NO. COA00-1533

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

STATE OF NORTH CAROLINA,

v. Columbus County
No. 97-CRS-9062
No. 97-CRS-9063

ALVIN E. LEGGETT,

Defendant-Appellant.

Appeal by defendant from judgment entered 19 April 2000 by Judge D. Jack Hooks, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 29 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General Melissa L. Trippe, for the State.

The McGougan Law Firm, by T. Scott Sessions, for Defendant-Appellant.

BRYANT, Judge.

This is an appeal arising out of a revocation proceeding in which defendant's probation was revoked after the trial court found that he committed a criminal offense.

On 17 November 1997, defendant Alvin E. Leggett pled guilty to two counts of second degree kidnapping. He received a suspended sentence and was placed on probation on the condition that he not commit a criminal offense. On 28 October 1999, the probation officer issued a violation report alleging that defendant committed

an assault on a female.

The State's evidence tended to show that the victim, Janice Wood [victim], was driving on Highway 701 at approximately 9:30 in the evening on 20 October 1999 when she noticed a car behind her flashing its lights on and off. The car followed her for approximately seven miles and continued to flash its headlights. The victim pulled into a parking lot and rolled down her window. Defendant got out of his car and told her that her car was leaking. When she opened her door, defendant said, "Let me feel your tits." [R. p. 7] Defendant then grabbed her breasts with both hands. Defendant fled when another car approached. On 25 October 1999 defendant was arrested and charged with several offenses including assault on a female. On 28 October 1999 two probation violation reports were issued against defendant.

On 13 March 2000, a Columbus County Superior Court Judge ruled that an authority to arrest was not served on defendant, and ordered defendant released. Before defendant left the courtroom, his probation officer issued new violation reports with an authority to arrest and defendant was again arrested. At the probation violation hearing, the judge ordered defendant's suspended sentence activated. Defendant appealed.

We begin with a general discussion of probation revocation proceedings. Probation revocation proceedings are not criminal prosecutions; rather, they allow the court to determine whether the defendant violated a valid condition of probation to warrant activating a prior sentence. *State v. Pratt*, 21 N.C. App. 538, 204

S.E.2d 906 (1974). The proceeding is not bound by the strict rules of evidence. *Id.*; *State v. Hill*, 132 N.C. App. 209, 510 S.E.2d 413 (1999). Furthermore, the alleged probation violation need not be proven beyond a reasonable doubt. *Hill*, 132 N.C. App. at 211, 510 S.E.2d at 414. Rather, "all that is required is that there be competent evidence reasonably sufficient to satisfy the judge in the exercise of a sound judicial discretion that the defendant had, without lawful excuse, willfully violated a valid condition of probation." *Pratt*, 21 N.C. App. 538, 540, 204 S.E.2d 906, 907 (1974) (citing *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967)); *State v. Hill*, 132 N.C. App. 209, 510 S.E.2d 413 (1999).

I.

Defendant first argues that the trial court erred in finding that the victim was a female, and in taking judicial notice of defendant's age, when the State provided no testimony of such facts. We disagree. N.C.G.S. § 14-33(c)(2) provides that "any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she assaults a female, he being a male person at least 18 years of age . . . ." N.C.G.S. § 14-33(c)(2) (1999). A court may take judicial notice of adjudicative facts sua sponte or upon request by the parties. N.C.G.S. § 8C-1, Rule 201(c), (d) (1999). An adjudicative fact is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort

to sources whose accuracy cannot reasonably be questioned." N.C.G.S. § 8C-1, Rule 201(b) (1999). Finally, "a court can take judicial notice of its own proceedings and records in the same case." *State v. Smith*, 73 N.C. App. 637, 638-39, 327 S.E.2d 44, 46 (1985) (holding that aggravating factors were supported by evidence, despite lack of testimony by witnesses, exhibits admitted into evidence, or stipulation by defendant at re-sentencing hearing, when ample evidence was presented at trial).

In this case, the court found as fact and took judicial notice in its 19 April 2000 Order that defendant was born on 19 October 1969. [T. p. 139; R. p. 41] When defendant objected, the judge stated, "I am permitted and take judicial notice that in viewing [defendant] he appears to be more than eighteen years of age and, indeed, the case file has within all of the pleadings a 1969 birthday, I believe it is." [R. p. 145] The 13 March 2000 Violation Reports for both second degree kidnapping charges listed defendant's birthday as 19 October 1969. [R. p. 14-23] Furthermore, the 13 March 2000 arrest warrant lists defendant's birthday as 19 October 1969. Thus, the court properly took judicial notice of records in the same case. *See Smith*, 73 N.C. App. 637, 327 S.E.2d 44 (1985).

Defendant also objects to the court's finding as fact that the victim was "a female person." [R. p. 39] Defendant argues that because the court made a finding for which the State presented no evidence, the court established for the State an essential element of the offense of assault on a female. We find no error here. The

victim testified before the court on 19 April 2000. She stated that her name was "Janice Wood," and attorneys from both parties referred to her as "Ms. Wood." Nothing in the record indicates that Janice Wood was other than a female person. The court correctly determined that Ms. Wood's sex was not subject to reasonable dispute. Thus, defendant's first assignment of error is without merit.

II.

Defendant next argues that the trial court erred in finding that service on defendant was proper and that defendant had adequate notice of the violations. We disagree.

Defendant cites only to N.C.G.S. § 15A-1345(a) in support of his argument; therefore, we look solely to the statute to determine whether the trial court erred. Section 15A-1345(a) states that

> [a] probationer is subject to arrest for violation of conditions of probation by a law-enforcement officer or probation officer upon either an order for arrest issued by the court or upon the written request of a probation officer, accompanied by a written statement signed by the probation officer that the probationer has violated specified conditions of his probation.

N.C.G.S. § 15A-1345(a) (1999). In this case it appears that the first set of probation violation reports were not properly served on defendant and the court ordered his release on 13 March 2000. However, defendant's probation officer issued new violation reports with an authority to arrest and defendant was immediately re-arrested on the same day before leaving the courtroom. [T. p. 92] The violation reports stated that a condition of defendant's

probation was that he commit no criminal offense. The report also stated that defendant violated probation by committing the offense of assault on a female. We find no error based on § 15A-1345(a). Accordingly, this assignment of error is overruled.

III.

Defendant next argues that the trial court erred in admitting evidence of prior bad acts under Rule 404(b) during cross-examination of defendant. Again, we disagree. At trial, defendant objected to the State's attempted offer of evidence that in the events leading up to defendant's two 1997 second degree kidnapping convictions, defendant stopped his victims by pulling his car behind them and flashing his lights. Defendant argued that the evidence was irrelevant. The court disagreed, stating that the evidence was relevant because it went toward a common purpose, scheme or plan, or lack of mistake, and was within a reasonable time proximity of about three years. [R. pp. 110-11] We agree.

Although the strict rules of evidence do not apply to probation revocation hearings, relevant evidence is generally admissible, except as otherwise provided. N.C.G.S. § 8C-1, Rule 402 (1999). Evidence is relevant if it has "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.G.S. § 8C-1, Rule 401 (1999). Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C.G.S. § 8C-1, Rule 403 (1999). "Evidence of other crimes . . .

is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C.G.S. § 8C-1, Rule 404(b) (1999). However, it may be admissible as proof of a plan or the absence of a mistake or accident. *Id.*

Defendant argues that evidence of his prior convictions was inadmissible because three-and-a-half years is too remote in time to be relevant under Rule 404(b). We disagree. In *State v. Chavis*, 141 N.C. App. 553, 540 S.E.2d 404 (2000), the defendant was convicted of statutory sexual offense and attempted statutory rape. The State's evidence indicated that the defendant sexually assaulted the victim, a family friend who was riding in his car, after pulling over and faking car troubles. At trial, the State presented evidence that ten years before, the defendant told his victim that there were car problems, pulled over in an isolated area and sexually assaulted the victim. The trial court allowed the evidence, holding that ten years was not to remote to show a common plan or scheme. *Id.* at 563, 540 S.E.2d at 412.

In the instant case, as in *Chavis*, evidence of defendant's prior actions was relevant because it tended to show a plan or absence of mistake. Furthermore, the 1996 acts were not too remote in time because they were less than four years before the incident giving rise to the proceeding in this case. Therefore, defendant's fourth assignment of error is without merit.

IV.

Defendant next argues that the trial court erred in using the standard that the State had to produce enough evidence to

reasonably satisfy the presiding judge of the defendant's guilt, rather than proof beyond a reasonable doubt, where all substantive charges against defendant had been dismissed prior to the hearing. We disagree. In *State v. Debnam*, 23 N.C. App. 478, 209 S.E.2d 409 (1974), the defendant argued that the trial court erred in activating his suspended sentence because the State took a voluntary dismissal on the charges on which the revocation was based. On appeal, this Court found no error because it was clear that the trial court's decision was not based on the charges which were dismissed. The Court based its decision that the defendant violated the conditions of his suspended sentence on the testimony of four witnesses.

In the instant case, defendant was charged with second degree sexual offense, attempted second degree sexual offense, second degree kidnapping and simple assault. The district court judge found no probable cause for the offense of second degree sexual offense, and the State took a voluntary dismissal on the remaining charges. However, while there were no pending criminal charges or convictions at the time of the revocation proceeding, Superior Court Judge Hooks properly made independent findings that defendant violated the conditions of his probation. These findings were based on the testimony of the victim, the arresting officer and defendant. Therefore, this assignment of error is without merit.

V.

Last, defendant argues that "the trial court erred in revoking the defendant's probation where the defendant, by stipulation, was

shown to be a model probationer, having no prior violations, and where the evidence of the defendant's commission of a criminal offense was arguably insufficient to sustain a conviction of the accused offense." We disagree. Defendant cites to N.C.G.S. § 15A-1344(a), which states that "probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation . . . ." N.C.G.S. § 15A-1344(a) (1999). Furthermore, defendant argues that the court has "considerable discretion" to decide whether there is good cause to modify the terms of probation. By defendant's own argument and authority, the court may revoke probation and has considerable discretion to decide whether good cause exists to do so. This Court will not overturn the trial court's findings of fact and judgment in a probation revocation hearing absent a gross abuse of discretion. *State v. Simpson*, 25 N.C. App. 176, 212 S.E.2d 566, *cert. denied*, 287 N.C. 263, 214 S.E.2d 436 (1975). We find no abuse of discretion here.

Conclusion

We hold that the trial court did not err in activating defendant's suspended sentence for violation of his probationary conditions. For the reasons stated above, we affirm.

AFFIRMED.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).