NO. COA02-313

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v. Pitt County
Nos. 98 CRS 19149, 19150, 19151, 19154, 19155, 19157, 19158

BENJAMIN CARL HARDING

Appeal by defendant from judgments entered 6 September 2001 by Judge James R. Vosburgh in Pitt County Superior Court. Heard in the Court of Appeals 31 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jennie Wilhelm Mau, for the State.

McCotter, McAfee & Ashton, PLLC, by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant-appellant.

WALKER, Judge.

On 28 January 1999, defendant was convicted of three counts of first degree statutory sexual offense and four counts of taking indecent liberties with a child. Originally, defendant was improperly sentenced under the Structured Sentencing Act, but he was subsequently sentenced under the Fair Sentencing Act to an active term of life imprisonment plus two consecutive terms of life imprisonment and one term of 5 to 6 months in prison.

The State's evidence tended to show the following: The victim began living with defendant, her step-father, when she was 6 years of age. When the victim was 9 years of age, defendant began to fondle her and subject her to anal intercourse regularly. These acts happened at least twice weekly and continued until the victim was 13 years of age, when she reported the abuse.

Dr. Coker, a court-recognized expert in child sexual abuse, testified that the victim displayed physical and emotional symptoms consistent with repeated anal and vaginal penetration over the subject period of time. Additionally, a child protective services investigator with Pitt County Social Services and a Pitt County Sheriff's Detective interviewed the victim separately, and each testified that the victim's interview corroborated her testimony.

Defendant first contends the trial court erred in denying defense counsel's motion to withdraw for inexperience and lack of preparation time. A motion to withdraw is left to the sound discretion of the trial court and will be disturbed on appeal only upon a showing of abuse of that discretion. *State v. Skipper*, 146 N.C. App. 532, 537, 553 S.E.2d 690, 693 (2001). On review, this Court will reverse the trial court's denial of the defendant's motion to withdraw only if the defendant establishes prejudicial error through ineffective assistance of counsel. *Id.* Our Supreme Court has adopted the test defined by the United State Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), to determine claims of ineffective assistance of counsel. *See State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). The

defendant bears the burden of showing (1) his counsel's performance fell below an objective standard of reasonableness and (2) he was so prejudiced by his counsel's performance that there exists a reasonable probability that, absent error, the result of his trial would have been different. *State v. Jaynes*, 353 N.C. 534, 547-48, 549 S.E.2d 179, 191 (2001).

Defendant's trial counsel argued that he should have been allowed to withdraw because he had not had adequate time to prepare and had never defended a case of this magnitude. Defendant also now questions certain trial strategies and decisions made by his trial counsel. However, defendant's trial counsel made numerous objections on evidentiary grounds, successfully argued for limiting instructions and successfully moved to dismiss defendant's indictment for first degree sexual offense and an indictment for indecent liberties.

Although defendant claims his trial counsel provided ineffective assistance, he has not shown that his trial counsel's performance was below the standard reasonably expected of competent counsel or that the result of his trial would have been different absent his trial counsel's errors. Therefore, the trial court did not abuse its discretion in denying defense counsel's motion to withdraw.

Next, defendant contends the trial court erred in overruling his objection to the victim's testimony about prior acts of sexual abuse between the victim and defendant. Specifically, the victim testified about two incidents occurring approximately two years

prior to the dates of the acts for which defendant was charged and convicted. The trial court allowed the testimony as admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b). The defendant also requested a limiting instruction, which the trial court gave at the close of all the evidence.

Rule 404(b) is a general rule of inclusion, allowing the admission of prior acts by a defendant into evidence. *State v. Golphin*, 352 N.C. 364, 443, 533 S.E.2d 168, 221 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). It provides:

> 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. Gen. Stat. § 8C-1, Rule 404(b) (2001). Relevant evidence of acts conforming to Rule 404(b) will be excluded where the only probative value of the evidence "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).

This Court has previously found prior sexual abuse acts with a child are properly admissible as evidence when they tend to show specific intent, scheme and design to take indecent liberties with a child. *Id.* at 278-80, 389 S.E.2d at 54-55; *State v. Beckham*, 145 N.C. App. 119, 123-24, 550 S.E.2d 231, 235-36 (2001). Furthermore, whether to exclude evidence under Rule 404(b) is left to the sound discretion of the trial court, and the trial court's ruling will be

disturbed only where it is "so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993).

Here, the evidence was admitted by the trial court to show defendant's plan, scheme and design to commit the acts charged and as being relevant since the victim was the same child and the circumstances were substantially similar. As our Courts have found acts committed as much as 26 years prior to be admissible to show plan or scheme, the fact that the prior incidents happened two years before the acts for which defendant was charged and convicted does not make them too remote in time to be admissible. *State v. Frazier*, 344 N.C. 611, 614-16, 476 S.E.2d 297, 299-300 (1996); *State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996); *State v. Sneeden*, 108 N.C. App. 506, 510, 424 S.E.2d 449, 452 (1993). Therefore, we find the trial court did not abuse its discretion in allowing the victim's testimony of defendant's prior acts. Defendant also contends the trial court erred in allowing the State to introduce photographs of the victim when she was 9 and 10 years of age. The pictures were posed school pictures and were admitted as relevant to depict the victim at the time of the incidents, because the victim was 16 years of age at the time of trial.

A witness may use photographs to illustrate anything about which the witness may testify. *State v. Sallie*, 13 N.C. App. 499, 508, 186 S.E.2d 667, 673 (1972). Here, the State argued, and the trial court agreed, that the photographs were relevant to the

jury's understanding of the defendant's acts against the victim. Even assuming the photographs were not relevant, not all trial errors require reversal. *State v. Mason*, 144 N.C. App. 20, 27-28, 550 S.E.2d 10, 16 (2001). Rather, to be reversible, the error must be material and prejudicial, and an error is not prejudicial unless "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *Id.* Defendant has failed to assert how he was unduly prejudiced by the admission of the photographs or that, absent their admission, the jury's determination would have been different.

Finally, defendant contends that the trial court erred in refusing to allow him to question the victim's expert witness about the victim's recent sexual activity. Defendant attempted to question the expert witness to determine if the victim's injuries could have been caused by other sexual conduct. The trial court barred defendant's questions as inadmissible under N.C. Gen. Stat. § 8C-1, Rule 412.

Although Rule 412 allows evidence of specific instances of sexual behavior to be offered into evidence to show the acts charged were not committed by the defendant, N.C. Gen. Stat. § 8C-1, Rule 412 (2001), the evidence excluded by the trial court in the present case was not relevant to show that someone other than defendant committed the acts charged. Specifically, the victim admitted that she had vaginal intercourse with her boyfriend beginning at 13 years of age. However, defendant was charged for

having anal intercourse with the victim. Furthermore, the expert witness testified that the damage to the victim's hymen and rectum occurred prior to the victim reaching 12 years of age. Therefore, any sexual behavior of the victim after reaching 13 years of age involving only vaginal intercourse was not relevant to show that someone else committed the acts for which defendant was convicted.

We find defendant's remaining assignments of error are without merit; therefore, they are overruled.

No error.

Judges McCULLOUGH and CAMPBELL concur.

Report per Rule 30(e).