NO. COA10-118

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

STATE OF NORTH CAROLINA

v. Caldwell County
No. 07 CRS 051945

JON RAYMOND DAVIS, JR.

Appeal by Defendant from judgment entered 2 April 2009 by Judge Robert C. Ervin in Caldwell County Superior Court. Heard in the Court of Appeals 2 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

Don Willey for Defendant.

STEPHENS, Judge.

At issue is whether the trial court erred in admitting evidence of a prior rape under Rule 404(b) of the North Carolina Rules of Evidence. We conclude there was no error.

I. Procedural History

Defendant Jon Raymond Davis, Jr. was indicted on 16 July 2007 on one count of second-degree rape and one count of second-degree forcible sexual offense. On 2 April 2009, Defendant was convicted on both counts and sentenced to a prison term of 133 to 169 months for the rape and a consecutive term of 107 to 138 months for the forcible sexual offense. Defendant appeals.

II. Factual Background

The prosecuting witness and victim in this case, Kendra,[1] testified that on 24 June 2007, she received a phone call from Defendant inviting her to a cookout in Caldwell County. Kendra had met Defendant once before and thought at the time that he "seemed like a very nice man." Kendra accepted Defendant's invitation and gave Defendant directions to her parents' home where she was living. Defendant picked her up and took her back to his home. Kendra was 5'1" tall and weighed about 95 pounds.

When they arrived at Defendant's home, another person named Travis was there. Kendra sat down in the living room and talked to Travis but Defendant left the room. Kendra opened a beer and consumed "maybe . . . like the top of it." After about ten to fifteen minutes, Kendra began to wonder what was going on because there "wasn't [sic] many people there for what was supposed to be the cookout. There wasn't any food or you know . . . ." Kendra got up and went to look for Defendant. Kendra walked into a back bedroom. The door was halfway shut and when she walked in, Defendant stepped out from behind the door and shut the door behind her. It was dark outside but dimly lit inside, and she saw that he was naked from the waist down and had a condom on.

When Kendra attempted to leave the room, Defendant stepped in front of the door and backed up against it. Defendant said, "'Well, how aggressively do you want to fight[?]'" Defendant pushed Kendra back into the room toward a bed. Defendant

[1] "Kendra" is a pseudonym.

instructed Kendra to remove her shorts, and when she refused, he grabbed her shirt and told her, "'Well, there is an easy way or we're going to do this the hard way, but it's going to happen.'" Defendant pushed her back onto the bed. Kendra felt that there was no way to get away from Defendant so she took her shorts off. Defendant got on top of her, forced her legs apart, and put his penis into her vagina. While he raped her, he held her wrist to her side and held her down, grabbed her face and forced her to look at him, and said several times, "You know you want this." He then held Kendra by the hair and forced her to perform oral sex on him for ten to fifteen minutes.

When he finished sexually assaulting Kendra, Defendant forced her to snort some white powder, threatening to give her "some more of it[,]" meaning sexual assault, if she refused. Afterward, Defendant drove Kendra back to her parents' house. On the way to her home, Defendant threatened that if she told anybody, he would hurt her daughter and "would say that [the sex] was over drugs." Defendant let Kendra use his cell phone on the way to let her family know she was on her way home.

Kendra's 19-year-old daughter convinced her to report the rape and sexual assault to the police. Kendra went to the emergency room where she was examined and treated and a rape kit was administered. She was interviewed by Detective Aaron Barlowe of the Caldwell County Sheriff's Office and identified Defendant by name as her attacker. She also picked him out of a photographic lineup.

The State offered the testimony of Laura[2] under Rule 404(b). After conducting a *voir dire* of Laura, the trial court determined that Laura's testimony was admissible to show the existence of a common plan or scheme on the part of Defendant and, over Defendant's objection, allowed Laura to testify before the jury. Laura testified that in 1979 Defendant raped her. She testified that after having run into Defendant at a place called P.D. Scotts, Defendant twice stopped by her home, once when she was at her mailbox, and another time to ask directions. On 6 November 1979, he again stopped by her house late at night. Laura and her roommate invited Defendant in. After watching television for about 30 minutes, Defendant invited Laura to go with him to his friend's house. Laura accepted Defendant's invitation, and Defendant drove her to what ended up being his cousin's house. She and Defendant both had some mixed drinks while there.

When Laura first met Defendant, she was excited and had a positive perception of him. However, as the evening progressed, she "didn't care for the group [she] was with or how [Defendant] started treating or talking to [her]." When she told Defendant that she wanted to go home, he told her to walk. Laura began to walk home, but after she had walked about a half mile, Defendant pulled up beside her in his car. He apologized to her and told her that he would take her home. Laura got into his car, and Defendant began driving toward her home. When Defendant turned right at a place where he should have gone straight, Laura reiterated that she

[2] "Laura" is a pseudonym.

wanted to go home. Defendant told her that he was going to take her to one more place and then would take her home. Defendant took her to the end of a dead-end road at the Caldwell County landfill.

Defendant parked the car and began kissing Laura. When she moved to get out the passenger side door, he grabbed the door and locked it. Defendant pinned her down and was on top of her, having undone both her jacket and bra. At the time, Laura weighed "105, 115 [pounds] at the most." Defendant pinned one of her arms to her side while she attempted to start the car with the other hand. Defendant took the keys out of the ignition and threw them in the backseat. While Laura struggled to get to the other door, Defendant took off one leg of her jeans and one leg of her underwear. He then inserted his penis into her vagina. After he finished assaulting her, Defendant got the keys from the backseat and drove her home. When they arrived at her home, Laura told him not to ever come around her again. "[H]e just looks at me like I am insane. Like he hasn't done a thing in the world wrong."

Defendant offered no evidence.

III. Discussion

Defendant contends that the trial court improperly admitted Laura's testimony pursuant to Rule 404(b) to show a common plan or scheme. We disagree.

North Carolina Rule of Evidence 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) (2009). Courts have characterized Rule 404(b) as a "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), *cert. denied*, __ N.C. __, 421 S.E.2d 360 (1992). Such evidence may, however, be admissible for other purposes, including proof of motive, opportunity, intent, preparation or plan. *Id.* "When evidence of the defendant's prior sex offenses is offered for the proper purpose of showing plan, scheme, system, or design . . . the ultimate test for admissibility has two parts: First, whether the incidents are sufficiently similar; and second, whether the incidents are too remote in time." *State v. Davis*, 101 N.C. App. 12, 18-19, 398 S.E.2d 645, 649 (1990) (citation and quotation marks omitted), *disc. review denied and appeal dismissed* , 328 N.C. 574, 403 S.E.2d 516 (1991). Evidence deemed admissible under Rule 404(b) must still carry probative value that outweighs the danger of undue prejudice to Defendant under Rule 403. *State v. Frazier,* 319 N.C. 388, 390, 354 S.E.2d 475, 477 (1987). "That determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *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). "[I]n cases involving prior sex offenses, including rape, our courts have been markedly liberal in the admission of 404(b) evidence." *State v. Harris*, 140 N.C. App. 208, 211, 535 S.E.2d 614, 617, *disc. review denied and appeal dismissed*, 353 N.C. 271, 546 S.E.2d 122 (2000).

In *Harris*, this Court held that evidence of two prior rapes committed by defendant was admissible under Rule 404(b) to show a common plan or scheme. This Court found that

> defendant displayed similar behavior here in comparison to his actions in the two prior rape cases. Specifically, in each situation, defendant befriended the women, took them to a secluded place, pinned the women down, became aggressive with them, sexually assaulted and raped them and afterwards acted like nothing had happened.

Id. at 212, 535 S.E.2d at 617.

In this case, the challenged testimony tends to show that Defendant displayed similar behavior here in comparison to his actions in the prior rape of Laura. Specifically, in each situation, Defendant approached his victim and presented himself as a pleasant, harmless individual. Defendant knew both women socially, but did not have a relationship with them. Defendant invited each woman to accompany him. In each situation, Defendant was consuming alcohol and the victims each consumed some alcohol. On what was essentially the first date in each instance, Defendant secluded himself with the victim, either in a car or in a room, and blocked the door when the victim attempted to leave. In each case, the victim was petite. Defendant held the victim's wrist, pinned

her body under him, got on top of her, and penetrated each one with his penis. After completing each assault, Defendant took the victim home. Both assaults took place at night in Caldwell County.

Defendant argues that Laura's testimony fails the first "sufficient similarity" prong of the admissibility test because the similarities between the 1979 assault and the present assault are simply "characteristics inherent to most crimes of that type." *See State v. Carpenter,* 361 N.C. 382, 390, 646 S.E.2d 105, 111 (2007) ("Under Rule 404(b) a prior act or crime is similar if there are some unusual facts present in both crimes . . . ." (citation and quotation marks omitted)). However, "[t]he similarities between the crime charged and the prior acts admitted under Rule 404(b) need not '"rise to the level of the unique or bizarre"' in order to be admissible." *State v. Brothers*, 151 N.C. App. 71, 76, 564 S.E.2d 603, 607 (2002) (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991) (citation omitted)), *appeal dismissed*, 356 N.C. 681, 577 S.E.2d 895 (2003). As in *Harris*, we conclude that the characteristics of Defendant's prior sexual offense are amply similar to the characteristics of the sexual offense in this case to be admissible for the purpose of showing Defendant's plan, scheme, system or design.

As for the temporal proximity requirement, "[i]t is proper to exclude time [a] defendant spent in prison when determining whether prior acts are too remote." *State v. Lloyd*, 354 N.C. 76, 91, 552 S.E.2d 596, 610 (2001) (citations and quotation marks omitted); *see, e.g.*, *State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427

(1986) (noting that "incarceration effectively explain[ed] the remoteness in time"). In *State v. Badgett*, 361 N.C. 234, 644 S.E.2d 206, *cert. denied*, 552 U.S. 997, 169 L. Ed. 2d 351 (2007), defendant was in prison for five of the ten years between a 1992 killing and the 2002 murder for which he was on trial, leaving only five years between the two crimes for purposes of the temporal requirement. *Id.* at 244, 644 S.E.2d at 212. As a result, our Supreme Court concluded that the introduction of evidence of the 1992 killing satisfied the temporal requirement of Rule 404(b). *Id.*; *see also State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998) (holding that introducing evidence of a crime committed seventeen years earlier did not violate temporal proximity requirement); *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991) (holding that introducing evidence of act committed ten years earlier did not violate temporal proximity requirement).

In this case, although there was a 28-year gap between the 1979 offense and the present offense, Defendant spent approximately 22 of those 28 years in prison,[3] leaving only six years between the two crimes for purposes of the temporal requirement. Similar to *Badgett*, we conclude that the six-year gap between the prior and present offense does not render the prior offense too remote to be admissible under Rule 404(b).

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[3] Defendant was convicted of second-degree rape and second-degree sexual offense on 14 May 1980. Defendant was incarcerated in prison on 24 May 1980, paroled on 20 January 1989, returned to prison on 13 October 1989, and released from prison on 2 April 2002.

Furthermore, we conclude that the trial court did not abuse its discretion in admitting Laura's testimony under the balancing test of Rule 403 since the prior incidents were sufficiently similar to the acts charged and not too remote in time. *State v. Boyd*, 321 N.C. 574, 578, 364 S.E.2d 118, 120 (1988). Defendant's argument is overruled.

Defendant received a fair trial, free of error.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).