NO. COA05-1607

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v. Union County
No. 04 CRS 51839

FRANCISCO SALINAS

Appeal by defendant from judgment entered 19 July 2005 by Judge Christopher M. Collier in Union County Superior Court. Heard in the Court of Appeals 11 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Allen W. Boyer, for defendant-appellant.

CALABRIA, Judge.

Francisco Salinas ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of taking indecent liberties with a child. We find no error.

At trial, the State presented the testimony of L.M.F. ("the victim") although currently age fourteen (14), was only eleven (11) years old at the time of this incident. The victim stated that on 7 December 2003, defendant, who is her uncle, came to her residence to transport the family to the grocery store. While her grandmother and other siblings went into other rooms to change clothes, she remained alone in the living room with the defendant.

As defendant hugged the victim from behind, he moved his fingers and hand between her legs in the vaginal area and squeezed her breasts. He then asked whether she had a boyfriend. She asked him to stop and attempted to push him away. Defendant relented when he heard her grandmother returning. Defendant told the victim not to tell anyone about the incident. Notwithstanding defendant's warning, she told her grandmother, older sister, and a friend about the incident. Her older sister told her parents of the incident. Nobody in her family called the police about the incident.

On 23 February 2004, the victim wrote a letter, addressed to God, in which she described the incident with defendant. She gave the letter to a Ms. Lowery, the Monroe Middle School guidance counselor, who subsequently brought the matter to the attention of the school's police resource officer, William Kilgo, of the Monroe Police Department. The victim told Officer Kilgo that a relative touched her inappropriately and the things he did made her feel uncomfortable. Officer Kilgo referred the matter to Scott Williams, a Detective with the Monroe Police Department. The victim informed Detective Williams that defendant came to her residence and while other family members were changing their clothes, defendant hugged her, grabbed her from behind, rubbed and squeezed her breasts, and moved his fingers around her vaginal area.

Cynthia Zambrano ("Zambrano"), the victim's adult sister, testified the victim told her defendant fondled her and touched her breasts. The victim's story made Zambrano angry because when she

was approximately nine years old, defendant "poked" at her genital area and "asked [her] what that was." Zambrano went into another room to get away from defendant. She did not tell anybody about the incident.

Defendant testified that he accidentally hit the victim between her cheek and her chest. He denied being alone with the victim. Further, he denied touching her breasts or vaginal area. Also, defendant stated he never touched Zambrano inappropriately.

On 19 July 2005, the jury found defendant guilty of taking indecent liberties with a child. Defendant was sentenced to a minimum of 19 months to a maximum of 23 months in the North Carolina Department of Correction. Defendant appeals.

Defendant first argues the trial court erred in admitting the testimony of Zambrano. Defendant contends Zambrano's testimony was not admissible under either Rule 404(b) or Rule 403. We disagree.

I. *Rule 404(b) and Rule 403*:

Rule 404(b) of the North Carolina Rules of Evidence provides:

> [e]vidence 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). This rule has been interpreted to be "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion 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. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). Notwithstanding, the court may exclude the evidence if it determines "its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2005). The decision whether or not to exclude evidence on the grounds of unfair prejudice is addressed to the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). Thus, this decision will not be disturbed by an appellate court unless it is shown the decision is manifestly unsupported by reason. *State v. Parker,* 315 N.C. 249, 258-59, 337 S.E.2d 497, 502-03 (1985).

For evidence of other crimes, wrongs or acts to be admitted it "must be offered for a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the danger of unfair prejudice to the defendant, and, if requested, must be coupled with a limiting instruction." *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991). Our courts are "markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b)." *State v. Brothers*, 151 N.C. App. 71, 76, 564 S.E.2d 603, 607 (2002). The ultimate test is whether the incidents are sufficiently similar and not so remote in time as to be more prejudicial than probative. *State v. Love*, 152 N.C. App. 608, 612, 568 S.E.2d 320, 323 (2002). "[R]emoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident;

remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *State v. Stager,* 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991).

In the instant case, we conclude the two incidents, one involving the victim in the case *sub judice* and one involving Zambrano, are sufficiently similar and not too remote in time. In each incident, defendant touched the vaginal areas of the victim and her sister, Zambrano, when each was between the ages of nine and eleven. Further, in each incident he asked the victim and Zambrano inappropriate questions as he touched them. Thus, because the defendant engaged in strikingly similar sexual actions with the victim and Zambrano, pursuant to *Brothers*, *supra*, Zambrano's testimony should be admitted unless the prejudicial effect overrode the probative value. However, Zambrano's testimony is highly probative because it reveals the strikingly similar manner by which defendant engaged in sexual misconduct with the victim and her sister. We discern no abuse of discretion in the trial court's decision to admit Zambrano's testimony. This assignment of error is overruled.

II. *Motion to Dismiss*:

Defendant next argues the trial court erred in denying his motion to dismiss. Defendant contends the State presented insufficient evidence to support the conviction of taking indecent liberties with a child. We disagree.

A court properly denies a motion to dismiss if substantial evidence is presented to establish every element of the charged

offense and to identify the defendant as the perpetrator. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002). In deciding the motion, the court must examine the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn from the evidence. *State v. Brown,* 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

The offense of taking indecent liberties with children is defined by statute.

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> > (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
> >
> > (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1(a)(2005). Our Supreme Court has stated that "a variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor." *State v. Etheridge,* 319 N.C. 34, 49, 352 S.E.2d 673, 682 (1987). "A sexual encounter encompasses a number of independent but related actions, any and all of which may be undertaken for the purpose of arousal."

Id. The victim's uncorroborated testimony is sufficient to withstand a motion to dismiss a taking indecent liberties with a child charge if the victim's testimony identifies the defendant as the perpetrator and establishes the requisite elements of the offense. *State v. Craven*, 312 N.C. 580, 590, 324 S.E.2d 599, 605 (1985).

Defendant contends the evidence is insufficient to show the element of acting for the purpose of arousing and gratifying sexual desire. Here, the victim testified defendant squeezed her breasts and moved his hand and fingers along her vaginal area while asking her whether she had a boyfriend. A jury could reasonably infer that defendant acted for the purpose of arousing and gratifying sexual desire. Thus, pursuant to *Craven*, *supra*, the State presented sufficient evidence the defendant took indecent liberties with the victim. This assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).