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NO. COA00-1482

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

STATE OF NORTH CAROLINA

v.

JOHNNY WAYNE WILLIAMSON

Davidson County
No. 98 CRS 12971

Appeal by defendant from judgment entered 6 July 2000 by Judge W. Erwin Spainhour in Superior Court, Davidson County. Heard in the Court of Appeals 9 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Diane A. Reeves, for the State.

Charles H. Harp II for the defendant-appellant.

WYNN, Judge.

Defendant appeals from his conviction of second-degree rape arguing first that the trial court committed reversible error by admitting under Rule 404(b) testimony of certain prior acts of defendant. N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). We disagree with his contention.

Under Rule 404(b), evidence of other bad acts must be excluded if its sole purpose is "to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b). Such evidence "is admissible so long as it is relevant to any fact or issue other than the character of the

accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986). Thus, evidence of defendant's prior bad acts is admissible for 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).

Defendant first argues that "the time period between the alleged prior acts of defendant and the acts upon which this appeal is based is of such a span that any similarity between the [] acts is severely attenuated." The acts giving rise to the charge of second-degree rape in this case took place in the fall of 1975 or 1976. The victim testified to other acts of a sexual nature taking place in the summer months of 1974 and 1975. The second witness testified concerning an incident of a sexual nature occurring in June 1974. The third witness recalled incidents of a sexual nature occurring in the summer of 1985. All three witnesses are related to defendant.

To determine the admissibility of these witnesses' testimony under Rule 404(b), the trial court conducted *voir dire* examinations of the proposed witnesses and heard arguments from counsel. At that hearing, the alleged victim--defendant's nine- or ten-year-old niece--testified that during the summer months of 1974 and 1975, defendant gave her swimming lessons. She testified that defendant would catch her when she jumped in the pool and would then fondle her under the water, rubbing her breasts and her vagina. Defendant would also slide his finger inside her vagina. She testified that defendant did similar things when she was learning to float. She

also mentioned an incident occurring at defendant's home in the fall of 1975 or 1976.

The second female witness, also a niece of defendant, testified on *voir dire* that in June 1974, she was helping defendant do some work in the attic of her home. Her parents told her to assist defendant by holding a flashlight. When defendant lifted her up into the attic, he rubbed her vaginal area. When they were in the attic together, defendant told her to come closer and to shine the light toward him. When she did, she saw that defendant had his penis out and was masturbating. He then put his hand in her shorts and inserted his finger into her vagina while continuing to masturbate. At the time of this incident the witness was twelve years old.

The third female witness testified on *voir dire* identifying defendant as her great-uncle. In the summer of 1985, when she was four or five years old, defendant put her on his shoulders and placed his hand behind his neck inside her panties and rubbed her vagina. She recalled another incident when she was alone with defendant in his house. While she sat in defendant's lap watching television, defendant placed his hand in her panties and rubbed her vagina.

Following *voir dire*, the trial court ruled that the challenged testimony was relevant to show defendant's motive, intent, common plan or scheme, and absence of mistake or accident; these are all proper purposes for admitting evidence of other bad acts under Rule 404(b). Nonetheless, even when other bad acts "are offered for a

proper purpose [under Rule 404(b)], 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); *see* N.C. Gen. Stat. § 8C-1, Rule 403 (1999). Rule 403 requires the exclusion of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403. "Whether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). Such a decision will not be disturbed unless it "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

The period of elapsed time between the events giving rise to the current charge and the other incidents is at most ten years. The prior incidents described by the alleged victim and the second witness occurred less than three years prior to the incident forming the basis for the charge. We note that "remoteness is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident," *State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999), and conclude that the lapse of time in this instance does not sufficiently diminish the similarities between the acts. Rather, the lapse of time goes to the weight of the evidence, not

to its admissibility. *See id.* Accordingly, we conclude that the trial court did not abuse its discretion in admitting the testimony regarding defendant's prior sexual acts. *See id.* at 405-06, 501 S.E.2d at 642 ("[t]he determination of whether relevant evidence should be excluded under Rule 403 is a matter that is left in the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion").

Lastly, defendant argues that the trial court committed plain error in its jury instructions. "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983) (citation omitted). In the instant case, a review of the whole record reveals no "plain error" requiring a new trial for defendant.

At the beginning of the charge conference, the trial court indicated that it intended to instruct the jury so as to require the State to prove three elements beyond a reasonable doubt as follows:

> First, that the defendant carnally knew the alleged victim, that is, that the defendant engaged in vaginal intercourse with the victim. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ. The actual emission of semen is not necessary. Second--because of the wording of the indictment--second, that the defendant abused the alleged victim. Vaginal intercourse with a 12-year-old child would be abuse in and of itself. And, third, that the victim was under 12 years of age at the time of the alleged occurrence.

Given the opportunity, defendant's counsel made no comment or request for additional instruction. Following closing arguments, the trial court instructed the jury concerning the elements of second-degree rape. Regarding the second element of abuse, the trial court instructed the jury that it must find:

> that the defendant abused the alleged victim. I instruct you that vaginal intercourse with a child under the age of 12 would be abuse in and of itself.

Defendant's counsel made no request for additional instructions on the elements of second-degree rape.

Defendant now argues that "by instructing that vaginal intercourse is itself abuse, the trial court merged elements one (1) and two (2), thereby removing the fact finding from the jury. By adding this wording, the judge removed the State's burden of proof on the element of abuse." As it existed at the time of the incident giving rise to the charge here, N.C. Gen. Stat. § 14-21 (repealed effective 1 January 1980 by N.C. Sess. Laws ch. 682, § 7) provided as follows:

> Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:
>
> (a) First-Degree Rape--
>
> (1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or
>
> (2) If the person guilty of rape is more

> than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.
>
> (b) Second-Degree Rape--Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court.

See State v. Perry, 291 N.C. 586, 591, 231 S.E.2d 262, 265 (1977).

Defendant is essentially arguing that "abuse" is an essential element of the crime of rape under this statute. We disagree. In *State v. Monds*, 130 N.C. 697, 41 S.E. 789 (1902), our Supreme Court construed the then-existing rape statute, which defined rape, in part, as "unlawfully and carnally knowing and abusing any female child under the age of 10 years[.]" 130 N.C. at 698, 41 S.E. at 789. Our Supreme Court stated that:

> the *gravamen* of the offense is the "knowing"--penetration with his person--without which there is no rape.
>
> The "abusing" is no part of the common (or statute) law definition of rape. . . .
>
> The "abusing" construed with the "carnally knowing" means the imposing upon, deflowering, degrading, ill-treating, debauching and ruining socially, as well as morally, perhaps, of the virgin of such tender years, who, when yielding willingly, does so in ignorance of the consequences and of her right and power to resist. . . . [T]he statute does not declare it to be an element of the crime to [] abuse the organs.

Id. at 700, 41 S.E. at 790. Despite the changes to the rape statute effected by N.C. Sess. Laws 1973 (Second Session 1974), ch.

1201, which divided the crime of rape into two separate offenses (first-degree and second-degree), the definition of rape *per se* did not change. *Perry*, 291 N.C. at 591, 231 S.E.2d at 265-66. Defendant's argument is without merit.[1]

No error.

Judges HUDSON and THOMAS concur.

Report per Rule 30(e).

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[1] We note additionally that the trial court's jury instructions conformed substantially with the pattern jury instructions that existed for the offense of second-degree rape under former G.S. § 14-21(b). *See* N.C.P.I., Crim. 207.12 (Replacement September 1979) (charging the jury that if it finds "from the evidence beyond a reasonable doubt that on or about [the date of the offense], [defendant] had sexual intercourse with [the victim] who at that time had not reached her twelfth birthday, it would be your duty to return a verdict of guilty of second degree rape").