NO. COA10-1506
NORTH CAROLINA COURT OF APPEALS

Filed: 21 June 2011

STATE OF NORTH CAROLINA

v. Cabarrus County
Nos. 09 CRS 6807-09

DAMIEN KASEEM STANFORD

Appeal by defendant from judgment entered 5 August 2010 by Judge Theodore S. Royster in Cabarrus County Superior Court. Heard in the Court of Appeals 11 May 2011.

*Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.*

*Mark Montgomery for defendant appellant.*

McCULLOUGH, Judge.

Damien Kaseem Stanford ("defendant") appeals from judgment based on his convictions for first-degree rape, first-degree sexual offense and taking indecent liberties with a child. The trial court sentenced defendant to 230 to 285 months in prison in case numbers 09CRS0067809 and 09CRS006807 and 230 to 285 months in case number 09CRS006808 with satellite-based monitoring upon release. We find no error.

## I. Background

At the time of trial, the victim, L.R., was seventeen years old. Between the ages of eight and fifteen she lived with her mother, siblings and aunt in Concord, North Carolina. Defendant, L.R.'s uncle, also lived with them off and on during that period of time. Defendant would sometimes care for L.R. and her siblings.

In 2004, when L.R. was eleven and defendant was nineteen, defendant rubbed L.R.'s thighs and breasts while sitting on a futon in the game room of her home. L.R. attempted to push defendant off and told him to stop. Defendant then touched her "private part" with his mouth. He proceeded to stand L.R. up, push her against the wall, pull down both their pants, and have intercourse with her. He stopped and walked away when he heard someone coming. L.R. did not tell anyone about the incident, because she felt that no one would believe her and she was afraid of defendant, as he threatened to kill her if she told anyone.

On a separate occasion, L.R. was lying on her mother's bed when defendant attempted to get on top of her and kiss her, but

she turned away. She tried to push him off, but failed. Defendant kissed her up and down her body, including her "private part." Defendant proceeded to again have intercourse with L.R. She again did not tell anyone about the incident because she was still afraid of defendant and did not think her mother would believe her.

At the age of fifteen, L.R. moved to Winston-Salem to live in foster care. In April 2009, she told her foster mother about the sexual incidents with her uncle. Her foster mother reported the incidents to Child Protective Services of the Department of Social Services for Forsyth County, who contacted the Cabarrus County Sheriff's Department. Detective Ronald Ferrell of the Concord Police Department also received a copy of the report from the Department of Social Services.

On 16 July 2009, defendant voluntarily went to the Concord Police Department, at Detective Ferrell's request, to be interviewed by Detective K.C. Berg. At the beginning of the interview, Detective Berg advised defendant that he did not have to answer any questions and that he was free to leave at any time. Detective Berg repeated this a few times throughout the interview, as well as informing defendant that he would be able to leave at the end of the interview. The interview lasted four

hours, during which time defendant did not appear impaired and was not deprived of food and water or yelled at by Detective Berg.

In the interview, Detective Berg spent the first hour or so building a rapport with defendant. Defendant initially claimed that he did not touch L.R., but did state that "he may have spanked the victim on the butt." Detective Berg told defendant that he did not think defendant forced himself on L.R., but that L.R. was the aggressor. Detective Berg also told defendant that it was not a big deal; it was not as if there were any bodies on the floor. Defendant then changed his story and stated that after he had taken a shower at his sister's house, L.R. entered the bathroom, hugged defendant, and defendant's towel fell to the floor. Defendant claimed that at this point L.R. initiated the sexual contact.

Detective Berg wrote down defendant's statement. He read the statement to defendant, allowed defendant to read it himself, and asked defendant if there was anything incorrect in the statement. Defendant did make a few corrections and subsequently signed the statement, knowing that he was not required to do so. Afterwards, Detective Berg typed up a synopsis of the interview.

At trial, retired detective, David F. Miller, testified about a prior sexual offense case he investigated in 2001 involving defendant and defendant's four-year-old cousin. The testimony involved a similar story as defendant's current statement in that, after taking a shower and while still wrapped in his towel, his cousin gave him a hug causing the towel to fall. His cousin then initiated sexual contact. Also at trial, Linda Troutman, Assistant Clerk in Cabarrus County, testified for the State regarding a transcript of plea in which defendant admitted his guilt to taking indecent liberties with a boy in connection with the 2001 incident. Defendant received probation for the 2001 incident.

Defendant testified that the statement to Detective Berg was not true. He claimed that he confessed to Detective Berg because he knew L.R. was accusing him, and he was afraid he would be convicted of a serious felony. He also claimed that he confessed to having consensual sex with L.R. because Detective Berg said it was not a big deal, and he thought he would get a similar sentence as the probation from the 2001 incident. Subsequent to being interviewed by Detective Berg, defendant told the same story as the one in his statement to a Department of Social Services social worker.

A jury found defendant guilty of first-degree rape, first-degree sexual offense, and taking indecent liberties with a child. Defendant appeals.

## II. Analysis

### A. Defendant's Statement

Defendant raises two main issues on appeal relating to the admission of two pieces of evidence at trial. Along with each issue, defendant attaches an argument of ineffective assistance of counsel. We will address each ineffective assistance of counsel argument with the corresponding, underlying issue. In defendant's first argument, he contends that the trial court committed plain error in admitting his statement to Detective Berg. We disagree.

Defendant first raises a constitutional issue in that due process protects a defendant from being coerced into incriminating himself. U.S. Const. amend. XIV; N.C. Const. art. I, § 19. Defendant claims that his due process rights were violated by being coerced into giving a statement to Detective Berg. N.C. Gen. Stat. § 15A-974 (2009) provides for the suppression of evidence if "[i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina[.]" "The exclusive method of challenging

the admissibility of evidence upon the grounds specified in G.S. § 15A-974 is a motion to suppress evidence which complies with the procedural requirements of G.S. § 15A-971 *et seq.*" *State v. Conard*, 54 N.C. App. 243, 244, 282 S.E.2d 501, 503 (1981). "The burden is on the defendant to demonstrate that he has made his motion to suppress in compliance with the procedural requirements of G.S. § 15A-971 *et seq.*; failure to carry that burden waives the right to challenge evidence on constitutional grounds." *Id.* at 245, 282 S.E.2d at 503. Here, defendant has failed to meet the burden that he made a proper motion to suppress, or one at all, and therefore has waived any right to challenge the admission of his statement based on constitutional issues. *See id*; *State v. Drakeford*, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Also, in contesting the admission of his statement, defendant contends that the trial court erred because Detective Berg used deception and promised leniency in eliciting defendant's statement. Defendant did not object to the admission of his statement at trial, and therefore, the proper review is for plain error. *See State v. Moody*, 345 N.C. 563, 572, 481 S.E.2d 629, 633 (1997). "In order to prevail under a plain error analysis, defendant must establish not only that the trial court

committed error, but that absent the error, the jury probably would have reached a different result." *Id.* (internal quotation marks and citations omitted).

Defendant relies on Justice Exum's dissent in *State v. Thomas*, 310 N.C. 369, 382, 312 S.E.2d 458, 465 (1984), for the contention that "[w]hen a confession follows a promise of leniency, the confession is inadmissible unless it can be shown that the influence of the promise had been entirely dissipated so that the promise did not in fact induce the confession." In regard to the use of deception defendant argues that:

> The general rule in the United States, which this Court adopts, is that while deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible. The admissibility of the confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession.

*State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983).

Here, the totality of the circumstances tends to show that defendant's statement to Detective Berg was voluntarily and understandingly made. "The use of trickery by police officers in dealing with defendants is not illegal as a matter of law." *Id.*

Defendant specifically takes issue with Detective Berg's assurances that defendant would definitely be able to leave the police station upon completion of the interview and his comments that the situation was not a big deal because there were no bodies on the floor. These comments purportedly led defendant to believe that the charges against him were not as serious as believed and that he may not be arrested.

Our Court has found that where a detective repeatedly asserted to the interviewee that he would be free to leave at the end of the interview, the assertions did not lead the interviewee "to believe that the criminal justice system would treat him more favorably if he confessed to the robbery." *State v. Thompson*, 149 N.C. App. 276, 282, 560 S.E.2d 568, 573, *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 231 (2002). Defendant admitted at trial that Detective Berg told him that no promises were being made in exchange for anything defendant told him in the interview. Defendant understood that by signing the statement "[a]t no time were any promises or threats made to [him] and no pressure or force was used against [him]."

Also, in evaluating the voluntariness of a confession under the totality of the circumstances, "[t]he proper determination is whether the confession at issue was the product of

'improperly induced hope or fear.'" *State v. Gainey*, 355 N.C. 73, 84, 558 S.E.2d 463, 471 (2002) (quoting *State v. Corley*, 310 N.C. 40, 48, 311 S.E.2d 540, 545 (1984)). The North Carolina Supreme Court has held that "an improper inducement must promise relief from the criminal charge to which the confession relates, and not merely provide the defendant with a collateral advantage." *Id.*; *see State v. Pruitt*, 286 N.C. 442, 458, 212 S.E.2d 92, 102 (1975). In the case at hand, Detective Berg did not promise defendant any relief from the potential charges against him, and therefore, defendant was not deceived by any promises of leniency.

Further, Detective Berg's comments were not overly deceptive. "[O]nly in limited circumstances are deceptive methods and attendant consequences sufficient to render a confession invalid." *State v. Barnes*, 154 N.C. App. 111, 114, 572 S.E.2d 165, 168 (2002). Defendant argues that Detective Berg's statements that it was not a big deal and that he believed L.R. was the instigator, do not make defendant's statement involuntary. *See Frazier v. Cupp*, 394 U.S. 731, 737-39, 22 L. Ed. 2d 684, 691-93 (1969) (Where the officer sympathetically suggested that the victim started the fight and defendant began to tell the story, defendant's statement was not

deemed involuntary). Detective Berg testified at trial that his interrogation tactics were used to determine the truth about what really happened. Further, defendant gave a similar statement to the Department of Social Services social worker without any form of inducement. Therefore, defendant's statement was not the product of deception or false promises of leniency and was properly admissible at trial.

Defendant makes a final argument in regard to the admission of his statement at trial in that defense counsel was ineffective in failing to have the statement excluded. In evaluating an ineffective assistance of counsel claim, defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced defendant so much that there is a reasonable possibility that but for counsel's deficiency, a different result would have occurred. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). Defendant must satisfy both prongs of the test. *Strickland*, 466 U.S. at 697, 80 L. Ed. 2d at 699. As discussed above, defendant's statement was not the product of police deception or implied promises of leniency and therefore was properly admissible at trial. Consequently, defendant cannot prove that

defense counsel's assistance at trial prejudiced defendant or was even deficient. This argument is without merit.

B. Admission of Defendant's Prior Guilty Plea

In defendant's second argument, he claims that the trial court erred in allowing his prior guilty plea to be admitted as substantive evidence. At trial, the State presented retired detective, David F. Miller, to testify regarding a 2001 investigation in which defendant took indecent liberties with a child. Following Detective Miller's testimony, the State presented the Cabarrus County Clerk of Court to testify regarding the transcript of defendant's guilty plea from the 2001 crime. Defendant failed to object to the admission of the testimony and evidence at trial, but rather sought an instruction to the jury on the proper consideration of the transcript of plea. Therefore, plain error analysis applies. *See State v. Moody*, 345 N.C. 563, 572, 481 S.E.2d 629, 633 (1997).

Evidence of similar crimes is generally admissible under Rule 404(b) of the North Carolina Rules of Evidence, which states:

> 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). Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception*." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). The one exception comes under Rule 403 of the North Carolina Rules of Evidence which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. Gen. Stat. § 8C-1, Rule 403 (2009). Prior crimes are similar when there are "some unusual facts present in both crimes or particularly similar acts which would indicate the same person committed both crimes." *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983). The similarities do not need to be "unique and bizarre," but "simply [] tend to support a *reasonable* inference that the same person committed both the earlier and the later acts." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991) (internal quotation marks and citation omitted).

Defendant does not question the admission of the underlying facts of the 2001 guilty plea to taking indecent liberties with a child, but argues that the trial court erred in admitting the bare fact of his guilty plea, because it was more prejudicial than probative. For his argument, defendant relies on Judge Wynn's dissent in *State v. Wilkerson*, 148 N.C. App. 310, 327, 559 S.E.2d 5, 16 (2002), *rev'd*, 356 N.C. 418, 571 S.E.2d 583 (2002) (for reasons stated in dissenting opinion, 148 N.C. App. at 318-29, 559 S.E.2d at 10-17 (Wynn, J., dissenting)), in determining that where the defendant does not testify "in a criminal prosecution, the State may not introduce prior crimes evidence under Rule 404(b) by introducing the bare fact that the defendant was previously convicted of a crime[.]" *Id.* The Court went on to hold that the admission of "the bare fact of a defendant's prior *conviction,* except in cases where our courts have recognized a categorical exception to the general rule (e.g. admitting prior sexual offenses in select sexual offense cases . . .), violates Rule 404(b) (as the conviction itself is not probative for any Rule 404(b) purpose) as well as Rule 403[.]" *Id.* at 327-28, 559 S.E.2d at 16.

*Wilkerson* can be distinguished from the case at hand. First, the State did not admit the bare fact of defendant's

conviction, but introduced the underlying similarities between the crimes, as well as the transcript of defendant's prior guilty plea where he acknowledges that he pled guilty and was guilty of the 2001 crime. In this form the current jury was not made aware that a prior jury had already "branded" the defendant a criminal. *See id.* at 328, 559 S.E.2d at 16.

Secondly, as Judge Wynn points out, there is a categorical exception that includes sexual offenses. *Id.* at 327-28, 559 S.E.2d at 16. *Wilkerson* did not involve a sexual offense, but our case involves one with facts that happen to be eerily similar to the underlying facts of defendant's prior guilty plea. *See id.* at 328, 559 S.E.2d at 16. Defendant's two incidents both start with him getting out of the shower and being covered by just a towel. In each instance, a relative approached defendant and gave him a hug, causing his towel to fall off. Defendant claimed both times that the relative then initiated the sexual contact. Defendant contends that he made his current statement similar to the facts of the prior incident, but that should not keep his statement from being admitted into evidence.

Thirdly, the State attempts to distinguish *Wilkerson* by arguing that defendant testified in the case at bar. Here,

defendant testified after the State's introduction of the prior crime evidence. We would note that we do not believe this is the situation that Judge Wynn was referring to in *Wilkerson* where defendant did not testify at all. *Id.* at 320, 559 S.E.2d at 11-12. In *Wilkerson*, Judge Wynn was referring to the admissibility of past crimes to impeach a witness on cross-examination, but that situation is not applicable to our case because the State introduced the evidence of the past crime prior to defendant's testimony. *Id.* Although the case at bar is distinguishable from *Wilkerson*, it is not through the fact that defendant testified.

Aside from the distinguishing characteristics between our case and *Wilkerson*, this Court has further distinguished between the improper admission of a defendant's prior conviction and the permissible admission of a defendant's transcript of plea. In *State v. Brockett*, 185 N.C. App. 18, 647 S.E.2d 628 (2007), three witnesses testified regarding the underlying facts of three armed robberies to which defendant had previously pled guilty. The firearm in the armed robberies was shown to be the same one used to murder the victim in the case being tried. *See id.* at 25, 647 S.E.2d at 634. To show defendant's access to the murder weapon, the State introduced the transcript of plea in which defendant admitted his guilt to the armed robbery charges.

*Id*. On appeal, this Court held that admission of the transcript of plea was more than "bare evidence of Defendant's prior conviction." *Id*. Even further, in *Brockett*, similarly to our case, the trial judge gave a limiting instruction to the jury regarding the use of the transcript of plea. *Id*.

Based on the ability to distinguish the case at hand from *Wilkerson* and the similarities to *Brockett*, we find that the trial court did not err in allowing into evidence defendant's prior guilty plea.

Defendant again raises an ineffective assistance of counsel argument, but this time in regard to the trial court's admission of defendant's prior guilty plea. As stated above, because the guilty plea was admissible under Rule 404(b) of the North Carolina Rules of Evidence and the rationale of *Brockett*, it is not possible for the admission to have been prejudicial. Therefore, defendant's ineffective assistance of counsel argument is without merit.

## III. Conclusion

For the foregoing reasons, we find no error on behalf of the trial court in admitting defendant's statement and prior guilty plea, and defendant's ineffective assistance of counsel arguments lack merit.

No error.

Judges HUNTER (Robert C.) and BRYANT concur.

Report per Rule 30(e).