An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-1196

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v.

PHILLIP ERVIN HIGGS,
Defendant.

Pitt County
Nos. 04 CRS 050602
04 CRS 050603

Appeal by Defendant from judgments entered 21 April 2005 by Judge Clifton W. Everett, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 20 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Belinda A. Smith, for the State.

Paul T. Cleavenger for defendant-appellant.

WYNN, Judge.

Although evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) of the North Carolina Rules of Evidence so long as it also "relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried." *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986). In this case, Defendant contends that the testimony of a witness was improperly admitted under Rule 404(b). As there were substantial similarities between the crime

being charged and the incident the witness testified about, the trial court did not abuse its discretion in admitting the testimony.

The State's evidence at trial tended to show the following: Defendant operated an automotive repair shop in Greenville, North Carolina, which also served as a local hangout for the children in the community. The children played at a basketball court behind the shop and Defendant set up a hotdog stand that he allowed the children to run. Although Defendant paid for the hotdogs and supplies to run the stand, he allowed the children to keep all of the money made at the stand.

The child in this matter was fifteen years old at the time the offenses occurred. Defendant knew the child because she spent time at his repair shop and he had mentored her brother in basketball. On the evening of 10 January 2004, Defendant offered to drive the child to the home of one of her friends. After driving past the friend's home and circling back, Defendant stopped his vehicle two lots before the friend's home. He told the child she was beautiful and he wanted to ask her a question. The child informed Defendant she did not want him to ask her a question. Defendant then told the child not to tell anyone, which prompted her to turn her head and look at him. When she did so, she saw that Defendant had pulled his erect penis out of his pants and held it in his hands.

Four additional witnesses, including the law enforcement officer with the Greenville Police Department who investigated the incident, testified that the child had informed them that Defendant

had exposed himself to her.

Over Defendant's objection, the State sought to offer evidence of Defendant's other acts of indecent exposure through the testimony of Lauren[1]. After a *voir dire* hearing, the trial court ruled that Lauren's testimony was admissible under Rule 404(b) of the North Carolina Rules of Evidence.

Lauren testified she was sixteen years old at the time of the offenses against the child. Lauren and her family lived rent-free in a trailer behind Defendant's house. She was friends with Defendant's son and spent time at Defendant's repair shop. Lauren also depended upon Defendant to drive her places. Lauren testified that on 9 January 2004, Defendant asked her to ride in his vehicle with him to a store to pick up some automotive parts. On the way back to Defendant's repair shop, Defendant took his erect penis out of his pants and masturbated in front of her. On 10 January 2004, the same day as the incident with the child, Lauren rode with Defendant in his vehicle to a restaurant. Defendant masturbated in the vehicle while they were on the way to the restaurant and asked Lauren to touch his penis. Lauren refused. On 11 January 2004, Lauren again rode with Defendant in his vehicle to a restaurant. She testified that Defendant again masturbated in front of her and asked her to touch his penis while they were in the vehicle. When she refused to do so, Defendant offered her money to touch his penis and asked her to pull down her jeans and expose herself.

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[1] For the purposes of this opinion we will use the pseudonym "Lauren" when referring to the minor witness.

Lauren refused. At various times when Defendant exposed himself to Lauren, he told her not to tell anyone. Lauren further testified that several weeks before the incident with Lauren, Defendant engaged in sexually inappropriate behavior with her including turning his television to a pornographic channel when Lauren was at Defendant's house, kissing her while the two were in Defendant's vehicle, and touching her breast.

On 20 April 2005, a Pitt County jury found Defendant Phillip Ervin Higgs guilty of indecent exposure and taking indecent liberties with a child. On 21 April 2005, the trial court entered judgments sentencing Defendant to sixty days imprisonment for the offense of indecent exposure and to a suspended sentence of nineteen to twenty-three months imprisonment for taking indecent liberties with a child. From the judgments entered, Defendant appeals.

In his sole assignment of error, Defendant contends the trial court committed reversible error in allowing the testimony of Lauren pursuant to Rule 404(b) of the North Carolina Rules of Evidence. We disagree.

Rule 404(b) provides in relevant part:

> 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) (2005). The North Carolina

Supreme Court has held that Rule 404(b) is a rule of inclusion. *State v. Lloyd*, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001) (citing *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)). Although evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried." *Morgan*, 315 N.C. at 637, 340 S.E.2d at 91.

The appellate courts in this State liberally admit evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b). *State v. Thaggard*, 168 N.C. App. 263, 270, 608 S.E.2d 774, 780 (2005) (citing *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 419 (1986)). Here, the trial court concluded that evidence of Defendant's acts with Lauren were admissible for the proper purposes of showing Defendant's motive, plan or scheme. We agree.

When evidence of a defendant's other sex offenses is offered for a proper purpose, "the ultimate test for determining whether such evidence is admissible [under Rule 404(b)] is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988); *see also State v. Pruitt*, 94 N.C. App. 261, 266, 380 S.E.2d 383, 385, *disc. review denied*, 325 N.C. 435, 384 S.E.2d 545 (1989). Here, the following similarities exist between

the incidents: (1) young females were involved; (2) Defendant was more than thirty years older than each of the females; (3) Defendant offered both females rides in his vehicle; (4) Defendant was involved with each female's family in that he provided a free home for Lauren's family and provided assistance with basketball to the child's brother; (5) Defendant exposed his erect penis to both females while they were in his vehicle; and (6) Defendant told each female not to tell anyone what he had done. Further, one of the incidents of indecent exposure involving Lauren occurred on the same day as the incident involving the child. The other incidents of indecent exposure involving Lauren occurred with within days of the incident with the child.

Defendant does not argue the incidents with Lauren were not sufficiently similar to the incident with the child, nor does he argue the incidents lacked the necessary temporal proximity. Rather, Defendant argues the admission of Lauren's testimony unduly prejudiced him because Lauren's direct testimony covered more pages in the transcript than the direct testimony of the child and the acts alleged by Lauren were more egregious than the act alleged by the child. The admission or exclusion of evidence under Rule 403 "is within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (citations and internal quotations omitted), *cert. denied*, 531 U.S. 1114, 148 L.

Ed. 2d 775 (2001).

Here, before allowing Lauren to testify, the trial court excused the jury, heard the *voir dire* testimony of Lauren to determine its substance, and then considered arguments of counsel before overruling Defendant's objection to the admission of Lauren's testimony. Further, the trial court gave a limiting instruction to the jury regarding Lauren's testimony. Although the trial court did not make a specific finding that the probative value of the evidence outweighed its prejudicial effect, the procedure that was followed demonstrated the trial court conducted the balancing test under Rule 403 of the North Carolina Rules of Evidence. As such, we conclude the trial court did not abuse its discretion in allowing Lauren's testimony. *See State v. Washington*, 141 N.C. App. 354, 367, 540 S.E.2d 388, 397-98 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001) (holding the trial court did not abuse its discretion in failing to make a specific finding that the probative value of the evidence outweighed its prejudicial effect where the procedure that was followed demonstrated the trial court conducted the balancing test under Rule 403).

We conclude Defendant had a fair trial, free from prejudicial error.

No error.

Judges MCGEE and HUNTER concur.

Report per Rule 30(e).