NO. COA01-1382

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

STATE OF NORTH CAROLINA

v.

KEITH DOUGLAS ROBINSON

Iredell County
Nos. 99 CRS 11470
99 CRS 11471
99 CRS 11472

Appeal by defendant from judgments entered 22 March 2001 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General William McBlief, for the State.

Deborah P. Brown for defendant-appellant.

THOMAS, Judge.

Defendant appeals from convictions of first-degree rape, first-degree sexual offense, and first-degree kidnapping. The trial court consolidated the rape and kidnapping counts for judgment and sentenced defendant to 339 to 416 months of imprisonment. The court imposed an additional, consecutive sentence of 339 to 416 months for the sexual offense.

Complainant, who is the cousin of defendant's ex-wife, testified that in the early afternoon of 21 June 1999, she drove past defendant as he was walking along Gardner Bagnal Boulevard in

Statesville, North Carolina. Complainant slowed her car and asked defendant if he needed a ride. He asked her to drive him to his home on Salisbury Road. When they arrived, complainant asked if she could use defendant's telephone. They went inside, and she made two phone calls. At some point, complainant saw defendant take pills. As she was leaving, defendant grabbed her and put his hand over her mouth. Defendant then put a box cutter to her neck and told her that she had "two choices[:]" either she would "do what he wanted[,]" or he would kill her.

Defendant took complainant into his bedroom and ordered her to undress. When she had finished, defendant made her get on the bed, telling her to "[l]ay here and act like you like it and don't scream[,]" and to "show [defendant] the love that you have for your kids." Defendant kept the box cutter at complainant's neck while he had vaginal intercourse with her. After he ejaculated inside her, defendant told complainant to put on her clothes. He then made complainant perform fellatio upon him.

Defendant told her not to tell his ex-wife or anyone else what had happened. She swore she would not tell anyone. Defendant walked into the front room and picked up the telephone. Believing she had a brief window of opportunity in which to escape, complainant repeated her promise not to tell as she "was easing to the door." When she turned the knob, defendant ran to her. After a struggle, complainant ran to a neighbor's house. She beat on the door until she was allowed inside by a woman she did not know. This neighbor, Shirley Smith, locked the door and called the

police. They arrived within fifteen minutes and took complainant to Iredell Memorial Hospital.

Complainant's testimony was corroborated by consistent statements she gave the day of the alleged attack to Smith, Iredell County Sheriff's Department Detectives Bill Hamby and Julie Gibson, victim advocate Brenda Swicegood, and Marie Meetie, a registered nurse, who examined complainant at the emergency room.

The State introduced a box cutter for illustrative purposes. Complainant confirmed that the box cutter resembled the weapon used by defendant, and that the blade on defendant's weapon appeared to be sharp.

Defendant's ex-wife testified that defendant had "put a knife to [her] throat and forced [her] to have sex with him" in the same bedroom approximately one week before the incident involving complainant. Defendant ordered his ex-wife to undress and lie down on the bed. Holding a butcher knife to her neck, defendant got on top of her, told her that she "had better respond," and threatened to kill her children if she screamed. Defendant kept his ex-wife in the bedroom for two to three hours, forcing her to have sex three times. After he had finished, defendant took some pills that had been prescribed for his ex-wife.

After hearing the testimony on voir dire, the trial court ruled evidence of this prior alleged rape admissible pursuant to N.C. R. Evid. 404(b), due to the "unusual facts present in both crimes." In written findings, the trial court noted the temporal proximity of the two assaults, the fact that both women were

relatives to whom defendant had "ready access[,]" and defendant's use of a sharp bladed weapon which he held to the women's necks. The trial court further found that in both instances the women were already in the house with defendant when he assailed them. The events occurred in the same bedroom and involved vaginal intercourse performed from the same position. Moreover, defendant ordered both women to remove their clothes, and to "respond" as if they "liked it." He also mentioned both women's children. Finally, the trial court found that defendant "took a number of pills" on both occasions. Based on these findings, the trial court concluded that the incidents were sufficiently similar to be admissible under Rule 404(b) to show a plan, scheme, or intent as well as a "certain modus operandi[.]" The trial court also concluded that the events were "not too remote in time" and that "the probative val[u]e of the proffered evidence substantially outweighs any prejudice to the defendant."

In addition to her testimony regarding the alleged rape, defendant's ex-wife further confirmed that, at the time she moved in with her mother, defendant kept a box cutter in the house.

Defendant testified that complainant initiated consensual sex with him in exchange for his assistance in paying her electric bill. Defendant denied threatening her with a box cutter or any kind of weapon. Regarding his ex-wife's allegations, defendant testified as follows:

> . . . I went and got a knife. And it wasn't to harm her. It was just to get her to talk to me. I wanted to know. And what she didn't do. And we had sex. I didn't force her to

> have sex. But with the knife in my hand, that's how she felt. She asked me to put the knife away before we began. And I did move it away. She was laying down, and it was kind of dark in the room, and she didn't know whether I had the knife in my hand or not.

Through Detective Hamby, defendant also introduced a statement he gave on the day of his arrest, in which he claimed complainant had sex with him for money to pay her electric bill. The property manager of the apartments where complainant lived in June 1999 testified that complainant had been in danger of having her electricity turned off for non-payment and was subsequently evicted in November 1999, for failing to pay her rent.

The trial court denied defendant's motion to dismiss the charges at the conclusion of the State's evidence and at the conclusion of all the evidence.

By defendant's first assignment of error, he argues the trial court erred in allowing his ex-wife to testify about the alleged rape that occurred in the week prior to 21 June 1999. Defendant contends this evidence tended to show nothing more than his general propensity to engage in such acts and was, therefore, inadmissible under N.C. R. Evid. 404(b). We disagree.

Rule 404(b) provides as follows:

> 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. R. Evid. 404(b) (2001). We have previously characterized this

rule as a "rule of inclusion of relevant evidence of other crimes, wrongs, or acts which is subject to but one exception, evidence should be excluded 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. Blackwell*, 133 N.C. App. 31, 34, 514 S.E.2d 116, 119, *cert. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999) (citing *State v. Jeter*, 326 N.C. 457, 459-60, 389 S.E.2d 805, 807 (1990)). In order to be admissible against a defendant, Rule 404(b) evidence must be both sufficiently similar to and not too remote in time from the charged offense. "The similarities . . . need not be 'unique and bizarre,' but rather must simply tend to support a reasonable inference that the same person committed both the earlier and later acts." *Blackwell*, 133 N.C. App. at 35, 514 S.E.2d at 119 (quoting *State v. Sneeden*, 108 N.C. App. 506, 509, 424 S.E.2d 449, 451 (1993), *aff'd*, 336 N.C. 482, 444 S.E.2d 218 (1994)).

We agree with the trial court that the challenged evidence was sufficiently similar and close in time to be admissible under Rule 404(b). As found by the court, defendant's wife and complainant are cousins. Both assaults occurred in the same bed in defendant's house. Defendant ordered both women to disrobe, demanded them to "respond" or "enjoy it," and alluded to their children. Defendant had vaginal intercourse while on top of both women and while holding a sharp blade to their necks. Defendant took pills after both encounters. Finally, the incidents occurred within a week of each other. The distinctive details and the temporal proximity of

the two events make the challenged testimony probative of defendant's modus operandi, scheme, or plan. *See State v. White*, 331 N.C. 604, 612-13, 419 S.E.2d 557, 562 (1992) (finding a "similar instrument was allegedly used by defendant against each of the women[,]" where he held a box cutter to one woman's neck while threatening to kill her and cut the second woman's neck with a knife several times" in committing his sexual assaults); *State v. Harris*, 140 N.C. App. 208, 212, 535 S.E.3d 614, 617, *appeal dismissed and rev. denied*, 353 N.C. 271, 546 S.E.2d 122 (2000).

Defendant also asserts that the risk of undue prejudice arising from the challenged evidence outweighed its probative value and required its exclusion under N.C. R. Evid. 403. He concedes, however, that rulings on the admissibility of evidence under Rule 403 are left to the trial court's discretion. *See State v. Robertson*, 115 N.C. App. 249, 255, 444 S.E.2d 643, 646 (1994). A trial court's decision on this issue is controlling 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. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 413 (1998) (citation omitted).

We find no abuse of discretion here. As discussed above, the two events occurred very close in time and bore significant factual similarities probative of a *modus operandi* or plan. Moreover, the trial court gave an appropriate limiting instruction to the jury prior to its deliberations. *Cf. State v. Hutchinson*, 139 N.C. App. 132, 137, 532 S.E.2d 569, 573 (2000).

By defendant's second assignment of error, he argues the trial court erred in denying his motion to dismiss. We disagree.

Specifically, defendant asserts there was "no concrete evidence" that he displayed a weapon in his encounter with complainant. However, complainant's testimony was sufficient evidence to show defendant's use of a deadly weapon. *See State v. Grimes*, 96 N.C. App. 489, 493, 386 S.E.2d 214, 217 (1989). Defendant also claims there was "simply no evidence that the victim 'was not released in a safe place,'" as required to establish first-degree kidnapping under N.C. Gen. Stat. § 14-39(b) (1999). This claim is likewise without merit. Complainant testified that defendant tried to physically restrain her as she attempted to flee his house. Thus, "[d]efendant never 'released' the victim; she escaped by her wits. The motion to dismiss was properly denied." *State v. Mayse*, 97 N.C. App. 559, 565, 389 S.E.2d 585, 588 (1990).

By his final assignment of error, defendant argues he received ineffective assistance of counsel, insisting that his trial attorney "effectively did nothing to represent [his] interests in his trial or sentencing." Defendant claims that his counsel "failed to object to most of the evidence offered by the State," failed to argue the objections she did raise, failed to conduct adequate cross-examinations, and "failed to preserve for the record the [d]efendant's mental evaluation, which is mentioned in sentencing." Defendant notes that he was never asked on the record if he intended to waive the insanity defense, despite evidence showing he "was suffering from some mental defect at the time of

the sexual assaults on [his ex-wife and complainant]." We disagree.

A defendant complaining of ineffective assistance of counsel must show both that counsel's performance fell below an objective standard of reasonableness and that counsel's deficiencies had a probable impact on the outcome at trial. *See State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 249 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984)). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d at 249.

Defendant has failed to satisfy either part of the *Braswell* standard. He offers no specific suggestion as to how his counsel could have more effectively objected to the State's evidence or cross-examined its witnesses. He suggests no subject area that his counsel either failed to address or should have explored more thoroughly. We have carefully reviewed the transcript of defendant's trial and conclude that counsel performed well within the acceptable range of professional competence. We note that counsel used cross-examination to establish several facts favorable to the defense, including the following: (1) police never found a box cutter, despite searching defendant's residence soon after the incident; (2) police found a condom wrapper in the residence,

potentially contradicting complainant's account of events; (3) none of the witnesses other than complainant had any personal knowledge of what transpired between defendant and complainant; (4) complainant had no noticeable injuries around her genital area or on her wrists; (5) the physical evidence was equally consistent with defendant's claim of consensual sex; and (6) defendant's ex-wife had not reported her alleged rape to police.

Additionally, there is no deficiency in counsel's handling of the evidence of defendant's mental illness. The record on appeal contains the psychological evaluation of defendant prepared on 17 March 2001 by Dr. Faye E. Sultan, who diagnosed defendant as suffering from "Depression" at the time of the alleged offenses. Dr. Sultan noted that depression affects an individual's "mood and cognition" and opined that defendant's condition "significantly impaired his reasoning and judgment."

Contrary to defendant's suggestion, the report provided no basis for a defense during the guilt/innocence phase of trial. In order to assert a defense of insanity, a defendant must show that he was laboring "under such a defect of reason, from disease or deficiency of mind, as to be incapable of knowing the nature and quality of his act, or if he [did] know this, was [he] by . . . defect of reason incapable of distinguishing between right and wrong in relation to such act." *State v. Vickers*, 306 N.C. 90, 94, 291 S.E.2d 599, 603 (1982), *overruled on other grounds, State v. Barnes*, 333 N.C. 666, 430 S.E.2d 223 (1993). Although Dr. Sultan found defendant's judgment impaired due to depression, nothing in

her report suggested a belief that he lacked the capacity to understand the nature and quality of his actions or to distinguish between right and wrong. Defendant offered sworn testimony that complainant initiated and consented to the sexual contact, not that he was unaware of the nature of his actions or that he could not tell right from wrong. *See State v. Attmore*, 92 N.C. App. 385, 393-94, 374 S.E.2d 649, 655 (1988).

We note that defense counsel tendered Dr. Sultan's report to the trial court at sentencing, asking it to find as a mitigating factor that "defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduces [his] culpability for the offense." Although the trial court elected to sentence defendant in the presumptive range, counsel properly made use of the psychological evidence for its only viable purpose.

Accordingly, we hold defendant received a fair trial free from error.

NO ERROR.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).