NO. COA07-626

NORTH CAROLINA COURT OF APPEALS

Filed: 2 September 2008

STATE OF NORTH CAROLINA

v. Durham County
No. 05 CRS 48754

SANTIAGO BONEE ELLIOTT,
Defendant.

Appeal by defendant from judgment entered 15 September 2006 by Judge Kenneth C. Titus in Durham County Superior Court. Heard in the Court of Appeals 28 November 2007.

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

William D. Spence for defendant-appellant.

GEER, Judge.

Defendant Santiago Bonee Elliott appeals his convictions for statutory rape of a 13-year-old girl and taking indecent liberties with a child. Defendant argues primarily that the trial court should have granted his motion to dismiss the charges for insufficient evidence. We hold that the evidence, including the prosecuting witness' testimony that she had "sex" with defendant, was sufficient to support both of defendant's convictions. Defendant also contends that the trial court erred under Rule 404(b) of the Rules of Evidence in admitting evidence that he had previously engaged in sexual intercourse with another girl who was

14 years old. Because the circumstances of both incidents were sufficiently similar and took place only eight months apart, we hold the testimony was properly admitted as evidence of a common plan or scheme.

Facts

The State's evidence tended to show the following facts. On 17 June 2005, Officer Benjamin Himan and Investigator J.J. Cartwright of the Durham Police Department were parked at an intersection watching for possible drug deals. Shortly after midnight, the officers stopped a Honda Civic driven by defendant because the license plate light was broken. Defendant was the driver; "Susan" was in the front passenger seat.[1] Officer Himan noticed that defendant's pants zipper was down, and his belt was unbuckled. As defendant was retrieving his license and registration from the glove compartment, Officer Himan saw several cut-up plastic bags. Suspicious that defendant might have hidden drugs down his pants, Officer Himan asked defendant if he had any drugs or guns in his possession. When defendant responded "no," Officer Cartwright directed defendant to get out of the car, and, after defendant consented to being searched, Cartwright found eight bags of "leafy vegetable matter" in defendant's pockets.

At this point, Officer Himan asked Susan to exit the car and sit nearby on the sidewalk to be interviewed. When Himan asked Susan what defendant had been doing, she responded: "we just got

[1]The pseudonym "Susan" is used throughout the opinion to protect the minor's privacy and for ease of reading.

finished." Himan went back to defendant's vehicle and began searching the backseat; he found what appeared to be fresh wet stains on the backseat of the car and an earring matching the one Susan was wearing. Himan returned and asked Susan if she had been referring to sex when she said they had "just finished." She responded, "no." When asked what she had been doing in the backseat and why her earring was back there, Susan replied, "I don't know," began to cry, and then admitted she had had sex with defendant at his cousin's place. She continued to deny having sex with defendant in the backseat of his car. Although she was 13 years old, she told the officers that she was 15.

Defendant, who was 32 years old, was indicted for statutory rape of a person 13 years old and for taking indecent liberties with a child. At defendant's 12 September 2006 trial, Susan testified that she had lied to the police on 17 June 2005 and that she had, in fact, had sex with defendant that night in the backseat of his car. Rachel Wynn, an expert in forensic serology and biology, testified that she recovered sperm from Susan's "external vagina" during her sexual assault examination. The sperm was analyzed, and Kristin Meyer, an expert in DNA analysis, testified that "it is scientifically unreasonable to believe that the DNA profile obtained from the sperm fraction of the external vaginal swabs came from anybody other than the suspect . . . ." Defendant presented no evidence.

The jury found defendant guilty of both statutory rape and taking indecent liberties with a child. The trial court

consolidated the offenses and sentenced defendant to a presumptive-range sentence of 288 to 355 months imprisonment. Defendant timely appealed to this Court.

I

Defendant's primary argument on appeal is that the trial court erred by denying his motions to dismiss the statutory rape and indecent liberties charges. A defendant's motion to dismiss should be denied if there is substantial evidence: (1) of each essential element of the offense charged, and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* at 597, 573 S.E.2d at 869. On review of a denial of a motion to dismiss, this Court views the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869. Contradictions and discrepancies do not warrant dismissal of the case, but rather are for the jury to resolve. *Id.*

A. Statutory Rape

Defendant was indicted for statutory rape under N.C. Gen. Stat. § 14-27.7A(a) (2007), which states in pertinent part that the defendant is guilty of the offense "if the defendant engages in vaginal intercourse . . . with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person." For purposes of this statute, vaginal intercourse "is

proven if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male." *State v. Robinson*, 310 N.C. 530, 533-34, 313 S.E.2d 571, 574 (1984).

Defendant contends that there was insufficient evidence of vaginal intercourse. During Susan's direct examination, however, she gave the following testimony:

> Q And when — in fact, did you have sex with [defendant] that night?
>
> A Yes.
>
> Q And where did you have sex with him?
>
> A In the back of the car.

Although defendant argues that the prosecutor's first question was ambiguous, and, therefore, Susan's first answer was necessarily ambiguous, any ambiguity in the prosecutor's question regarding *whether* sexual intercourse occurred was clarified by her second question regarding *where* the sexual intercourse occurred.

Defendant also argues that Susan's testimony that she did "have sex" with defendant is, without more, insufficient evidence of penetration. This testimony is not, however, the only testimony pertinent to the issue of vaginal penetration. Susan also testified that she "lied and said no" when the officers asked whether she "was having sex" with defendant. Officer Himan corroborated Susan's testimony, testifying that when he asked her, in the car, whether defendant had shoved anything down his pants, she said, "No. We just got finished." He also noted that Susan told him that "this was the first time she hadn't used protection when having sex." Officer S. Montgomery, who interviewed Susan

more fully, testified that Susan said she and defendant had "climbed into the backseat, and she pulled her pants off, and he pulled his pants down." Susan also told the officer that "she asked him to use a condom, and he didn't have one. She said that they did it, but he did not come in her; he came — he came out on the backseat of the car . . . ."[2]

The evidence in this case is materially indistinguishable from that found sufficient on the issue of penetration in *State v. Kitchengs*, 183 N.C. App. 369, 375, 645 S.E.2d 166, 171, *disc. review denied*, 361 N.C. 572, 651 S.E.2d 370 (2007). In *Kitchengs*, the Court noted that the transcript contained the following pertinent evidence:

> During her testimony, T.M. stated: (1) that Defendant helped T.M. pull her pants and underwear down; (2) that she was "laying down[;]" and (3) that Defendant "took his thing out." T.M. also answered "[y]es" to the State's inquiry as to whether T.M. and Defendant then had sex. Further, T.M. stated that the incident took about five minutes. T.M.'s testimony was corroborated by the testimony of Mann. Mann testified she asked T.M. whether T.M. had sex with Defendant and T.M. stated that she did. Mann also testified that T.M. claimed to have contracted a sexually transmitted disease from Defendant. Also, during Deputy Carr's testimony on rebuttal, he testified that Defendant denied "rap[ing]" T.M.

Id. The Court then held: "Our standard of review requires us to view the evidence in the light most favorable to the State and we cannot conclude, in light of the above testimony, that the State

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[2]Defendant did not object to the admission of the officers' testimony on any basis.

failed to meet its burden of showing substantial evidence of penetration. Thus, the trial court did not err in denying Defendant's motions to dismiss." *Id.* at 376, 645 S.E.2d at 171-72.

Defendant acknowledges *Kitchengs*, but urges us to "re-examine the holding in *Kitchengs*, overrule *Kitchengs* on this issue, and hold that the State failed to prove penetration in this appeal." We are not, however, permitted to do so. Only the Supreme Court may revisit *Kitchengs*. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). *Kitchengs* establishes that the evidence in this case was sufficient to prove penetration.

Alternatively, defendant argues that because Susan's testimony was impeached by her prior statements to the police in which she denied having sex with defendant, her testimony cannot be sufficient to defeat a motion to dismiss. Relying predominately on *State v. Wilson*, 293 N.C. 47, 235 S.E.2d 219 (1977), and *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967), defendant invokes the following principle: "While ordinarily the credibility of witnesses and the weight to be given their testimony is exclusively a matter for the jury, this rule does not apply when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with the physical conditions established

by the State's own evidence." *Wilson*, 293 N.C. at 51, 235 S.E.2d at 221.

Both *Wilson* and *Miller*, however, address the issue whether, under the circumstances presented by the State's evidence, it was physically possible for the witness to have actually seen the defendant during the commission of the offense or shortly afterwards. *See id.* at 52, 235 S.E.2d at 222 (holding identification was sufficient to support burglary conviction when prosecuting witness saw the defendant from about six to eight feet away, and defendant was illuminated by kitchen light); *Miller*, 270 N.C. at 732, 154 S.E.2d at 905 (holding identification was insufficient to support breaking and entering conviction where witness saw the defendant for the first time at night from approximately 300 feet away "peeping" around corner of building in witness' direction). In this case, not involving testimony that is "'inherently impossible or in conflict with indisputable physical facts or laws of nature,'" *id.* at 731, 154 S.E.2d at 905 (quoting *Jones v. Schaffer*, 252 N.C. 368, 378, 114 S.E.2d 105, 112 (1960)), questions of credibility arising out of prior inconsistent statements were questions for the jury.

Indeed, our Supreme Court has previously held that "[t]he uncorroborated testimony of the victim is sufficient to convict under N.C.G.S. § 14-202.1 if the testimony establishes all of the elements of the offense." *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993). We, therefore, hold that the record contains sufficient evidence of penetration, and the trial court properly

denied the motion to dismiss. *See also State v. Ashford*, 301 N.C. 512, 513-14, 272 S.E.2d 126, 127 (1980) (holding prosecuting witness' statements that defendant "had 'intercourse' and 'sex' with her" were "sufficient as shorthand statements of fact on the issue of penetration").

B. Indecent Liberties

Turning to defendant's conviction for taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1(a)(1) (2007), the State was required to prove "(1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire." *State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987). Defendant argues only that the State failed to prove (1) "what, if any, immoral, improper, or indecent liberty was taken by defendant-appellant" with Susan, and (2) that defendant acted for the purpose of arousing or gratifying sexual desire.

It is well established that evidence of penetration, such as with statutory rape, is sufficient to establish the offense of taking indecent liberties with a minor. *State v. Baker*, 333 N.C. 325, 329, 426 S.E.2d 73, 75-76 (1993) (holding that the offense of taking indecent liberties with a minor may involve sexual penetration, but does not require sexual penetration). Since we

have concluded that the State presented sufficient evidence of statutory rape to defeat the motion to dismiss, it follows that there was sufficient evidence of an indecent liberty. *See Quarg*, 334 N.C. at 100, 431 S.E.2d at 5 (holding victim's testimony that defendant got undressed, got on top of her, and then inserted his penis into her vagina was sufficient to withstand motion to dismiss indecent liberties charge).

With respect to defendant's intent, this Court observed in *State v. Campbell*, 51 N.C. App. 418, 421, 276 S.E.2d 726, 729 (1981), that "[a] defendant's purpose, being a mental attitude, is seldom provable by direct evidence and must ordinarily be proven by inference." Thus, whether an action was for the purpose of arousing or gratifying sexual desire "may be inferred from the evidence of the defendant's actions." *Rhodes*, 321 N.C. at 105, 361 S.E.2d at 580. The State presented evidence that defendant and Susan "had sex" and that defendant ejaculated. Such evidence was sufficient to allow the jury to find that defendant acted for the purpose of arousing or gratifying his sexual desire. *See State v. Fuller*, 166 N.C. App. 548, 557, 603 S.E.2d 569, 576 (2004) (finding sufficient evidence of purpose to gratify sexual desire based on victim's testimony that defendant kissed her breasts and private area and digitally penetrated her).

II

Defendant next argues that the trial court erred by allowing the State to present evidence of sexual intercourse between

defendant and a 14-year-old girl, "Cathy."[3] The trial court allowed the State to present Cathy's testimony over defendant's objection on the grounds that it was a "modus operandi kind of situation, because there is a striking similarity between the two offenses, not so remote in time as to be otherwise inadmissible if the proper sequence is followed." Cathy testified that in October 2004, when she was 14 years old, she went out with defendant, they drank alcohol and smoked marijuana together, they had unprotected sex in the backseat of his car, and she became pregnant.

Defendant contends that Cathy's testimony was inadmissible under Rule 404(b) of the Rules of Evidence because *modus operandi* evidence may only be used to identify a defendant as the perpetrator of the offense, and defendant's identity was never at issue in this case. *See, e.g.*, *State v. Carter*, 338 N.C. 569, 588-89, 451 S.E.2d 157, 167-68 (1994) (stating that identity must be at issue to admit *modus operandi* evidence under Rule 404(b), but not for admitting evidence of common plan or scheme), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263, 115 S. Ct. 2256 (1995). We believe, however, that although the trial judge referred to *modus operandi*, his explanation for admission of the evidence indicated that he was admitting the evidence to prove a common plan or scheme.

In any event, if the evidence is admissible for a proper purpose under Rule 404(b), defendant is not prejudiced by the fact that the trial judge admitted it for an improper purpose. *See*

[3]We use the pseudonym "Cathy" because the witness was a minor.

State v. Harris, 140 N.C. App. 208, 212, 535 S.E.2d 614, 617 ("[B]ecause the evidence was admissible for a proper purpose (to show a common plan or scheme), the trial court's error in admitting that same evidence for an improper purpose (lack of consent) is rendered non-prejudicial."), *appeal dismissed and disc. review denied*, 353 N.C. 271, 546 S.E.2d 122 (2000); *State v. Haskins*, 104 N.C. App. 675, 683, 411 S.E.2d 376, 383 (1991) ("Although it is error to admit other crimes evidence for a purpose not supported in the evidence, the error cannot prejudice defendant when the same other crimes evidence is admitted for a purpose which is supported in the evidence."), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992). We hold that the evidence was admissible as evidence of a common plan or scheme.

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.R. Evid. 404(b). It is well established 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 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). In addition, "North Carolina's appellate courts

have been 'markedly liberal in admitting 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) (quoting *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 419 (1986)); *accord State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996) ("This Court has been liberal in allowing evidence of similar offenses in trials on sexual crime charges.").

The standard for determining whether evidence of other misconduct is admissible as demonstrating a common plan or scheme "is whether the incidents establishing the common plan or scheme 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." *Id.* at 615, 476 S.E.2d at 299; *accord State v. Smith*, 152 N.C. App. 514, 527, 568 S.E.2d 289, 297 ("The use of evidence permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity."), *appeal dismissed and disc. review denied*, 356 N.C. 623, 575 S.E.2d 757 (2002). Furthermore, whether evidence should be excluded under Rule 403 "is a matter generally left to the sound discretion of the trial court, which we leave undisturbed unless the trial court's ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision[.]" *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 74 (2002) (internal citations and quotation marks omitted), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823, 123 S. Ct. 916 (2003).

Here, we agree with the trial court that the incident involving Cathy and the present case involving Susan are sufficiently similar: (1) Cathy was 14 when she had sex with defendant and Susan was 13 years and 10 months old; (2) defendant had sex with each girl in the backseat of his car at night; (3) defendant had unprotected sex with each girl; and (4) Cathy smoked marijuana with defendant, and when the police stopped defendant with Susan, they found eight bags of "leafy vegetable matter" in his pockets.[4] The two incidents also had the necessary temporal proximity since defendant had sex with Cathy in October 2004 and Susan in June 2005 (although defendant had first met Susan in October 2004).

Given the similarities between the two incidents, combined with the fact that they were committed only eight months apart, the trial court properly admitted Cathy's testimony under Rule 404(b) to show defendant's common plan or scheme of seducing young girls. *See State v. Curry*, 153 N.C. App. 260, 265, 569 S.E.2d 691, 695 (2002) (holding evidence properly admitted under Rule 404(b) to establish common plan or scheme when, over a period of 10 years, the defendant (1) asked 13- to 14-year-old girls to join track team he coached, (2) offered them rides to and from practice, and (3) had sex with them in the same "locale"); *State v. Chavis*, 141 N.C. App. 553, 563-64, 540 S.E.2d 404, 412 (2000) (holding evidence was properly admitted under Rule 404(b) to establish common plan or

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[4]Susan indicated she knew that defendant had marijuana — it was the reason she was worried when the police stopped them.

scheme where (1) both victims were young girls "similar in age," (2) the defendant drank alcohol with both victims, and (3) the defendant drove each victim in his car to an isolated road at night, asked them to get out to help him fix the car, and then sexually assaulted them on the side of the road).

"Once the trial court determines evidence is properly admissible under Rule 404(b), it must still determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *State v. Bidgood*, 144 N.C. App. 267, 272, 550 S.E.2d 198, 202, *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001). Defendant contends that Cathy's testimony was not probative at all on the central issue at trial: whether penetration occurred. The State was, however, attempting to prove that defendant had unprotected sexual intercourse with Susan in the backseat of his car on the night of 17 June 2005. Defendant's cross-examination of Susan and the police officers focused on Susan's prior statements denying that sex had occurred in the car. As a result, Cathy's testimony that eight months earlier she had unprotected sex with defendant at night in the backseat of his car was relevant to the State's theory of the case by showing that the incident with Susan was consistent with defendant's common plan or scheme when seducing young girls.

Given the eight-month time frame and the similarities in the ages of Cathy and Susan when defendant had sex with each of them, the method defendant used to seduce them, and the manner in which he committed the alleged acts, the trial court's determination that

the probative value of Cathy's testimony was not substantially outweighed by any unfair prejudice to defendant was not manifestly unreasonable. *See Curry*, 153 N.C. App. at 265, 569 S.E.2d at 695 (holding probative value of evidence of similar sexual misconduct was not substantially outweighed by unfair prejudice to the defendant "in light of the strong similarities between the alleged acts" of seducing young girls); *Bidgood*, 144 N.C. App. at 272, 550 S.E.2d at 202 ("Because the rape of Ms. McClure and the alleged rape of Ms. Tate were sufficiently similar and occurred less than ten months apart, we hold Ms. Tate's testimony was admissible under Rule 404(b).").

Defendant further argues that the trial court abused its discretion by failing to conduct the Rule 403 balancing test on the record. Defendant acknowledges that he did not object to this omission at trial, but argues plain error. In *State v. Washington*, 141 N.C. App. 354, 540 S.E.2d 388 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001), however, this Court held that the trial court was not required to explicitly conduct the balancing test on the record when the record itself showed that the court excused the jury after the defendant objected, conducted a *voir dire* of the witness to determine the substance of the proffered testimony, and considered arguments from both sides before admitting the testimony. *Id.* at 367, 540 S.E.2d at 397-98. Here, the trial court followed substantially the same procedure approved in *Washington* and, therefore, no error occurred when the trial

court did not explicitly discuss the Rule 403 balancing test on the record.

Defendant also assigns plain error to the trial court's failure to give a limiting instruction to the jury with respect to Cathy's testimony. Our Supreme Court has held, however, that "[t]he admission of evidence which is relevant and competent for a limited purpose will not be held error in the absence of a request by the defendant for a limiting instruction. Such an instruction is not required unless *specifically* requested by counsel." *State v. Stager*, 329 N.C. 278, 309, 406 S.E.2d 876, 894 (1991) (internal citations and quotation marks omitted). Because defendant did not request a limiting instruction at the time Cathy's testimony was admitted or at the charge conference, defendant's argument is not properly before us. *Id.* at 310, 406 S.E.2d at 894.

III

In his final argument on appeal, defendant contends that the court erred by failing to intervene *ex mero motu* during the prosecutor's closing argument. Defendant points to the following portion of that closing argument:

> [PROSECUTOR:] Now, you've heard about another case, [Cathy] — y'all remember that, don't you? [Cathy], she ran into [defendant], too. . . . That evidence is letting us know that you can believe what [Susan] says. [Cathy] doesn't know her, but he does the same thing; that's what he does.
>
> That's how you know it's him; that's how he seduces these young ladies. Think about the similarities: a student, a student; 13, 14; back seat of the car — Why are you going to test the back seat of that car? His DNA

> would be in there. See, this is what [defendant] does.

Although he did not object at the time, defendant now argues that the argument by the prosecutor was "grossly improper."

"Where a defendant fails to object, an appellate court reviews the prosecutor's arguments to determine whether the argument was 'so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu* to correct the error.'" *State v. Braxton*, 352 N.C. 158, 200, 531 S.E.2d 428, 452-53 (2000) (quoting *State v. Williams*, 317 N.C. 474, 482, 346 S.E.2d 405, 410 (1986)), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797, 121 S. Ct. 890 (2001). "'[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.'" *Id.*, 531 S.E.2d at 453 (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160, 117 S. Ct. 229 (1996)).

Relying primarily on *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986), defendant maintains that the prosecutor's argument was improper because the only proper purpose for admitting Cathy's testimony under Rule 404(b) was to show defendant's *modus operandi*. He contends that the evidence could not be relied upon to bolster Susan's credibility or as substantive evidence of defendant's guilt.

In *Tucker*, 317 N.C. at 543, 346 S.E.2d at 423, our Supreme Court held that the prosecutor's closing arguments to the jury were improper because the prosecutor, in the course of his argument, used evidence of the defendant's prior convictions as substantive evidence, even though impeachment "was the only legitimate purpose for which the evidence was admissible." The situation is different in this case. The prosecutor's argument was in fact consistent with the basis upon which we have held Cathy's testimony to be admissible: a common plan or scheme to commit the charged offense. The purpose of common plan or scheme evidence is to suggest that the defendant in fact acted consistent with that common plan or scheme, precisely as the prosecutor argued. *See, e.g., State v. Sneeden*, 108 N.C. App. 506, 510, 424 S.E.2d 449, 452 (1993) ("Here, even though defendant admits having sex with Angela Hatfield, he contends she consented. Accordingly, due to its close similarity, the 1967 rape is probative upon the question of defendant's intent when Hatfield entered his car and upon the question of Hatfield's consent."), *aff'd on other grounds*, 336 N.C. 482, 444 S.E.2d 218 (1994). The trial court, therefore, did not abuse its discretion by failing to intervene *ex mero motu* during the prosecutor's closing arguments.

No Error.

Judges McCULLOUGH and STEELMAN concur.

Report per Rule 30(e).