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NO. COA12-248
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

STATE OF NORTH CAROLINA

v.

Rockingham County
Nos. 11 CRS 50264-65

JOE WESLEY CARTER

Appeal by defendant from judgments entered 5 October 2011 by Judge R. Stuart Albright in Rockingham County Superior Court. Heard in the Court of Appeals. 5 November 2012.

Attorney General Roy Cooper, by Assistant Attorney General Oliver G. Wheeler IV, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

Calabria, Judge.

Joe Wesley Carter ("defendant") appeals from the trial court's judgments entered upon jury verdicts finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), first-degree kidnapping, and felonious breaking and entering. We find no error.

I. Background

The State presented evidence that defendant met Mary Ann Russell ("Russell") in August 2010. In October 2010, although defendant and Russell were casually dating, defendant paid Russell \$75 every two weeks to stay in her home because he needed a place to live. On Thanksgiving night, when Russell returned home she found that defendant had packed his belongings. In addition, he was "in a rage," stomping on canned goods in the kitchen and removing and tossing around her belongings from her closets. He told her he did not want to see her again, and both of them left Russell's home. When Russell returned she found defendant was in her home again, but after Russell asked him to leave, he left. The next day, when Russell returned home, defendant was in her yard. She told him to leave her alone and he left again.

On 17 December 2010, Russell returned home and found defendant sitting in her truck in front of the house. Defendant's presence scared Russell, so she drove away. Later, when she returned, defendant was gone. However, six days later, when defendant's scooter broke down, Russell gave him a ride.

In early January 2011, defendant showed up unexpectedly at Russell's house and asked if she would help him read and understand some papers he brought with him. Russell allowed him

to come into the house. Then he asked her if she knew that she had three keys to the front door. After she replied she did not know how many keys she had, defendant threatened if she lied to him again he would punch her eye out with a screwdriver. When Russell got up to leave, defendant grabbed her and flung her across the room. He also kicked her, hit her, and knocked her to the floor. After the incident, Russell went to the hospital, and then to a motel because she was afraid to go home. The next day, she called a locksmith to change all of her locks, and a few days later contacted law enforcement.

On the night of 22 January 2011, Russell awoke to the sound of someone in her house, and the person said, "This is me, and you know why I'm here. I'm here to kill you." Then she saw defendant in her room, holding a knife. When defendant turned away when he heard a noise outside, Russell went to her porch and screamed. She opened one of the screens with a hammer and attempted to exit the porch, but was unable to do so because she was hit on the top of her head. Russell struggled but defendant continued holding her. Then he began to beat her and attacked her with the knife. Russell sustained several injuries, including a stab wound to her hand. She also injured her head because she lost consciousness and fell down on the cement

floor. Next, defendant dragged Russell back into the bedroom, took money from her purse, and had sex with her. She passed out again. When Russell became conscious, defendant was wiping the blood from her face with a kitchen towel. He then dressed Russell in a t-shirt and threw her into the wall. Russell again passed out and the next thing she remembers is being in her car with defendant driving.

Although Russell testified that she lost and then regained consciousness while defendant was driving, she remembered defendant stopping at a gas station. They also stopped by a body of water and he told her that if he threw her body into the water no one would ever find her. In addition, defendant showed her the place where he had been living since she made him leave her house. Eventually, when Russell awoke back in her house, defendant was there and asked her for a key. She refused.

Defendant threatened her that if she talked, he would hurt her family. Therefore, Russell did not tell anyone about anything defendant had done to her until defendant called her the next day to tell her he was going to law enforcement to tell them what he did. Russell sustained multiple injuries including having one of her teeth knocked out, facial lacerations, black

eyes, a broken nose, a broken cheekbone and a stab wound in her right hand.

Defendant was charged with AWDWIKISI, first-degree kidnapping, and felonious breaking or entering. The jury returned verdicts finding defendant guilty of all charges. Defendant was sentenced to a minimum of 146 and a maximum of 185 months for the assault conviction, a minimum of 146 and a maximum of 185 months for kidnapping, and a minimum of 20 and a maximum of 24 months for breaking or entering. All sentences were to be served in the North Carolina Department of Correction and were to run consecutively. Defendant appeals.

II. Rule 404(b)

Defendant contends the trial court erred by allowing the admission of evidence of a prior assault in violation of Rule 404(b). We disagree.

Rule 404(b) of the North Carolina Rules of Evidence provides, in relevant part:

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) (2011). The rule is inclusive of relevant evidence, as long as the evidence is introduced for a proper purpose as enumerated in the rule. See *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). The North Carolina Supreme Court has recently clarified the standard of review to determine whether evidence was properly admitted under Rule 404(b):

When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, ___ N.C. ___, ___, 726 S.E.2d 156, 159 (2012). "In applying Rule 404(b), our Supreme Court has consistently held that a defendant's prior assaults on the victim ... are admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim." *State v. Harris*, 149 N.C. App. 398, 404, 562 S.E.2d 547, 550 (2002) (internal quotations and citation omitted).

In the instant case, the State sought to introduce evidence regarding defendant's prior assault of Russell in early January 2011 ("the prior assault"). Defendant objected. The State made

an offer of proof regarding the prior assault. The trial court sustained defendant's objection but indicated the possibility of revisiting the issue of admissibility after hearing the evidence regarding the offense charged. After introducing evidence concerning the charged offense, the State again sought to introduce testimony of the prior assault. This time, the trial court ruled that the prior assault was admissible. The Court found that the prior assault involved the same parties, was not too remote in time since it occurred only two weeks before the events leading to the charged offenses, and the assault was "relevant to show the defendant's intent, guilty knowledge and plan, scheme or design involving the crimes charged in this case." The trial court also determined that the probative value of the prior assault outweighed the danger of unfair prejudice, confusion of the issues or misleading the jury. The trial court gave a limiting instruction to the jury to consider the prior assault only for the purpose of showing that defendant had the intent as well as a plan, scheme or design to commit the offense.

Defendant argues the trial court erred in overruling his objection to Russell's testimony because the State presented sufficient evidence regarding defendant's offenses and therefore

the evidence of the prior assault was needlessly cumulative. He asserts the purpose of the State's evidence was to "stir up prejudice" against him "by portraying him as a habitual 'woman beater[.]'" We disagree.

There were multiple purposes for introducing the evidence that defendant assaulted the same victim just a few weeks prior to the events which led to the present charges. First, it was part of a narrative explaining defendant's general pattern of behavior toward Russell. Second, the prior assault showed that defendant's interactions with Russell grew increasingly hostile. Third, the prior assault indicates intent as well as a scheme or plan to harass and intimidate the victim. Therefore, although there was sufficient evidence for the jury to determine whether defendant was guilty or not of the charged offenses without the evidence of the prior assault, introduction of the evidence was not needlessly cumulative. We conclude that the evidence of defendant's prior assault on the victim was relevant and admitted for a proper purpose. The trial court did not err in deciding that admission of the evidence did not violate Rule 404(b).

We also must review whether the evidence was properly admitted under Rule 403, and thus must determine whether the

trial court abused its discretion in finding that the probative value of the evidence outweighed the danger of unfair prejudice. "[W]hen prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *Harris*, 149 N.C. App. at 404, 562 S.E.2d at 551 (citation omitted).

In the instant case, both the prior assault and the charged offenses consist of defendant's physical assault of Russell. In addition, the prior assault only occurred a few weeks prior. Therefore, the prior assault is not too remote in time to "run afoul of the balancing test...." *Id.* The transcript indicates that the trial court carefully considered the balancing test of Rule 403. We find that the trial court did not abuse its discretion in admitting the evidence. Therefore, we conclude, defendant's trial was free of prejudicial error.

No error.

Judges HUNTER, Robert C. and McCULLOUGH concur.

Report per Rule 30(e).