudicial, we overrule defendant's ineffective assistance of counsel claim.

In October 2008, Janet¹ was living with the brother of David Scott Hodge (Defendant), whom she had dated over the course of the last 13 years. During an argument, defendant's brother hit her. Defendant was present and suggested that he could take Janet somewhere safe. Defendant took Janet to his house, and they began a relationship that continued for the next several months. Janet lived primarily with defendant during their relationship, and defendant and Janet would often consume large amounts of alcohol together. Their heavy consumption would lead to arguments and fighting, sometimes culminating with defendant hitting Janet.

On 3 February 2009, defendant returned home from a court appearance and purchased a twelve-pack of beer. That night Janet and defendant drank beer together and watched a movie in their bedroom. Eventually Janet decided to go to sleep, which angered defendant. Defendant promptly asked Janet to give back the ring he had given her, which she did. Defendant proceeded to yell at Janet for disrespecting him and blocked the door, preventing Janet from leaving the room. Defendant then grabbed a police baton and threatened Janet's life with it. Defendant began striking the bed repeatedly near where Janet was laying, threatening to hit her in the head. Defendant then struck Janet with the baton just above the ankle of her left leg. Janet

¹ We use a pseudonym instead of the victim's full name.

immediately felt that her left leg was broken and asked defendant to take her to the hospital. Defendant did not believe her and instead jumped on Janet and started choking her. In self-defense, Janet managed to propel them both to the floor, stopping defendant from choking her further. After the attack, Janet got up from the floor limping. Defendant noticed her limping and said that if she kept limping like that he would do the same thing to her other leg.

Defendant then realized that he had lost the ring Janet had returned to him and told Janet to take off all her clothes and crawl on her hands and knees to find the ring. During her search for the ring, Janet was forced to crawl through glass shards while defendant continued hitting her in the head and even body slammed her, resulting in her head hitting the concrete floor. Janet looked for the ring for several hours and any time Janet would try to leave the room defendant would block the door. In the early morning hours of 4 February 2009, defendant told Janet that he would kill her and that he was going to flee to Florida after he did.

Throughout the evening and early morning after the attack, Janet repeatedly asked defendant to take her to the hospital to seek medical care but he refused. After sleeping for a few hours, Janet again asked defendant to take her to the hospital for medical care. Defendant refused and said he would go buy

her food and Tylenol instead. After defendant returned with food and Tylenol, he allowed Janet to contact her daughter via email. In the email, Janet notified her daughter that she had broken her leg and needed medical attention after falling down the stairs. A few hours later, Janet sent another email to her daughter requesting that she contact Janet's mother to help her get medical care, since defendant was not going to take her to the hospital or let her leave.

Later that evening on 4 February 2009, Knightdale Police officers arrived and Janet informed them that she needed medical attention because she had fallen. While in the ambulance, Janet told one of the EMT workers that she actually had been assaulted by defendant. Janet said the same thing to Sgt. Vickie Powers and the emergency room physician while being treated for a fractured leg at the hospital.

Upon discharge from the hospital, Janet was escorted by Knightdale police officers to defendant's home to retrieve her things and also locate defendant and the baton. When the officers arrived, they noticed defendant had nailed the front door shut so they went to the back door. Defendant was subsequently arrested at his house with two thousand dollars in his hand.

On 24 March 2009, defendant was indicted by a Wake County Grand Jury for assault with a deadly weapon inflicting serious

injury. Defendant was also charged with assault inflicting physical injury by strangulation and first degree kidnapping.

At trial, the State offered multiple witnesses to testify to Janet's injuries and corroborate her statements regarding the events that transpired on 3 and 4 February 2009. The State also presented testimony from Karen², defendant's former girlfriend. Karen testified that she lived with defendant for a few years and that defendant became physically violent within the first few months of their relationship. Karen stated that their relationship involved alcohol and that defendant was always drinking when he became violent. During these violent episodes, defendant mostly struck Karen with his hands, resulting in nosebleeds and black eyes, but he also prevented her from leaving the house by nailing the doors shut. Karen also testified to instances in which defendant held a knife to her throat, cut her leg with a knife, and slammed her into a cement wall inside the house. Karen stated that defendant prevented her from calling the police or seeking medical treatment for most of her injuries, although she did go to the dentist for two teeth that were knocked out. Further, Karen testified that defendant kept what appeared to be a police baton hanging over one of the doors in his house.

² We use a pseudonym instead of the witness's full name.

Defendant took the stand and testified that Janet was the one who had violent episodes and that he had seen her abuse prescription drugs and fall down and hurt herself previously while she was under the influence of prescription drugs. Regarding the evening of 3 February 2009, defendant stated that Janet hurt herself falling down some steps before she came to his house that night. Defendant testified that he did not take Janet to the hospital because he did not think she was badly injured, but rather that she only wanted to get pain medication instead. During direct examination, defendant acknowledged that he did have a previous violent episode with Janet in November 2008, which resulted in his subsequent conviction of misdemeanor assault. Defendant also testified regarding another violent episode with Janet on 22 January 2009. Lastly, defendant testified to three assault convictions in 1998 and one in 1999.

Defendant was found guilty of assault with a deadly weapon inflicting serious injury and not guilty of the other two charges. Defendant was sentenced on 17 June 2010 to a minimum term of forty-six months and a maximum term of sixty-five months. Defendant appeals.

On appeal, defendant argues (1) the trial court erred in admitting the 404(b) testimony of Karen, and (2) defense counsel did not provide effective assistance of counsel.

I.

Defendant first contends the trial court erred in admitting the testimony of Karen. We disagree.

We review a court's decision regarding the admission of evidence for abuse of discretion. *Hines v. Wal-Mart*, 191 N.C. App. 390, 663 S.E.2d 337 (2008), *disc. review denied*, 363 N.C. 126, 673 S.E.2d 131 (2009). "To receive a new trial based upon a violation of the Rules of Evidence, defendant must show that the trial court erred and that there is a 'reasonable possibility' that without the error 'a different result would have been reached at the trial.'" *State v. Ray*, 364 N.C. 272, 278, 697 S.E.2d 319, 322 (2010) (citing N.C. Gen. Stat. § 15A-1443(a) (2009)); *see also State v. Mason*, 317 N.C. 283, 291, 345 S.E.2d 195, 200 (1986) ("[B]efore the defendant is entitled to any relief on appeal, he must show that he was prejudiced by the [trial court's] error." (citing N.C.G.S. § 15A-1443(a))).

North Carolina Rule of Evidence 404(b) states:

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.

N.C. R. Evid. 404(b) (2009). In analyzing Rule 404(b), we have said it "is a clear general rule of inclusion of relevant

evidence of other crimes . . . by a defendant, subject but to one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Kennedy*, 130 N.C. App. 399, 403, 503 S.E.2d 133, 135 (1998). Moreover, "evidence of another crime is admissible to prove a common plan or scheme to commit the offense charged. But, the two acts must be sufficiently similar as to logically establish a common plan or scheme to commit the offense charged, not merely to show the defendant's character or propensity to commit a like crime." *State v. Willis*, 136 N.C. App. 820, 822-23, 526 S.E.2d 191, 193 (2000).

In the instant case, the State offered the 404(b) evidence as proof of a common plan or scheme by defendant to physically and mentally abuse the women who lived with him. In admitting Karen's testimony as proof of a common plan or scheme, the trial court stated that "the witness has testified as to the events, the similarity of the events, the violence of the events, the striking that took place, the nails in the doors, [and because] the kinds of behavior that have been testified here and previously testified are so similar in nature" We agree with the trial court that the acts as described by Karen are sufficiently similar in proof of circumstance to the acts as described by Janet to establish proof of a common plan or scheme

by defendant to physically and mentally abuse the women who lived with him. As a result, we find no error in the trial court's admission of the Rule 404(b) testimony.

Defendant also contends the evidence is not admissible under Rule 403. Specifically, defendant argues that Karen's testimony is so prejudicial as to outweigh any probative value.

Although admissible under Rule 404(b), the probative value of this evidence must still outweigh the danger of undue prejudice to the defendant to be admissible under Rule 403. *State v. Frazier*, 319 N.C. 388, 390, 354 S.E.2d 475, 477 (1987). The admission of evidence is a "matter within the sound discretion of the trial court, and [the trial court's] ruling may be reversed for an abuse of discretion only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E.2d 139, 145 (1988) (citations and internal quotations omitted).

Here, Janet testified that: defendant hit her numerous times during their relationship; defendant slammed her into the concrete in his residence; defendant became violent after consuming alcohol; defendant refused to take her to get medical treatment; and defendant prevented her from leaving his residence. Janet also testified that her relationship with defendant became abusive shortly after it began. Based on

Janet's testimony, the trial court properly admitted evidence of acts of physical and mental abuse performed by defendant against Karen while she lived with defendant. The probative value of this evidence as proof of a common scheme or plan is outweighed by its prejudicial effect. Accordingly, we find no abuse of discretion by the trial court in admitting this testimony under Rule 403 or 404(b).

II.

Next, defendant argues trial counsel's performance violated defendant's Sixth Amendment right to effective assistance of counsel. We disagree.

Ineffective assistance of counsel claims are measured by the two-prong test in *Strickland v. Washington*. 466 U.S. 668, 80 L. Ed. 2d 674 (1984). The test developed in *Strickland* requires defendant to demonstrate first "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." *Id.* at 687, 80 L. Ed. 2d at 693. If defendant illustrates that counsel's performance was "deficient" under the *Strickland* test, then 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." *Id.* To establish

prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698.

Here, defendant contends that trial counsel's performance was ineffective and prejudiced defendant when trial counsel unnecessarily introduced evidence of defendant's prior criminal record in violation of Rule 609 of the North Carolina Rules of Evidence. Rule 609 is titled "Impeachment by Evidence of Conviction of Crime". Rule 609(b) generally prohibits the admission of evidence of convictions more than ten years old unless the trial court determines the probative value of the evidence outweighs its prejudicial effect. N.C. R. Evid. 609(b) (2009). However, this rule does not prohibit defense counsel on behalf of a defendant from introducing prior criminal convictions that are more than ten years old as a matter of trial strategy.

It does appear from the record that defense counsel strategically introduced this evidence to argue that even though defendant was a "bad boy" his lifestyle was not on trial. The Supreme Court of North Carolina has stated that "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required

standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001); see also *State v. Prevatte*, 356 N.C. 178, 235-36, 570 S.E.2d 440, 471-72 (2002). Additionally, the United States Supreme Court stated, in reference to trial counsel's performance, that:

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...."

Id. Based on this presumption and the evidence before the Court indicating trial counsel strategically introduced this evidence, we find trial counsel's performance was not deficient.

However, even assuming *arguendo* we could determine trial counsel's performance to be deficient, defendant cannot show that there is a reasonable probability that the outcome of the case would have been different but for trial counsel's errors. Defendant's claim that counsel was deficient in other ways - failure to request sequestration of witnesses; failure to anticipate witness testimony; failure to move to ban certain testimony or object at trial; and failure to object to prior bad act testimony - must also fail. As referenced herein, *supra*,

the State's evidence of defendant's assault on Janet was substantial and consisted of Janet's testimony, medical testimony, and testimony from law enforcement. On this record, defendant cannot show that there is a reasonable probability that the outcome of the case would have been different but for trial counsel's alleged errors. Therefore, we overrule defendant's argument as to his ineffective assistance of counsel claim.

No error.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).