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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-20

Filed: 19 November 2019

Chatham County, Nos. 17 CRS 50315-17

STATE OF NORTH CAROLINA

v.

DAVID OCAMPO, Defendant.

Appeal by defendant from judgments entered 12 July 2018 by Judge G. Bryan Collins Jr. in Chatham County Superior Court. Heard in the Court of Appeals 18 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorneys General, Juliane L. Bradshaw and Anna M. Szamosi, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

BERGER, Judge.

On July 12, 2018, David Ocampo ("Defendant") was convicted of attempted second-degree rape, attempted incest, interfering with an emergency communication, assault on a female, and sexual battery. On appeal, Defendant contends the trial court (1) erred when it admitted Rule 404(b) evidence; (2) committed plain error when it admitted hearsay evidence under Rule 803(4); (3) erred when it denied Defendant's

motion to dismiss; and (4) committed plain error when it failed to instruct the jury on voluntary intoxication. Defendant also contends he received ineffective assistance of counsel. We disagree.

Factual and Procedural Background

On the morning of March 15, 2017, J.O. ("Jorja")[1] and her brother, Defendant, were alone in the family home in Chatham County. At approximately 6:00 a.m., Defendant entered Jorja's bedroom. Defendant was naked and got on top of Jorja while she was asleep. At the time, Jorja was wearing leggings, a tank top, underwear, and a bra. Jorja awoke as Defendant pulled down her leggings and attempted to remove her shirt, bra, and underwear. Jorja yelled that she was on her period, and Defendant then felt for a pad.

Defendant stopped removing Jorja's clothing and left her bedroom. However, Defendant took Jorja's phone. Jorja asked Defendant to give her phone back, and if he did not, she would tell someone at school what he had done. Defendant returned Jorja's phone, and she immediately went to her mother's room, locked the door, and called 911 to report the incident.

Defendant "busted through the door" and took Jorja's phone again. Defendant told Jorja to tell the dispatcher that her story was a lie, but Jorja refused and repeated the story to the dispatcher. At approximately 6:30 a.m., Police Officer Jedidiah

[1] While this is not a case pursuant to N.C.R. App. P. 3.1(b), a pseudonym will be used to protect the identity of the juvenile as the details of this case are of a personal nature.

Bristow ("Officer Bristow") arrived on scene. Officer Bristow arrested Defendant and took him to the magistrate's office. Defendant was charged with one count of attempted first-degree rape, four counts of assault on a female, one count of sexual battery, and one count of interfering with an emergency communication.

As a result of this incident, Jorja avoided socializing, had difficulty sleeping in her own bed, and suffered from nightmares. Jorja received medical care from the University of North Carolina's Beacon Program, where she met with Sara Kirk ("Ms. Kirk"). During one of their meetings, Jorja told Ms. Kirk about an incident that occurred approximately one year prior to the March 15, 2017 incident (the "Exposure Incident"). Jorja reported that Defendant asked her if "she had ever held a gun before." When Jorja replied "no," Defendant exposed his penis to Jorja. Jorja did not report the Exposure Incident because Defendant claimed he was drunk, apologized to her, and gave her five dollars to not talk about it.

Defendant was later indicted by the Chatham County Grand Jury for attempted incest, attempted second-degree rape, assault on a female, sexual battery, and interfering with an emergency communication. The jury found Defendant guilty of all charges. In addition, Defendant admitted to the existence of three aggravating factors: the offense was committed while Defendant was on pretrial release for another offense; Defendant had previously violated probation or post-release supervision; and Defendant took advantage of a position of trust or confidence. The

trial court sentenced Defendant to 105 to 186 months in prison for attempted second-degree rape, assault on a female, and sexual battery; a consecutive term of 19 to 32 months for attempted incest; and an additional 150 days for interfering with an emergency communication.

Defendant appeals, arguing that the trial court (1) erred when it permitted the State to introduce evidence of the Exposure Incident under Rule 404(b); (2) committed plain error when it admitted hearsay evidence under Rule 803(4); (3) erred when it denied Defendant's motion to dismiss; and (4) committed plain error when it failed to instruct the jury on voluntary intoxication. Defendant also contends he received ineffective assistance of counsel. We disagree.

I. Admissibility of Evidence Pursuant to Rule 404(b)

> [W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Rule 404(b) of the Rules of Evidence states, in part:

> 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, 404(b) (2017).

Rule 404(b) is a "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. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). "To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002).

When considering the admissibility of evidence under Rule 404(b), the trial court shall first determine "that the evidence is of the *type* and offered for the proper *purpose* under Rule 404(b)." *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986). The trial court must also make a make a relevancy determination. *Id.* at 637, 340 S.E.2d at 91. Relevant evidence "means evidence having 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. Gen. Stat. § 8C-1, Rule 401 (2017). Finally, the trial court is then required to consider whether the "probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2017).

Our courts have historically taken a liberal approach in admitting a defendant's similar prior bad acts. *See e.g., State v. Williams*, 303 N.C. 507, 513, 279 S.E.2d 592, 596 (1981) (admitting testimony of the defendant's prior sexual act to show intent and plan or design to commit the crime charged therewith). "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).

Here, the Exposure Incident was sufficiently similar to the March 15, 2017 incident for admission pursuant to Rule 404(b). There was testimony that the Exposure Incident occurred within approximately one year of the March 15 incident. Both incidents involved progressively aggressive sexual activity between Defendant and Jorja, and both occurred at night in the same bedroom. *See Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (finding similarity based, in part, on the location of the occurrence and the progression of the previous sexual acts). In addition, there was evidence that Defendant had been drinking on both occasions, immediately showed remorse for his actions, and encouraged Jorja not to tell anyone about what he had done. Evidence of the Exposure Incident tended to show that Defendant intended to commit a sexual act against Jorja sufficient to satisfy the requirements of Rule 404(b).

In addition, the trial court did not abuse its discretion when it determined that the probative value of the evidence substantially outweighed the prejudicial impact of the evidence under Rule 403. "While all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial." *State v. Rainey,* 198 N.C. App. 427, 433, 680 S.E.2d 760, 766 (2009) (citation omitted). "The meaning of unfair prejudice in the context of Rule 403 is an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Id.* at 433, 680 S.E.2d at 766 (citation and quotation marks omitted).

Here, the trial court properly considered and weighed the probative value of the evidence against the danger of unfair prejudice. The trial court conducted a *voir dire* of Jorja and limited the testimony concerning the Exposure Incident to the issue of intent. Because Defendant has not demonstrated that the trial court's admission of the challenged evidence was so arbitrary that it could not have been the result of a reasoned decision, the trial court did not abuse its discretion, and there was no error in the admission of the 404(b) evidence at issue.

II. Plain Error Analysis under Rule 803(4)

Defendant next argues that the trial court plainly erred by admitting Ms. Kirk's testimony under Rule 803(4) of the North Carolina Rules of Evidence without a limiting instruction. Because Defendant did not object to the admission of evidence

under Rule 803(4), we review only for plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

> Plain error arises when the error is so basic, so prejudicial, so lacking in its elements that justice cannot have been done. Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.

State v. Bice, ___ N.C. App. ___, ___, 821 S.E.2d 259, 264 (2018) (*purgandum*), *review denied*, ___ N.C. ___, 831 S.E.2d 70 (2019).

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation omitted). However, our Supreme Court has held that "[t]he admission of evidence which is competent for a restricted purpose without limiting instructions will not be held to be error in the absence of a request by the defendant for such limiting instructions." *Coffey*, 326 N.C. at 286, 389 S.E.2d at 59 (citation omitted).

Defendant concedes that trial counsel did not make a request for a limiting instruction regarding use of Ms. Kirk's testimony. Because there is no error by the trial court, Defendant cannot show that a fundamental error occurred at trial, and, thus, cannot show plain error.

III. Motion to Dismiss the Attempted Rape and Attempted Incest Charges

Defendant further argues that the trial court erred in denying Defendant's motion to dismiss because the State failed to present substantial evidence of intent

regarding the attempted second-degree rape and attempted incest charges. Specifically, Defendant argues that the trial court should have dismissed both charges because the State failed to provide substantial evidence that Defendant specifically intended to have vaginal intercourse with Jorja. We disagree.

"On appeal, the standard of review for the denial of a motion to dismiss is to determine whether the evidence, when taken in the light most favorable to the State, would permit a reasonable juror to find defendant guilty of each essential element of the offense beyond a reasonable doubt." *State v. Mueller*, 184 N.C. App. 553, 560, 647 S.E.2d 440, 446 (2007). "The [S]tate is entitled to all reasonable inferences that may be drawn from the evidence. Contradictions in the evidence are resolved favorably to the [S]tate." *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986). "[T]he trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995) (citation omitted).

A criminal defendant may be convicted of attempted second-degree rape when the State proves "that (1) the defendant had the specific intent to rape the victim; and (2) that the defendant committed overt acts showing intent to rape, going beyond

mere preparation but falling short of the completed offense of second-degree rape." *State v. Mangum*, 158 N.C. App. 187, 192, 580 S.E.2d 750, 754 (2003). For Defendant to be convicted of attempted incest, "the State must prove that [D]efendant attempted to engage in 'carnal intercourse' with" his sister. *Mueller*, 184 N.C. App. at 562, 647 S.E.2d at 448; N.C. Gen. Stat. § 14-178 (2017).

"Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred." *State v. Gammons*, 260 N.C. 753, 756, 133 S.E.2d 649, 651 (1963). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

Substantial evidence necessary to satisfy the specific intent element of an attempted rape charge is shown when a defendant, "at any time during the attempt has an intent to gratify his passion upon the woman, notwithstanding any resistance on her part." *Mangum*, 158 N.C. App. at 192, 580 S.E.2d at 754. Our Supreme Court has found substantial evidence of specific intent for attempted rape where a sleeping victim had her clothes removed by the defendant, and the defendant got into bed with the victim without consent. *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974).

Furthermore, the State must also produce substantial evidence that Defendant committed an overt act for attempted rape. "[T]here is substantial precedent from our courts establishing that some overt act manifesting a sexual purpose or motivation on the part of the defendant is adequate evidence of an intent to commit rape." *State v. Dunston*, 90 N.C. App. 622, 625, 369 S.E.2d 636, 638 (1988). In an analogous case, *State v. Powell*, we found the State presented substantial evidence of the defendant's overt acts to support a finding of attempted rape. 74 N.C. App. 584, 328 S.E.2d 613 (1985). In that case, the State offered evidence that the defendant entered the victim's bedroom while she was asleep. *Id.* at 585, 328 S.E.2d at 614. The victim was awakened by the defendant's heavy breathing, and she saw the defendant standing completely naked close to her head. *Id.* at 585, 328 S.E.2d at 614. The defendant in that case left after being confronted by the victim. *Id.* at 585, 328 S.E.2d at 614.

At trial, Jorja testified that she was asleep in her bedroom when Defendant entered her room. Defendant was naked and got on top of her while she was still asleep. Defendant attempted to remove Jorja's bra, leggings, and underwear without her consent. Defendant touched Jorja's genital area without her consent, and Defendant only stopped the assault when he discovered that Jorja was menstruating.

Based upon this evidence, there was substantial evidence from which the jury could find that Defendant had the specific intent necessary for the crime of attempted

second-degree rape and attempted incest. In addition, there was substantial evidence that Defendant had engaged in an overt act manifesting a sexual purpose or motivation. Thus, the trial court did not err in denying Defendant's motion to dismiss the charges of attempted second-degree rape and attempted incest.

IV. Voluntary Intoxication

Finally, Defendant contends that the trial court committed plain error by failing to instruct the jury on voluntary intoxication. Defendant also asserts that his trial counsel was ineffective for failing to raise the defense of voluntary intoxication.

A. Jury Instruction

Initially, we note that Defendant failed to request an instruction on the defense of voluntary intoxication at trial. Accordingly, we review only for plain error. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333. "It is well established that an instruction on voluntary intoxication is not required in every case in which a defendant claims that he [committed a criminal act] after consuming intoxicating beverages or controlled substances." *State v. Cheek*, 351 N.C. 48, 74, 520 S.E.2d 545, 560 (1999) (citations and quotation marks omitted).

> Voluntary intoxication in and of itself is not a legal excuse for a criminal act. It is only a viable defense if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense. Before the trial court will be required to instruct on voluntary intoxication, a defendant must produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is

> being tried defendant's mind and reason were so completely intoxicated and overthrown as to render him *utterly incapable* of forming the requisite specific intent. In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon. The evidence must be viewed in the light most favorable to the defendant, and a defendant is entitled to rely exclusively on the evidence produced by the State.

State v. Wilson-Angeles, ___ N.C. App. ___, ___, 795 S.E.2d 657, 666 (2017) (*purgandum*).

Here, the evidence tended to show that Defendant understood his present situation and was able to communicate with Officer Bristow regarding what had transpired. Defendant admitted to drinking "just a little bit." Officer Bristow later testified that when he asked Defendant to submit to a breathalyzer test, Defendant refused, but said, "I'm not trying to [expletive deleted] myself over more than I already am." There is no evidence in the record that would establish that Defendant's "mind and reason were so completely intoxicated and overthrown as to render him *utterly incapable* of forming the requisite specific intent." *Id.* at ___, 795 S.E.2d at 666. Therefore, the trial court did not err by not instructing on voluntary intoxication. Because the trial court did not err, Defendant cannot show plain error.

B. Ineffective Assistance of Counsel

Defendant further alleges that his trial counsel was ineffective because defense counsel failed to request a jury instruction on voluntary intoxication.

In determining whether an attorney provided ineffective assistance, our Supreme Court has adopted the two-prong test from the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The first prong requires that "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." *Id.* at 687. If the defendant has satisfied the first prong, then "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." *Id.* If a defendant fails to satisfy both prongs, then "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

However, as stated above, the evidence presented at trial did not support an instruction on voluntary intoxication, and Defendant's claim for ineffective assistance of counsel must fail.

Conclusion

For the reasons stated herein, Defendant received a fair trial that was free from error.

NO ERROR.

Judges INMAN and MURPHY concur.

Report per Rule 30(e).