NO. COA05-642

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

STATE OF NORTH CAROLINA

v. Buncombe County
No. 03 CRS 65156

ROGER ALLAN FINCHER

Appeal by Defendant from judgment entered 20 May 2004 by Judge E. Penn Dameron in Buncombe County Superior Court. Heard in the Court of Appeals 6 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for the State.

Robert W. Ewing for Defendant-Appellant.

STEPHENS, Judge.

Roger Allan Fincher ("Defendant") appeals judgment and sentencing upon conviction of taking indecent liberties with a child. For the reasons stated herein, we affirm the conviction, but in accordance with current decisions of our Supreme Court, remand for resentencing.

The State's evidence tended to show that on 17 November 2003, eight-year-old M.K. went with her family to K-Mart to shop for Christmas gifts. While M.K. perused the toys alone in an aisle not far from her parents, Defendant walked up to her and put his hand in her pants. M.K. screamed, "Mommy," and Defendant said, "Shh."

Anthony Hauck, a K-Mart employee, heard M.K.'s scream and immediately looked into the aisle. He saw M.K. and a man whom he

later identified as Defendant in blue jeans and a blue shirt with white letters on it. When Defendant saw Hauck, he ran out of the aisle. M.K. told Hauck that a man had "stuck his hands down [her] pants." Hauck ran to the front of the store and made an announcement on the intercom to keep everyone inside the store due to an emergency. However, Defendant was already moving through the exit doors. Hauck and other K-Mart employees continued to chase Defendant while Defendant ran out of the store yelling, "I did not do anything." Defendant made it to his car, but M.K.'s father, Kevin, held the car door open to see if Defendant was the one who had assaulted his daughter. M.K. stated that she was not sure whether her father caught the right man even though she remembered his blue shirt with words written on it. Kevin let Defendant drive away since his daughter was not sure of his identity. He noted that Defendant's car was an older model tan station wagon with primer gray hood and fenders.

The sheriff's department was called and came to the K-Mart to investigate. M.K. described the man's clothing as a "blue shirt with holes in it with writing."

Kevin called his friends and described the station wagon to them. One friend, David Bartlett, recognized the description of the car. Kevin and Bartlett drove to a trailer park, where they found Defendant's car. Kevin immediately recognized it and telephoned the sheriff's department.

Detective Anne Benjamin was assigned the case on 18 November 2003. That morning, M.K. and her family came to the sheriff's

department for an interview with Detective Benjamin. Detective Benjamin interviewed M.K. in a private office with another detective. M.K. immediately picked Defendant's picture out of a photo lineup provided by Detective Benjamin.

Later that same day, Detective Benjamin interviewed Defendant after reading him his *Miranda* rights. Defendant denied touching M.K. and stated that he left the K-Mart so rapidly because he always leaves an area rapidly if he hears a young child scream. Subsequently, Defendant was arrested. His trial began on 18 May 2004 and, on 20 May 2004, the jury returned a verdict of guilty of indecent liberties with a child. Judge Dameron sentenced Defendant to an aggravated sentence of thirty-one to thirty-eight months in prison, based on a prior record level of IV, a non-statutory aggravating factor found by the trial judge, and a finding of no mitigating factors. Defendant appeals.

By his first and second assignments of error, Defendant argues that the trial court erred by sentencing him to an aggravated sentence, and that such error is reversible *per se*. Because Defendant's position is fully supported by the holding of the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004), as recently interpreted by the North Carolina Supreme Court, we agree.

In *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), our Supreme Court examined the constitutionality of North Carolina's Structured Sentencing Act, N.C. Gen. Stat. 15A-1340.10 *et seq.*, in

light of the United States Supreme Court's decisions in *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). In a four-three majority opinion, the *Allen* Court concluded that, when "[a]pplied to North Carolina's structured sentencing scheme, the rule of *Apprendi* and *Blakely* is: *Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." 359 N.C. at 437, 615 S.E.2d at 264-65 (citing *Blakely*, 542 U.S. at 301-02, 159 L. Ed. 2d at 413-14; *Apprendi*, 530 U.S. at 490, L. Ed. 2d at 455; N.C. Gen. Stat. §§ 15A-1340.13, 15A-1340.14, 15A-1340.16, 15A-1340.17) (emphasis added).

In the instant case, the trial court found the following as an aggravating factor: "The defendant committed the same offense more than one time and has previously served more than one active sentence for this same offense and the active sentences have not been a deterrent to committing this offense again." This non-statutory aggravating factor was not submitted to the jury for consideration, in violation of the holding in *Blakely*. Further, Defendant did not stipulate to the aggravating factor. In *State v. Allen*, our Supreme Court held that such error is structural and reversible *per se*. *Allen*, 359 N.C. at 449, 615 S.E.2d 256 at 272. *See also State v. Speight,* 359 N.C. 602, 614 S.E.2d 262 (2005); *State v. Upshur,* ___ N.C. App. ___, 625 S.E.2d 911 (2006); *State v. Durham*, ___ N.C. App. ___, 625 S.E.2d 831 (2006). Accordingly, as required by our Supreme Court, we remand this issue to the trial

court for resentencing consistent with *Blakely*.

In doing so, we reiterate that even under *Blakely*, the trial court may impose an aggravated sentence solely on the basis of prior convictions. *State v. Borders*, 164 N.C. App. 120, 594 S.E.2d 813 (2004); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000) ("*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[]") (emphasis added). *Accord, State v. Allen*, 359 N.C. at 437, 615 S.E.2d at 264-65. This applies even where, as here, the prior convictions were also used to determine Defendant's prior record level. *Borders*, 164 N.C. App. at 125, 594 S.E.2d at 817 (2004) ("we have found no statutory authority or case law precluding prior convictions . . . used to determine a defendant's prior record level from also being used to aggravate that defendant's sentence[]"). We therefore reject Defendant's contention to the contrary. However, because the trial court went beyond the existence of Defendant's prior convictions for the same offense charged, and aggravated the presumptive sentence based on its determination that Defendant's punishment for the prior offenses had not been a deterrent to his subsequent commission of the offense, the *Blakely* rule was violated, and the *Allen* holding requires resentencing.

We now examine Defendant's third and final assignment of error: that the trial court erred in admitting evidence of other acts and wrongs under Rule 404(b) through the testimony of J.C.,

Rosemary Carter and Detective Anne Benjamin, and that even if the testimony was admissible, it nevertheless should have been excluded because the prejudicial effect of the evidence outweighed its probative value. Because we hold that the evidence was properly admitted, we affirm Defendant's conviction.

Rule 404(b) addresses the relevance of evidence of prior "bad acts" and provides that:

> 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). Rule 403 allows the exclusion of even clearly relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2005). The trial court's decision whether to exclude evidence under Rule 403 is soundly within its discretion. *State v. Handy,* 331 N.C. 515, 419 S.E.2d 545 (1992).

Our appellate courts have repeatedly emphasized that Rule 404(b) is

> 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 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); *see also State v. Berry,* 143 N.C. App. 187,

546 S.E.2d 145, *disc. review denied*, 353 N.C. 729, 551 S.E.2d 439 (2001). Further, our appellate courts have been "markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b)." *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988); *see also State v. Blackwell*, 133 N.C. App. 31, 514 S.E.2d 116, *cert. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999).

Defendant contends, however, that the testimony at issue in this case is inadmissible under our Supreme Court's holding in *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). The *Artis* Court explained that:

> The use of evidence as permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity. 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. When otherwise similar offenses 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.
>
> Evidence of other crimes must be connected by point of time and circumstance. Through this commonality, proof of one act may reasonably prove a second. However, the passage of time between the commission of the two acts slowly erodes the commonality between them. . . . Admission of other crimes at that point allows the jury to convict defendant because of the kind of person he is, rather than because the evidence discloses, beyond a reasonable doubt, that he committed the offense charged.

Id. at 299, 384 S.E.2d at 481-82. Therefore, the admissibility of the prior acts hinges on whether they are sufficiently similar to the offense charged and not so remote in time as to be more probative than prejudicial. *See also State v. Frazier*, 344 N.C. 611, 476 S.E.2d 297 (1996); *State v. Williamson*, 146 N.C. App. 325, 553 S.E.2d 54 (2001), *disc. review denied*, 355 N.C. 222, 560 S.E.2d 366 (2002). In determining whether the prior acts are sufficiently similar, it is not necessary that the similarities "rise to the level of the unique and bizarre." *State v. Stager,* 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991) (quoting *State v. Green,* 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied,* 488 U.S. 900, 102 L. Ed. 2d 235 (1988) (internal citation omitted)).

In the case at bar, the trial court admitted testimony from J.C., Rosemary Carter, and Detective Benjamin that Defendant had exposed himself to a minor in 1997. On 16 August 1997, Defendant parked his pick-up truck next to the fenced-in back yard where J.C., eight years old at the time, and her five-year-old sister were playing in a pool. He got out of his truck, stood as close to the fence as possible, pulled his shorts down to his knees, and within view of the children, began masturbating. J.C. and her sister hid in their play gym and then ran to their house. At supper, they told their mother, Rosemary, what had happened. Mrs. Carter called the police and reported the incident. Exactly a week later, Defendant returned to the same parking place, but J.C. and her sister immediately ran back inside their house. On that occasion, Mrs. Carter chased Defendant in her car until she was

able to write down his license plate number and get a good look at his face. She then called the police again and shortly thereafter, Detective Benjamin interviewed J.C. Detective Benjamin's written statement of her interview with J.C. was admitted in evidence without objection from Defendant.

At trial and on appeal, Defendant contends that the evidence of the 1997 acts was not sufficiently similar to the offense charged in this case to be admitted pursuant to Rule 404(b). In response to Defendant's position, the trial court conducted an extensive *voir dire* hearing, during which Rosemary Carter and Detective Benjamin testified. At the conclusion of the hearing and after arguments by counsel, the court made the following findings:

> Looking at the evidence as a whole, . . . I would note that based on the evidence that I have heard and upon all of the evidence that's before me at this hearing, that I would find that the alleged acts in 1997, consisting of what Ms. Carter testified to and the statements that have been testified to by Detective Benjamin, although not identical, are sufficiently similar, in my view, to be admissible for the purpose of proving one of the essential elements which the State has to prove with regard to the indecent liberties charge, and that is the specific purpose or state of mind of the Defendant.
>
> I would find that there are certain similarities which I think are significant and probative on that point to at least meet the initial burden that the State has to meet . . . both to prove intent and also to prove absence of mistake.
>
> And I'm aware of the fact that the Defendant[,]neither at this hearing nor at trial to date has asserted a defense or a contention of mistake, but I would observe that based upon the circumstances that have been testified to, an inference might arise

that if in fact it was the Defendant who was present with the minor victim at the time that she complained of, that an inference might arise, with or without argument by counsel, that any touching or bumping into her was innocent or an unintended action. And I think that under the circumstances, the State is entitled to offer probative evidence that would tend to negate that inference. And I would find that on the question – both in the absence of mistake and of intent, that the evidence is sufficiently similar from [sic] the 1997 event to the one that's alleged in 2003 to be admissible on that point, or at least probative.

Now, specifically the circumstances that are similar, I think both the 1997 event and the 2003 event, approximately eight-year-old Caucasian females were involved in both cases. The young girls were strangers to the Defendant, . . . and that the girls were approached in essentially public places or places that were at least accessible to the public, and this did not involve any particularly secretive activity. That at the time, even though the places appeared or seemed to be essentially public places, that the children were at least momentarily or apparently unsupervised or unattended by any adults.

And taking into consideration all of those factors, I would find that the initial tests of probative value or relevance would be met.

I would find that even disregarding the period of incarceration that apparently followed the 1997 events – it appears there was a 21- to 26-month sentence that was imposed. Even disregarding that, I would find that these events are not too remote to have some probative value, and especially, into consideration a period of incarceration, remoteness is not a problem affecting the admissibility of this particular evidence.

And lastly, I would find that weighing the probative value of this evidence against the unfair prejudicial effect that that evidence might have, I would find that that

> evidence is not so unfairly prejudicial as to . . . render it inadmissible. . . . And I find that the statements testified to by Ms. Carter as to what [J.C.] stated to her would be admissible under Rule 8032 [sic] as an excited utterance.

Our appellate courts have consistently required trial courts to make specific and meaningful findings regarding issues of similarity and remoteness of proposed Rule 404(b) evidence. *See, e.g., State v. Jacob*, 113 N.C. App. 605, 439 S.E.2d 812 (1994). The trial court's findings are binding on the appellate court if they are supported by competent evidence. *State v. Berry*, 143 N.C. App. 187, 546 S.E.2d 145 (2001). The detailed findings made by Judge Dameron plainly establish that the trial court carefully considered the similarity and remoteness factors and concluded that evidence of Defendant's prior acts was admissible. For the following reasons, we agree that Judge Dameron was correct in admitting the 1997 evidence.

Defendant was charged with and pled guilty to two counts of taking indecent liberties with a minor as a consequence of his actions on 16 August 1997, a fact which he admitted on direct examination when he testified at the trial of this case. On cross-examination, the following evidence was elicited:

> Q. Do you remember seeing two little girls playing in their back yard–
> A. Yes.
> Q. --in August of 1997?
> . . . .
> A. Yes.
> . . . .
> Q. What were you doing?
> A. I was exposing myself to them.
> Q. Were you masturbating in front of them?

> A. I was shaking it. I wasn't masturbating, but I was shaking it.
> Q. You were exposing your penis and you were shaking it at them?
> A. Yes.
> . . . .
> Q. The little girl, about how old do you think she was?
> . . . .
> A. Eight to ten.
> . . . .
> Q. You are sexually stimulated by eight-year-old little girls,. . . aren't you?
> . . . .
> A. I have been.
> Q. Are you saying you are cured?
> . . . .
> A. *There's no cure. You battle with it.*

(emphasis added).

While Defendant objected to the direct evidence and the cross-examination of him regarding the August 1997 incidents, evidence regarding an 8 March 2000 incident in which Defendant touched an eight-year-old girl in the vaginal area in the shoe department at K-Mart was admitted without objection. Further, Defendant has not assigned error to the admission of this evidence on this appeal. Testimony of the victim of the 2000 incident established that after Defendant touched her, he exposed himself to her, and that his penis was "real fat" when he did so. Defendant admitted that he touched the eight-year-old victim's clothes on top of her vagina, that he rubbed the area, and that he became aroused. He further admitted that he exposed his penis to the victim and that his penis was swollen just as the victim had described in her testimony. Defendant pled guilty to one count of indecent liberties with a child and one count of indecent exposure.

To be admissible under Rule 404(b), the similarities between

prior acts and the current charged offense "must tend to support a *reasonable* inference that the same person committed both the earlier and later acts." *Berry,* 143 N.C. App. at 197, 546 S.E.2d at 153 (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991)) (emphasis in original). The fact that there are also dissimilarities in the evidence is not dispositive, so long as sufficient similarities exist. *Id.* at 198, 546 S.E.2d at 153. We agree with Judge Dameron that, taken as a whole, the evidence of Defendant's indecent exposure to an eight-year-old Causasian girl playing in a public place without adults present is sufficiently similar to his shoving his hand down the front pants of an eight-year-old Caucasian girl perusing the toys at a public place without adults present. *State v. Frazier,* 344 N.C. 611, 476 S.E.2d 297 (1996); *State v. Williamson,* 146 N.C. App. 325, 553 S.E.2d 54 (2001). Defendant's challenge to the admission of this evidence on grounds that the test for sufficient similarity was not met is without merit and is overruled.

Defendant also challenges the admission of the 1997 incidents on grounds that such evidence was too remote to be more probative than prejudicial. We disagree and find particularly persuasive this Court's well-reasoned decision on this issue in *State v. Jacob,* 113 N.C. App. 605, 439 S.E.2d 812 (1994). The defendant in *Jacob* was convicted of two counts of statutory rape of his daughter. At trial, the defendant's daughter from an earlier marriage was allowed to testify, over objection, to her father's sexual abuse of her which had occurred at least ten years earlier.

In concluding that the defendant's prior sexual abuse was not too remote to be prohibited under the test for admissibility of Rule 404(b) evidence, this Court recognized that:

> While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

Jacob, 113 N.C. App. at 611, 439 S.E.2d at 815 (quoting *State v. Matheson,* 110 N.C. App. 577, 583, 430 S.E.2d 429, 432 (1993) (additional citation omitted)). In reliance on the *Matheson* rationale, the *Jacob* Court examined whether "the plan or scheme of molestation was interrupted or ceased due to underlying circumstances, and then resumed in a continual fashion." *Id.* Noting that the defendant did not have access to a prepubescent daughter to abuse for the ten-year period of time when his abuse of one daughter ended before the abuse of the next one began, the *Jacob* Court held that the remoteness in time between the prior abuse and the crime charged did not render the evidence of the prior misconduct inadmissible.

In the present case, Defendant received a sentence of twenty-one to twenty-six months for his guilty pleas to the 16 August 1997 indecent liberties charges. While the record is silent as to the dates during which he was actually incarcerated, it is reasonable to infer that he had not been out of prison long before he committed his next offense against the young victim in March 2000.

Likewise, his guilty pleas in November 2000 to indecent liberties and indecent exposure following his arrest for the March incident landed him in prison for a period of time, leading to another reasonable inference that these circumstances interrupted Defendant's ability to continue his plan or scheme of seeking sexual arousal at the expense of young girls. Moreover, Defendant's own testimony that there is "no cure" for his acts of indecent liberties against little girls supports the conclusion that once an opportunity presented itself to Defendant to engage in this misconduct, he took it. Accordingly, we hold that the remoteness in time between the 16 August 1997 incident and the current crime charged does not render the evidence regarding the 1997 acts inadmissible.

Finally, Defendant complains that the 1997 evidence was prejudicial to his case and should have been excluded pursuant to Rule 403 even if otherwise admissible under Rule 404(b). We disagree. Our appellate courts have often noted that most of the prosecution's evidence against a defendant in a criminal case will be prejudicial, but that mere fact does not require exclusion of the evidence under Rule 403. *See, e.g., State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987). Rather, the trial court exercises its discretion in admitting the evidence after balancing the prejudicial effect of the evidence against its probative value, and the court's ruling will not be disturbed on appeal absent a clear abuse of its discretion. *State v. Garcia*, 358 N.C. 382, 417, 597 S.E.2d 724, 749 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d

122 (2005). Here, the trial judge made extensive findings, as previously discussed, and concluded that the probative value of the evidence concerning Defendant's 1997 indecent liberties outweighed any prejudice to Defendant. In light of the evidence of Defendant's indecent exposure and indecent liberties convictions arising out of the March 2000 incident, as well as evidence that Defendant was also convicted of an indecent exposure charge in January 1997, we are not persuaded that the trial judge abused his discretion in allowing the evidence concerning the 1997 incident. Further, the judge gave a limiting instruction to the jury regarding the purposes for which the jury could consider the evidence of the 1997 acts.

Accordingly, we hold that the trial court did not err in admitting the evidence at issue, and we thus affirm the conviction in this case. However, we remand the case to the trial court for resentencing as required by *State v. Allen*.

Affirmed in part, reversed and remanded in part.

Chief Judge MARTIN and Judge WYNN concur.

Report per Rule 30(e).