NO. COA11-507
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 10 CRS 66769-72

DANIEL EDWARD PALACIOS

Appeal by defendant from judgments entered 31 January 2011 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 28 November 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Celia Grasty Lata, for the State.

Robert W. Ewing for defendant-appellant.

ELMORE, Judge.

Daniel Edward Palacios (defendant) appeals from judgments entered upon his convictions for multiple sex offenses. After careful review, we find no error.

Defendant is the father of the victim in this case, V.P. V.P. testified that she began living with her father when she was seven years old. When she was ten years old and the family was living in Pennsylvania, defendant began touching her breasts

and inserting his finger into her vagina and moving it around. V.P. testified that these incidents would occur approximately once per week. Later, when V.P. was in the fifth grade, the family moved to Maryland, at which time her father began having sexual intercourse with her "[m]aybe once a week, maybe every other day, maybe . . . every day." V.P. further testified that on one occasion her father performed oral sex on her.

When V.P. was twelve years old and in the sixth grade, the family moved to Greensboro, North Carolina. V.P. testified that approximately a month after moving to North Carolina, her father came to her room and touched her vagina and her breasts under her clothes. V.P. stated that on five or six occasions her father stuck his finger into her vagina and moved it around. V.P. additionally testified that her father would come into her room at night when she was sleeping, lock the door, take off her clothes and have sexual intercourse with her. V.P. stated that these incidents "would happen maybe once a week, twice, I mean, every other day, every day. It varied." V.P. also testified that on one occasion her father forced her to perform oral sex on him. V.P. stated that the incidents of sexual contact with her father continued until she was fourteen years old, at which point she reported the incidents to her school counselor.

Defendant was convicted of four counts of taking indecent liberties with a child, four counts of felony child abuse, two counts of statutory rape, and one count each of incest with a person under the age of thirteen, statutory sex offense with a person under thirteen, and first degree rape of a child. The trial court sentenced defendant to five consecutive terms of 240 to 297 months' imprisonment. Defendant appeals.

Defendant argues that the trial court erred by allowing his daughter to testify regarding the incidents of sexual contact that occurred in Pennsylvania and Maryland. Defendant contends that her testimony should have been excluded under Rules 403 and 404(b) of our Rules of Evidence. We disagree.

We initially note that defendant did not object at trial on the basis that admission of the evidence violated Rule 404(b). Instead, defendant objected solely on the basis that admission of the evidence violated Rule 403. Nevertheless, the trial court conducted a *voir dire* and analyzed whether the evidence was admissible under both Rule 403 and 404(b). Defendant contends that it was apparent from defendant's objection and the line of questioning that the issue regarding V.P.'s testimony required an analysis under Rule 404(b), and thus the issue has been properly preserved for appellate review. Alternatively,

defendant argues that admission of the evidence constituted plain error. Assuming *arguendo* that defendant has properly preserved his argument for appellate review, we find no prejudicial error.

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. Cook*, 193 N.C. App. 179, 181, 666 S.E.2d 795, 797 (2008). An abuse of discretion is a ruling "so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted).

Rule 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 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. Gen. Stat. § 8C-1, Rule 404(b) (2009). Our Court has stated:

> This rule is a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but 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. Washington, 141 N.C. App. 354, 366, 540 S.E.2d 388, 397

(2000) (citation omitted).

Here the trial court ruled that the alleged sexual acts committed by defendant against his daughter in Pennsylvania and Maryland were "very similar, if not identical, to the sexual acts committed against her" in North Carolina. Moreover, the trial court noted that defendant's acts were a continuous, uninterrupted course of conduct. Accordingly, the trial court determined that the evidence was admissible "for the purpose of showing that there existed in the mind of the defendant a plan, scheme, or system or design involving the crimes charged in this case or the absence of mistake and the absence of accident." Additionally, the court found the evidence was relevant to show the defendant's *modus operandi*. The trial court further analyzed admission of the evidence under Rule 403 and concluded that that "the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by any consideration of undue delay, waste of time —— presentation of cumulative evidence." We find no abuse of discretion in the trial court's rulings. Accordingly, we find no error.

No error.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).