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NO. COA05-1637

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

STATE OF NORTH CAROLINA

v.

Cabarrus County
Nos. 04 CRS 12012
04 CRS 12053

MATUSALEM RAMIREZ CRUZ

Appeal by defendant from a judgment entered 25 February 2005 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 6 February 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General W. Wallace Finlator, Jr., for the State.

David Childers, for defendant.

Jackson, Judge.

On 12 July 2004, Matusalem Ramirez Cruz ("defendant") was indicted for one count each of second degree forcible rape and second degree burglary. Following a trial by a jury, defendant was found guilty of second degree rape and non-felonious breaking or entering. Defendant was sentenced to a prison term of seventy-three to ninety-seven months with the North Carolina Department of Correction. Defendant appeals from his convictions.

On 7 March 2004, Lizbeth Dela Rosa ("Lizbeth") had been out dancing with her sister and her sister's husband, and returned to her home with her six month old child around 2:45 a.m. Upon

entering her locked, dark home, she was immediately confronted by defendant. Defendant came from the living room into the kitchen where Lizbeth was, and proceeded to hit her. He knocked her to the floor, where he continued to hit her and beat her head against the floor.

Lizbeth testified that she attempted to get away from defendant, but was unable. She stated that at one point during the assault she attempted to call the police, however defendant had taken the batteries out of both of the home phones. Defendant then dragged Lizbeth into the living room, where he began taking her clothes off. Lizbeth testified that defendant asked her "why did you go out with that skirt like that? You look ridiculous. Is it because you want for other men to look at you?" Defendant continued to hit her, and then removed a condom from his pants and put it on. Lizbeth testified that before putting on the condom, defendant stated "that he was going to make me get pregnant so no other men would look at me."

Defendant then had intercourse with Lizbeth, which she testified was against her will. Lizbeth stated that she repeatedly told defendant "no," but that he did not listen. Following the rape, Lizbeth was able to retrieve her child and then lock herself into the back bedroom while defendant was in the bathroom. The following morning Lizbeth heard defendant making a phone call. While he was in the bathroom, she retrieved one of the home phones, and attempted to call the police. The dispatcher was unable to understand Lizbeth, so Lizbeth hung up. Lizbeth testified that

defendant then pleaded with her to run away with him. She refused, and eventually allowed him to use her car to go to work.

The police arrived shortly after defendant left, and found Lizbeth locked in the back bedroom. When the police found her, she was very upset, crying, and her face was red and swollen. Lizbeth told police that defendant had broken into her home, attacked her, and raped her. She stated that all of the home's doors had been locked, but that defendant had previously lifted up the sliding glass door to gain entrance even when the door was locked from the inside. She told the officers, and later testified, that she and defendant had been dating and living together in her home, but that they had separated and defendant no longer had permission to be in her home. Lizbeth's sister, Teresa, also testified that Lizbeth and defendant had broken up several months prior to the attack, and that at that time, defendant no longer lived in the home or had any possessions there. Both Lizbeth and Teresa testified that defendant was a jealous man, not only of men in general, but specifically of Teresa's husband.

At trial, defendant testified and admitted to being in Lizbeth's home in the early morning hours of 7 March 2004. He stated that he and Lizbeth had not broken up, and that at no time had he moved out of the home. Defendant admitted to striking Lizbeth upon her coming into the home, but he denied that the sex between them was anything but consensual. He also admitted to striking Lizbeth on an occasion several months prior to the instant assault.

On appeal, defendant raises twenty-five assignments of error. Defendant, however, has not presented any argument in his brief with respect to seven of the assignments of error. Accordingly, these assignments of error are deemed abandoned. See N.C. R. App. P. 28(b)(6) (2006) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

Defendant first contends that certain evidence admitted regarding his display of jealousy and an alleged physical altercation with Lizbeth was irrelevant and unduly prejudicial. He contends that the incidents were too remote in time to the incident in issue for them to be relevant, and that the evidence constituted impermissible character evidence. Defendant asserts that even if the evidence was relevant and admissible, the danger of unfair prejudice substantially outweighed its probative value.

Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2003). Rule 404 of our rules of evidence provides that generally, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a) (2003). Rule 404(b) 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) (2003). Evidence which is admitted pursuant to Rule 404(b) must not be too dissimilar to, or excessively remote in time from, the offense for which defendant is being tried. *State v. Artis*, 325 N.C. 278, 299-300, 384 S.E.2d 470, 481-82 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). "When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value." *Id.* at 299, 384 S.E.2d at 481. Moreover, when the prior similar acts "are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor." *Id.* The admission of evidence under Rule 404(b) rests within the discretion of the trial court and will be overturned only upon a showing of an abuse of discretion. *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 74 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). All evidence that is relevant and otherwise admissible, is still subject to Rule 403, which excludes evidence when the "probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2003); *State v. Murillo*, 349 N.C. 573, 586, 509 S.E.2d 752, 759 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999).

At defendant's trial, Lizbeth's sister, Teresa, testified over defendant's objection, regarding an incident which occurred in

November of 2003. Defendant argues the admission of this testimony constitutes reversible error, in that it was irrelevant and unduly prejudicial.

At trial, Teresa testified that in November of 2003, defendant and Lizbeth were at her home, when defendant saw a photograph of Teresa's child with her husband and became angry. Lizbeth previously had testified that defendant was jealous of Teresa's husband, and Teresa reiterated this fact during her testimony. Teresa stated that on the day in November, defendant saw the photograph of her child, and became angry when he saw that her child looked very similar to his child with Lizbeth. Teresa testified that upon seeing the photograph, defendant stormed out of the house followed by Lizbeth in tears. Teresa stated that following this incident, she and her husband went to Lizbeth's home in January of 2004 in order to resolve any issues of jealousy which defendant may have regarding Lizbeth and Teresa's husband. Teresa testified that during this visit, defendant told her that he and Lizbeth had broken up, and that he no longer lived in the home. She stated that defendant told her that he had moved all of his belongings out of the home.

Defendant contends this evidence was admitted for the sole purpose of proving that he acted in conformity with his alleged jealous nature, and that there was no proper purpose for which this evidence could have been admitted. However, as the trial court stated, this evidence "is relevant evidence because it lays the foundation for [Teresa's] explanation as to why she wanted to take

her husband to go see the defendant and her sister at their home in January of 2004 after this incident that occurred in November of 2003." The trial court determined that the evidence was not unduly prejudicial per Rule 403. We agree with the trial court's determination. By the time this evidence was presented, the trial court had heard testimony from Lizbeth that defendant was a jealous man, and that he was jealous not only of her brother-in-law, but of all men who looked at her. The trial court also had heard testimony from Lizbeth concerning her separation from defendant and the fact that he no longer resided in her home. In addition, during defendant's testimony, he offered his own explanation for why he told Teresa and her husband that he no longer lived in the home.

Based upon the evidence before the trial court, we hold the admission of Teresa's testimony regarding the November 2003 incidence of jealousy was properly admitted. The testimony laid a foundation for her subsequent testimony regarding a conversation she had with defendant, in which he stated that he and Lizbeth had separated and he no longer resided in the home. This evidence was relevant and not unduly prejudicial as argued by defendant. Defendant's assignment of error is overruled.

Defendant next contends the trial court erred in admitting testimony regarding an incident which occurred 23 April 2003, almost one year prior to the incident at issue.

While cross-examining defendant, the State asked defendant if he and Lizbeth were getting along well on 23 April 2003, and then

proceeded to ask questions concerning an altercation which took place between defendant and Lizbeth on this date. Defendant objected based on relevancy, particularly based upon the remoteness in time from the incident for which defendant was being tried. Defendant testified that while he and Lizbeth were driving through the parking lot of the K-Mart shopping center, she became aggressive with him and bit him on the ear. He denied hitting her on this occasion.

On rebuttal, the State presented, without objection from defendant, the testimony of a witness to this altercation. Rodney Short ("Short") testified that on 23 April 2003, he was driving through the parking lot and was directly behind defendant and Lizbeth. He stated that he saw defendant hit Lizbeth in the head several times with his fists.

North Carolina General Statutes, section 15A-1226 (2003) provides that "[e]ach party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party." N.C. Gen. Stat. § 15A-1226(a) (2003). During his testimony, defendant testified that he did not strike Lizbeth while driving in the K-Mart parking lot on 23 April 2003. Thus, the State was permitted to introduce evidence which tended to rebut defendant's testimony.

We hold that Short's testimony was not only permissible rebuttal testimony, but also that it was permissible evidence under Rule 404(b) of defendant's intent to commit rape. Defendant was being tried for second degree rape, which is a violent assault upon

an individual. During his testimony, defendant denied raping Lizbeth, and claimed that the two had consensual sex on 7 March 2004. Short's testimony, along with that of Lizbeth and defendant, demonstrated that defendant and Lizbeth's relationship was characterized by defendant's assaultive behavior towards her. Defendant admitted to hitting Lizbeth not only on 7 March 2004, but also several months prior. Similarly, Detective Moreau testified that Lizbeth told him that defendant had assaulted her in the past. Therefore, we hold the trial court did not abuse its discretion in admitting this testimony, and the testimony was not unduly prejudicial. Defendant's assignment of error is overruled.

Defendant next argues on appeal that the trial court erred in denying his motion to dismiss the charge of second degree burglary based upon an insufficiency of the evidence.

We note that defendant initially appealed from, and assigned error to, the denial of his motion to dismiss the charges of both second degree rape and second degree burglary. However, on appeal, defendant has presented argument only as to the denial of his motion to dismiss the burglary charge. Thus, defendant is deemed to have abandoned his appeal from the denial of his motion to dismiss the charge of second degree rape. N.C. R. App. P. 10(a) (2006) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal").

"In ruling on a defendant's motion to dismiss, the trial court must determine whether the State has presented substantial evidence

(1) of each essential element of the offense and (2) of the defendant's being the perpetrator." *State v. Boyd*, __ N.C. App. __, __, 628 S.E.2d 796, 804 (2006) (citing *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, cert. denied, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002)). "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001)). "When considering a motion to dismiss, the trial court must view all of the evidence presented 'in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.'" *Id.* (quoting *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), cert. denied, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995)).

Contradictions and discrepancies in the testimony or evidence are for the jury to resolve and will not warrant dismissal. *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). Moreover, determinations of the credibility of witnesses are issues for the jury to resolve, and they do not fall within the role of the trial court or the appellate courts. See *Hyatt*, 355 N.C. at 666, 566 S.E.2d at 77. When a trial court is considering a defendant's motion to dismiss based upon an insufficiency of the evidence presented, the trial court "is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Defendant initially was charged with second-degree burglary, and following the presentation of evidence, the jury also was instructed as to the lesser included offenses of felonious breaking or entering, and non-felonious breaking or entering. On appeal, defendant contends there was insufficient evidence to support his conviction for non-felonious breaking or entering. In order for defendant's charge of second degree burglary to survive a motion to dismiss, the State was required to present substantial evidence that defendant committed an unlawful "(1) . . . breaking (2) and entering (3) in the nighttime (4) into a dwelling house or sleeping apartment (5) of another (6) with the intent to commit a felony therein." *State v. Key*, __ N.C. App. __, __, 636 S.E.2d 816, 821 (2006) (quoting *State v. Rick*, 342 N.C. 91, 101, 463 S.E.2d 182, 188 (1995)); see also N.C. Gen. Stat. § 14-51 (2003). Second degree burglary does not require that the dwelling actually be occupied at the time of the breaking and entering. *Id.*; N.C. Gen. Stat. § 14-51. Non-felonious, or misdemeanor, breaking or entering requires proof of only the wrongful breaking or entry into a building or dwelling. *State v. Freeman*, 307 N.C. 445, 451, 298 S.E.2d 376, 380 (1983); N.C. Gen. Stat. § 14-54(b) (2003). It is not necessary to prove both breaking and entering, only one or the other. N.C. Gen. Stat. § 14-54(b); cf. *State v. Brown*, __ N.C. App. __, __, 626 S.E.2d 307, 312 ("the offense of felonious breaking or entering requires that the State only prove that either breaking or entering took place") (citing *State v. Myrick*, 306 N.C.

110, 114, 291 S.E.2d 577, 579 (1982)), *disc. review denied*, 360 N.C. 538, 634 S.E.2d 221 (2006).

During defendant's trial, both Lizbeth and her sister Teresa testified that Lizbeth and defendant broke up in December of 2003, and that after that time defendant no longer lived in the home. Lizbeth stated multiple times that on the night of the attack, defendant did not have her consent or permission to be in the home. She stated that after they broke up, defendant no longer lived in or had any possessions in the home. She testified that on the night of 6 March 2004, all of the doors were locked when she left, and that the only way defendant could have gained entrance into the home was by lifting the sliding glass door up off and out of its track.

While defendant testified that on the date of the attack he and Lizbeth were still dating, and thus he had permission to be in the home, this contradiction in the evidence was for the jury to resolve. Thus, we hold the State presented sufficient evidence that defendant did not have permission to be in Lizbeth's home on the night of the attack, and that he gained entry into the home by breaking and entering through the sliding glass door. As there was sufficient evidence presented to support defendant's conviction for non-felonious breaking or entering, defendant's assignment of error is overruled.

No error.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).