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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-695

Filed 7 May 2024

Bladen County, Nos. 21 CRS 272-78

STATE OF NORTH CAROLINA

v.

PETER MICHAEL FRANK, Defendant.

Appeal by Defendant from judgments entered 7 June 2022 by Judge Douglas B. Sasser in Bladen County Superior Court. Heard in the Court of Appeals 19 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Benjamin O. Zellinger, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant.

GRIFFIN, Judge.

Defendant Peter Michael Frank appeals from judgments entered upon jury verdicts finding him guilty of numerous offenses related to criminal conduct with minors. Defendant also petitions this Court for a writ of certiorari to review his guilty plea to indecent liberties with a child and indecent liberties with a student if we find that his notice of appeal given in open court was imperfect through no fault of his

own. Defendant argues the trial court violated a statutory mandate during sentencing, erred by allowing 404(b) evidence, and committed plain error instructing the jury. We deny Defendant's petition and hold Defendant received a trial free from error. However, we remand for the trial court to arrest judgment on one of Defendant's convictions for taking indecent liberties with a student.

I. Factual and Procedural Background

In 1997, Defendant, at the age of twenty-four, was hired as a middle school band teacher at Roland-Grise Middle School in Wilmington. The same year, Meredith[1], at the age of eleven, began her sixth-grade year at Roland-Grise. She played the saxophone and took the elective band course that Defendant taught. During seventh grade, Meredith started taking private percussion lessons from him and talked to him on the phone at night. Defendant regularly engaged in physical and sexual contact with Meredith during the private lessons. During the summer after Meredith's eighth-grade year, Defendant met Meredith at her parents' house while they were away and kissed her.

In January 2020, Rebecca, a former student of Defendant, contacted an individual at the New Hanover County District Attorney's Office informing them of inappropriate conduct that Defendant had engaged in with her while she was his student. Detective Whitt of the New Hanover County Sheriff's Office led the

[1] We use pseudonyms to protect the identities of minor victims. *See* N.C. R. App. P. 42(b).

investigation into Defendant. On 24 January 2020, Detective Whitt interviewed Defendant, during which Defendant provided Detective Whitt with his cell phone. Detectives discovered multiple photographs of female students' backsides.

On 10 February 2020, a New Hanover County grand jury brought a twelve-count indictment against Defendant, charging him with six counts of indecent liberties with a child and six counts of indecent liberties with a student relating to the photos found on his phone (20 CRS 843–848). On 20 March 2020, a New Hanover County grand jury indicted Defendant for one count of statutory sexual offense, two counts of first-degree sexual offense, three counts of sexual activity with a student, four counts of indecent liberties with a student, and seven counts of indecent liberties with a child relating to conduct occurring with Meredith. On 15 September 2020, the Honorable R. Kent Harrell transferred Defendant's case to Bladen County. New Hanover County files 20 CRS 843–848 were changed to Bladen County files 21 CRS 272–277 following the transfer.

On 19 August 2021, a Bladen County grand jury returned a superseding seventeen-count indictment charging Defendant with one count of sexual activity with a student, two counts of first-degree sexual offenses, three counts of indecent liberties with a student, four counts of statutory sexual offense, and seven counts of indecent liberties with a child (21 CRS 278).

At trial, the State introduced evidence of Defendant maintaining inappropriate relationships with other female students, Detective Whitt's interview, and the

photographs recovered from Defendant's phone. A jury found Defendant guilty of all seventeen counts in 21 CRS 278. Defendant pled guilty to the remaining twelve counts in 21 CRS 272–277.

The trial court consolidated all charges in 21 CRS 272–277 into one judgment and sentenced Defendant to sixteen to twenty-nine months incarceration to be served concurrent with the sentence imposed in 21 CRS 278.

Defendant entered a notice of appeal in open court from the judgments entered upon the jury verdicts in 21 CRS 278. Defendant did not appeal from the judgment entered upon his guilty plea.

II. Analysis

A. Petition

Defendant petitions this Court for a writ of certiorari, pursuant to Rule 21(a) of the North Carolina Rules of Appellate Procedure, after trial counsel failed to give proper notice of appeal from the convictions entered upon Defendant's guilty plea in 21 CRS 272–277.

Under N.C. Gen. Stat. § 15A-1444, a defendant who has pled guilty has the right to appeal whether the sentence imposed upon them:

> (1) [r]esults from an incorrect finding of the defendant's prior record level . . . or the defendant's prior conviction level . . . ;
>
> (2) [c]ontains a type of sentence disposition that is not authorized by [N.C. Gen. Stat. §] 15A-1340.17 or [N.C. Gen. Stat. §] 15A-1340.23 for the defendant's class of offense and

> prior record or conviction level; or
>
> (3) [c]ontains a term of imprisonment that is for a duration not authorized by [N.C. Gen. Stat. §] 15A-1340.17 or [N.C. Gen. Stat. §] 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a2)(1)–(3) (2023). A defendant who has pled guilty may also appeal "whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing [ ] if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense." N.C. Gen. Stat. § 15A-1444(a1) (2021).

Defendant does not appeal from 21 CRS 272–277 for any of these reasons. Recognizing this deficiency, Defendant filed a petition for a writ of certiorari. This Court may exercise its discretion to issue the writ "when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief." N.C. R. App. P. 21(a)(1). This Court "has jurisdiction and authority to issue [a] writ of certiorari . . . in the exercise of its discretion." *State v. Killette*, 381 N.C. 686, 691, 873 S.E.2d 317, 320 (2022).

Defendant failed to properly give notice of appeal from his guilty plea for any statutorily prescribed reason. Defendant was aware of the limitations that pleading guilty would impose upon his right to appeal. Defendant's petition for a writ of

certiorari is denied.

B. Sentencing

Defendant contends the trial court failed to follow the statutory mandate in N.C. Gen. Stat. § 14-202.4 by entering judgment against Defendant for count 13 and count 14 of 21 CRS 278—taking indecent liberties with a child and indecent liberties with a student, respectively—and then consolidating those judgments with the judgment for first-degree sexual offense.

North Carolina General Statute section 14-202.4 provides:

> [i]f a defendant, who is a teacher . . . at least four years older than the victim, takes indecent liberties with a victim who is a student, at any time during or after the time the defendant and victim were present together in the same school but before the victim ceases to be a student, the defendant is guilty of a Class G felony, *unless the conduct is covered under some other provision of law providing for greater punishment.*

N.C. Gen. Stat. § 14-202.4 (2000) (emphasis added). Taking indecent liberties with a child is punishable as a Class F felony. N.C. Gen. Stat. § 14-202.1 (2000).

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Jones*, 237 N.C. App. 526, 530, 767 S.E.2d 341, 344 (2014) (citations and internal marks omitted). "If the language used [in a statute] is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993)

(citation and internal marks omitted). We have interpreted the language "unless the conduct is covered under some other provision of law providing for greater punishment," as it appears in N.C. Gen. Stat. § 14-202.4, to indicate "the General Assembly was aware . . . that other, higher class offenses might apply to the same conduct." *State v. Davis*, 364 N.C. 297, 304, 698 S.E.2d 65, 69 (2010). In these instances, the General Assembly "intended an alternative: that punishment is *either* imposed for the more heavily punishable offense *or* [for the lesser offense], but not both." *Id.* (holding in the context of vehicular crimes); *see also Jones*, 237 N.C. App. at 531, 767 S.E.2d at 344 (holding the same for interfering with a witness and violating a domestic violence protective order); *State v. Williams*, 201 N.C. App. 161, 173, 689 S.E.2d 412, 418–19 (2009) (holding the same for assault inflicting serious bodily injury and assault by strangulation).

Here, Defendant's convictions for counts 13 and 14 were consolidated with his conviction for count 2, first-degree sexual offense. Defendant was sentenced within the presumptive range to 200–249 months in this consolidated judgment. Counts 13 and 14 allege Defendant took indecent liberties with Meredith between 1 June 2000 and 31 August 2000. The only evidence the State presented covering these dates was the interaction between Defendant and Meredith at her parents' house. On this occasion, the conduct constituting an indecent liberty was Defendant kissing Meredith. Judgment was entered against Defendant based on this conduct for both taking indecent liberties with a child and with a student. This was an erroneous

outcome because section 14-202.4 mandates that the conduct be punished only under the statute providing for a higher felony sentence, section 14-202.1.

Defendant contends the erroneous consolidation influenced the trial court's decision to run Defendant's sentences consecutively and not to find mitigating factors. The record reveals evidence to the contrary. The trial court considered defense counsel's request for a mitigated sentence but, in its discretion, chose to sentence Defendant within the presumptive range for the offense. *See* N.C. Gen. Stat. § 15A-1340.16(a) (2023). Moreover, this sentence was one of three for Class B1 felonies that also contained consolidated judgments and were within the presumptive range for the offense. Thus, it is unlikely that the erroneous consolidation influenced the trial court's decision to run them consecutively. *See State v. Curry*, 203 N.C. App. 375, 378–79, 692 S.E.2d 129, 134 (2010) (holding a defendant did not receive a harsher punishment because of an error in sentencing where the sentence for the higher offense was statutorily prescribed). While arresting judgment would not have affected the length of Defendant's sentence as it was consolidated with the judgment for a Class B felony, the trial court nonetheless should have arrested judgment on count 14 to comply with the statutory mandate.

Accordingly, we remand to the trial court for the sole purpose of arresting judgment on count 14 of 21 CRS 278 and do not disturb the sentence for first-degree sexual offense.

C. Jury Instructions

Defendant contends the trial court committed plain error by failing to instruct the jury on acts excluded from the definition of indecent liberties with a student. Specifically, Defendant argues by failing to exclude certain acts from the definition of indecent liberties in the jury instructions, the trial court allowed the prosecution to meet a lower burden for proving Defendant took indecent liberties with a student. The dates of the conduct alleged in these counts occurred between 1 January 2000 to 30 April 2000, 1 May 2000 to 31 May 2000, and 1 June 2000 to 31 August 2000, respectively.

Defendant did not object to the jury instructions at trial. Thus, we review "only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). Plain error is "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[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (citations and internal marks omitted). A defendant must show "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 799 (1997) (citations and internal marks omitted). In a case with highly conflicting evidence, "an error in the jury instructions *may* tilt the scales and cause the jury to convict a defendant." *State v. Chavez*, 378 N.C. 265, 270, 861 S.E.2d 469, 473 (2021) (emphasis in original) (citation omitted). However, "where the evidence against a defendant is overwhelming and uncontroverted, a defendant

cannot show that, absent the error, the jury probably would have returned a different verdict." *Id.* (citation and internal marks omitted).

Here, the trial court instructed the jury to enter a guilty verdict for Defendant taking indecent liberties with a student if, among other things, they found that he "willfully took any immoral, improper, or indecent liberties with the victim for the purpose of arousing or gratifying sexual desire[.]"

"'[I]ndecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts. . . . [The d]efendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial.'" *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180–81 (1990)). However, two acts, relevant here, that have been statutorily excluded from constituting an indecent liberty are cunnilingus and genital penetration. N.C. Gen. Stat. § 14-202.4(d)(3b) (2000); N.C. Gen. Stat. § 14-27.1(4) (2000) (recodified as N.C. Gen. Stat. § 14-27.20(4) (2015)).

Defendant contends the trial court committed plain error by failing to exclude these acts because evidence was offered to show Defendant did both to Meredith during their private lessons. We disagree.

First, count 14 alleged conduct occurring between 1 June 2000 and 31 August 2000. The only evidence of conduct during this period was Meredith's testimony that Defendant kissed her while at her parents' house and talked to her on the phone. Thus, the jury did not have evidence of any other acts occurring during this period

and therefore could not have been misled by the trial court's instructions.

Next, counts 8 and 12 allege conduct occurring between 1 January 2000 to 30 April 2000 and 1 May 2000 to 31 May 2000. The State presented overwhelming and uncontroverted evidence of acts, excluding those not included in the definition of indecent liberties, to support the verdicts for counts 8 and 12. Specifically, Meredith testified that Defendant would regularly "make out" with her during their weekly percussion lessons from the time she was in seventh grade through her eighth-grade year. *See State v. Hammet*, 182 N.C. App. 316, 322–23, 642 S.E.2d 454, 459 (2007) (holding the defendant's act of french kissing as substantial evidence of a lewd or lascivious act); *see also State v. Banks*, 322 N.C. 753, 767, 370 S.E.2d 398, 407 (1988) (holding the defendant's act of inserting his tongue into a child's mouth sufficient to constitute an indecent liberty).

Even assuming arguendo, that the instructions were in error by not excluding certain acts, Defendant has failed to show a jury likely would have reached a different conclusion because there was substantial, uncontroverted evidence of Defendant committing other acts sufficient to support the guilty verdicts.

Accordingly, Defendant has failed to show that the trial court's jury instructions amount to plain error.

D. 404(b) Evidence

Defendant contends the trial court erred in allowing 404(b) evidence to show intent and a common scheme or plan. Specifically, the State introduced testimony

from two of Defendant's former students and photographs taken from Defendant's phone which he had surreptitiously taken of female students' backsides.

"Rule 404(b) is a clear general rule of inclusion" and evidence of prior acts may be admitted for numerous purposes, "including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (citations and internal marks omitted). Evidence of prior acts is admissible unless "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).

"[W]hether Rule 404(b) evidence is properly admitted is a question of law and is reviewed de novo[.]" *State v. Pickens*, 385 N.C. 351, 355, 893 S.E.2d 194, 198 (2023) (citing *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 156). North Carolina courts have "'been markedly liberal in admitting evidence of similar sex offenses by a defendant.'" *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (quoting *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987)); *see also State v. White*, 331 N.C. 604, 612, 419 S.E.2d 557, 561–62 (1992) (explaining the liberal policy in "permitting the State to present such evidence" of prior sex offenses). However, evidence of prior acts offered to show a common scheme or plan "is still constrained by the requirements of similarity and temporal proximity." *Pickens*, 385 N.C. at 356, 893 S.E.2d at 198 (citations and internal marks omitted). Where there is evidence that "similar acts

have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan." *State v. Curry*, 153 N.C. App. 260, 264–65, 569 S.E.2d 691, 694 (2002) (citations and internal marks omitted).

Defendant met Charlotte during the 2001–2002 school year while she was a seventh-grader attending Roland-Grise. She was twelve years old. Charlotte and Defendant began communicating via AOL Instant Messenger and text message when she was in seventh grade. On one occasion, Charlotte mimicked a sexual act on a Pepsi bottle to which Defendant stated he wished he "could be that Pepsi bottle." On another occasion, Defendant requested to see illicit photographs of Charlotte. Defendant also touched Charlotte's chest outside of her shirt.

Defendant met Rebecca during the 2001–2002 school year while she was a sixth-grader attending Roland-Grise. She was twelve years old. Defendant and Rebecca began communicating over AOL Instant Messenger and phone. During the summer after her eighth-grade year, Defendant and Rebecca met at Wrightsville Beach to surf. After surfing, Defendant drove Rebecca to her house where he accompanied her inside and kissed her.

Both Charlotte and Rebecca testified to illicit acts and behaviors that were either concurrent with or just a few years after Defendant's relationship with Meredith. Thus, there was a close temporal proximity between the events testified to and the crimes for which Defendant was tried. *See State v. Shamsid-Deem*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) (upholding the admission of 404(b) evidence

of sexual offenses occurring over a twenty-year period). Further, both witnesses testified to a pattern of conduct where Defendant escalated his relationships with adolescent female students for the purpose of engaging with them sexually. Defendant would begin communicating with his female students online or over the telephone and then, over the course of their middle school careers, make sexual remarks to or advances on them. This series of events is similar to Defendant's conduct with Meredith where he communicated with her on the phone and ultimately made sexual advances on her during their private percussion lessons. Charlotte's and Rebecca's testimonies were sufficiently similar in fact and proximate in time to show a common scheme to engage in sexual conduct with adolescent female students. *See State v. Frazier*, 344 N.C. 611, 616, 476 S.E.2d 297, 300 (1996) (holding a pattern of sexual abuse to be "a classic example of a common plan or scheme").

Thus, the trial court did not err in admitting testimony from two of Defendant's prior students as 404(b) evidence of a common scheme or plan.

Defendant additionally challenges the admission of photographs. The State called Detective Whitt to testify about his investigation of Defendant. During Detective Whitt's testimony, the State introduced twelve photographs downloaded from Defendant's phone which were surreptitiously taken of female middle-school students from behind. Some of these photographs were taken in the band room at Roland-Grise. Excerpts of Defendant's interview were played during the trial. During the interview, Detective Whitt asked Defendant whether he was attracted to

the girls in the photos because they were young. Defendant responded, "Yes."

Defendant was charged with, among other sexual crimes, multiple counts of taking indecent liberties with a child. The State was required to prove:

> (1) the defendant was at least 16 years of age; (2) he was five years older than his victim; (3) he willfully took or attempted to take an indecent liberty with the victim; (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred; and (5) *the action by the defendant was for the purpose of arousing or gratifying sexual desire*.

State v. Martin, 195 N.C. App. 43, 50, 671 S.E.2d 53, 59 (2009) (citation and internal marks omitted) (emphasis added).

Here, some of the photographs were taken in the band room at Roland-Grise and all were taken of middle-school students showing, at a minimum, Defendant had an interest in having photographs of his students. His answer in the accompanying interview, that he found the girls in the photographs attractive, show his intent to have the photographs for the purpose of arousing or gratifying sexual desires. Thus, the photographs, and Detective Whitt's accompanying testimony, were evidence of Defendant's sexual desire and were probative of an element the State was required to prove; Defendant's intent to arouse or gratify his sexual desires through his conduct with Meredith.

Accordingly, the trial court did not err in admitting photographs taken from Defendant's phone as 404(b) evidence of intent.

After conducting a 404(b) review, we review the trial court's "Rule 403 determination for abuse of discretion." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. Rule 403 states that "[a]lthough 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. Gen. Stat. § 8C-1, Rule 403 (2021). "An abuse of discretion occurs when the trial court's ruling is manifestly unsupported by reason." *State v. Enoch*, 261 N.C. App. 474, 487, 820 S.E.2d 543, 553 (2018) (citation and internal marks omitted). "Limiting instructions mitigate the danger of unfair prejudice" and we "presume[ ] that the jury follows such instructions." *State v. Barnett*, 223 N.C. App. 450, 456, 734 S.E.2d 130, 135 (2012) (citations omitted).

Here, the trial court "considered the risk proposed . . . as to potential unfair or undue prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence." The trial court found that the State did not plan to call an excessive number of witnesses nor spend an extreme amount of time with these witnesses. The trial court also gave numerous limiting instructions throughout the trial for all 404(b) evidence introduced, which mitigated any potential prejudice against Defendant. Moreover, the admission of Charlotte's and Rebecca's testimonies and Defendant's photographs is consistent with this State's liberal policy of admitting 404(b) evidence in sexual offense cases. *See*

Beckelheimer, 366 N.C. at 130, 726 S.E.2d at 159.

Accordingly, the trial court did not err in admitting 404(b) evidence of Defendant's other relationships with his students and photographs downloaded from his phone.

III. Conclusion

For the aforementioned reasons, we hold that Defendant received a fair trial, free from error. We remand for the sole purpose of arresting judgment on count 14 of 21 CRS 278.

NO ERROR IN PART, REMANDED IN PART.

Judges HAMPSON and THOMPSON concur.

Report per Rule 30(e).