NO. COA01-782

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. Gaston County
Nos. 98 CRS 18102, 18104-05

KELVIN L. HOWELL

Appeal by defendant from judgment dated 27 May 1999 by Judge Timothy S. Kincaid in Gaston County Superior Court. Heard in the Court of Appeals 26 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Diane G. Miller, for the State.

David Childers for defendant-appellant.

GREENE, Judge.

Kelvin L. Howell (Defendant) appeals a judgment dated 27 May 1999 entered consistent with a jury verdict finding him guilty of taking indecent liberties with a child, a statutory sexual offense, and statutory rape.

On 3 August 1998, Defendant was indicted for indecent liberties with a minor, statutory sexual offense of a person who is fifteen years old, and statutory rape of a person who is fifteen years old. At trial, the State's evidence revealed that in 1997 and 1998, Defendant, then thirty years old, worked as a third-

shift, part-time counselor at a teen shelter in Belmont, North Carolina. The minor victim, A.G., who was fifteen years old, stayed at the teen shelter from 29 December 1997 until 28 January 1998. After being at the shelter for several weeks, Defendant allowed A.G. and her roommate to leave their room after the lights were out. During those times, the two girls would watch television. Sometimes Defendant and A.G. would go into the shelter's office alone.

During her time at the shelter and while out of her room, A.G. engaged in oral and vaginal intercourse with Defendant. A.G. recorded the dates of these sexual encounters on a calendar in her room. A.G. also told her roommate about her activities with Defendant, and the roommate was aware of A.G.'s calendar notations of her sexual activities with Defendant. After leaving the shelter and being placed in a group home, A.G. ran away to a friend's house on or about 17 February 1998. She thereafter contacted Defendant several times. Defendant subsequently picked up A.G. and took her to a motel. At the motel, Defendant engaged in oral and vaginal intercourse with A.G. The next morning, Defendant took A.G. to her mother's residence.

Defendant objected to the proposed testimony of N.E., a past resident of the teen shelter, regarding her alleged sexual encounters with Defendant. The trial court heard N.E.'s testimony on *voir dire*, made findings regarding the similarities between Defendant's sexual acts with A.G. and N.E. as well as the temporal proximity of those acts, and subsequently overruled Defendant's

objection. The trial court instructed the jury and admitted N.E.'s testimony into evidence for the limited purpose of showing intent and the existence of "a state of mind in . . . Defendant, a certain scheme or plan or design or system involving the alleged crime charged." The trial court repeated its instruction during final jury instructions.

N.E. testified Defendant had engaged in sexual intercourse with her as well. N.E., fifteen years old at the time, was admitted to the shelter on 18 February 1998. N.E. was not assigned a roommate. On the night of 18 February 1998, while working the third shift, Defendant went into N.E.'s room, undressed her, and engaged in vaginal intercourse with her. Thereafter, when N.E. began to bleed, Defendant instructed her to go to the bathroom. Upon her return from the bathroom, Defendant called N.E. into the shelter's office, at which time he again engaged in vaginal intercourse with her. The next morning, when N.E.'s mother picked her up from the shelter, N.E. told her mother about the events of the previous night. N.E.'s mother then took the teen to the hospital, where she was examined by a doctor and interviewed by a law-enforcement officer. While the State initially indicted Defendant for offenses related to N.E.'s allegations, the charges were not prosecuted based on the State's belief that the evidence was insufficient.

Defendant denied ever having engaged in sexual activities with A.G. or N.E. Although he admitted having spoken to A.G. on 17 February 1998, Defendant stated that his wife was on an extension

during the conversation and all he did was encourage A.G. to return to the group home. As to his name and signature appearing on the registration card at the motel, Defendant testified he had taken a friend, who had been fighting with his roommate and wanted to be alone, to the motel and registered the friend under his name because the friend did not have any identification on him. Defendant was, however, unable to explain why the registration card reflected that there had been two guests at the motel.

During direct examination, Defendant asked Elizabeth Hawk (Hawk), a residential coordinator for a mental health center, if she knew about Defendant's character and reputation in the community. At this point, the State objected. The State asked Defendant to specify which area of reputation or character he was attempting to elicit from Hawk and noted that there was evidence Defendant had previously been arrested for drug possession. The State observed that "before [Defendant] opens the door[,] . . . [he should] give second consideration to his question" because a witness' unawareness of a defendant's prior bad acts could properly be used to attack the witness' credibility as to her ability to speak to the defendant's character and reputation. The trial court stated "[t]he trait of . . . Defendant for honesty or truthfulness or law abidingness . . . would certainly be admissible, but I agree [with the State that] it does tend to open the door for cross[-]examination for specific instances." At the conclusion of this conference, Defendant withdrew his question to Hawk regarding Defendant's character and reputation.

The jury found Defendant guilty, and the trial court consolidated the charges for judgment and sentenced Defendant to 240 to 297 months imprisonment.

The issues are whether: (I) N.E.'s testimony regarding the details of Defendant's alleged sexual activity with her was admissible under N.C. Gen. Stat. § 8C-1, Rules 404(b) and 403; and (II) the trial court committed reversible error in its ruling regarding Defendant's attempt to open the issue of his character.

I

Defendant argues the trial court erred in introducing the testimony of N.E. regarding the details of Defendant's alleged sexual activity with her. Specifically, Defendant contends the testimony was not admissible under N.C. Gen. Stat. § 8C-1, Rules 404(b) and 403. We disagree.

Rule 404(b) prohibits the admission into evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show that he acted in conformity therewith. [Such evidence] 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.G.S. § 8C-1, Rule 404(b) (1999); *see State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (describing Rule 404(b) as a rule of inclusion). In *State v. Harris*, this Court held that "'[w]hen evidence of the defendant's prior sex offenses is offered for the proper purpose of showing plan, scheme, system, or design . . . the

"ultimate test" for admissibility has two parts: First, whether the incidents are sufficiently similar; and second, whether the incidents are too remote in time.'" *State v. Harris*, 140 N.C. App. 208, 212, 535 S.E.2d 614, 617 (quoting *State v. Davis,* 101 N.C. App. 12, 18-19, 398 S.E.2d 645, 649 (1990), *appeal dismissed and disc. review denied*, 328 N.C. 574, 403 S.E.2d 516 (1991)), *appeal dismissed and disc. review denied*, 353 N.C. 271, 546 S.E.2d 122 (2000). Moreover, in instances where such evidence is offered to prove a defendant's intent to commit the similar sexual offense charged, our Supreme Court has stated a rule of liberal admission. *See State v. White*, 331 N.C. 604, 612, 419 S.E.2d 557, 561-62 (1992) (citing *State v. Boyd*, 321 N.C. 574, 578, 364 S.E.2d 118, 120 (1988) (evidence the defendant was found naked in bed with a young female relative on prior occasion admissible to demonstrate the defendant's intent or scheme to take sexual advantage of young female relatives left in his custody)).

The admissibility of evidence under Rule 404(b) is further "subject to the weighing of probative value versus unfair prejudice mandated by [N.C. Gen. Stat. § 8C-1, Rule] 403." *State v. Agee*, 326 N.C. 542, 549, 391 S.E.2d 171, 175 (1990). Our Supreme Court noted in *Coffey* that evidence which is probative of the State's case is necessarily prejudicial to the defendant; thus, "the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *Id.*

In the instant case, the trial court heard the testimony of

both A.G. (before the jury) and N.E (on *voir dire*), and thereafter, made findings regarding the similarities between Defendant's sexual acts with A.G. and N.E. and the temporal proximity of those acts.[1] The trial court then concluded that N.E.'s testimony was admissible under Rules 404(b) and 403 for the limited purpose of showing intent and common scheme or plan. At the time of N.E.'s testimony before the jury, the trial court gave a limiting instruction and repeated this limitation during final jury instructions, which served to minimize the degree of prejudice to Defendant.

Defendant's reliance on *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992), is misplaced. In *Scott*, our Supreme Court held that where the probative value of a prior alleged offense depends upon the defendant having in fact committed the prior alleged offense, his acquittal of the offense in an earlier trial so divests the evidence of probative value that, as a matter of law, it cannot outweigh the tendency of such evidence to unfairly prejudice the defendant. *Id.* at 44, 413 S.E.2d at 790. The State's decision in this case to not prosecute Defendant for engaging in sexual acts with the minor N.E is not the equivalent of an acquittal of the charges. *See State v. Hickey*, 317 N.C. 457, 466, 346 S.E.2d 646, 652 (1986) (the State's pre-trial remark that it was not proceeding on some of the offenses charged in an indictment does not have the immediate effect of an acquittal).

As Defendant was not unfairly prejudiced, the trial court did

[1]The events described by A.G. occurred between December 1997 and February 1998. The events N.E. testified to occurred on 18 February 1998.

not abuse its discretion in admitting the testimony of N.E. This assignment of error is therefore overruled.

II

Defendant next argues the trial court committed reversible error in ruling the State could introduce evidence of his unrelated arrest for drug possession to rebut evidence of his good character. As Defendant had not been tried or convicted of those charges, he contends the trial court's ruling was in error. We disagree.

During his case-in-chief, Defendant asked Hawk if she knew about Defendant's character and reputation in the community. The State objected and asked to be heard outside of the jury's presence. During an exchange with Defendant, the State reminded him that investigative files revealed Defendant had been arrested for drug possession in the past. The State cautioned Defendant that "before [he] opens the door[,] . . . [he should] give second consideration to his question." At that point, the trial court commented on its perception of the law, and Defendant subsequently withdrew his question to Hawk.

We first note that in withdrawing his question, Defendant waived appellate review of the trial court's ruling. *See State v. Larrimore*, 340 N.C. 119, 149, 456 S.E.2d 789, 805 (1995). Assuming, however, the trial court's ruling was properly before this Court, Defendant has misinterpreted the trial court's statements. Contrary to Defendant's contentions, the trial court's statements were no more than a restatement of N.C. Gen. Stat. § 8C-1, Rules 404 and 405. Further, the trial court's statements tend

to show agreement with Defendant that his evidence of good character was admissible. The trial court merely cautioned that said evidence would open the door for the State to cross-examine the witness as to specific instances of Defendant's conduct. At no time did the trial court issue a ruling as to the admissibility of evidence regarding any unrelated drug charges of which Defendant had not been convicted. Accordingly, this assignment of error is also overruled. Defendant's remaining assignments of error, which are not discussed in his brief, are deemed abandoned. *See* N.C.R. App. P. 28(a).

No error.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).