NO. COA13-15
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v.

Wake County
No. 07 CRS 101795

GAVIN COLEMAN SMITH

Appeal by defendant from judgment entered 24 July 2012 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 13 August 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Andrew L. Farris, for Defendant.

ERVIN, Judge.

Defendant Gavin Coleman Smith appeals from a judgment sentencing him to a term of 73 to 97 months imprisonment based upon his conviction for second degree rape. On appeal, Defendant argues that the trial court erred by admitting testimony concerning a sexual encounter between Defendant and a different individual and by allowing the prosecutor to inquire of a defense witness concerning the extent to which he realized that he was guilty of a crime based upon his own testimony.

After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

After eating dinner at Bojangles on the evening of 20 October 2007, R.G.[1], a seventeen year old high school senior at Wakefield High School in Raleigh, and her friend, Anne, were invited to a party being held at Al's house by another friend, Kevin. Although Rebecca had met Al on one or two prior occasions, the two of them were not close, and she had never been to his house prior to that evening. Rebecca followed Kevin to Al's house, with Anne as a passenger in her vehicle.

Upon arriving at the party between 8:00 and 9:00 p.m., Rebecca made herself a drink containing vodka and Hawaiian Punch. About 30 to 45 minutes later, Defendant, who had graduated from Wakefield High two years earlier, and his friend Seth McMinis, arrived at the party. Although she did not know Defendant personally, Rebecca was aware that he had been a

[1]R.G. will be referred to throughout the remainder of this opinion as Rebecca, a pseudonym used for ease of reading and to protect her privacy.

popular football player at Wakefield. Similarly, Rebecca did not know Mr. McMinis, a recent high school graduate who had joined the United States Marine Corps and was home from his duty station at Camp Lejeune for the weekend. During the course of the evening, Rebecca and Mr. McMinis engaged in mutually flirtatious behavior.

While at the party, Rebecca called her friends, Britni and Kara, and invited them to join the festivities. In addition, Anne's friend, Trish, came to the party as well. Ultimately, there were about 10 to 15 people at the party, all of whom were drinking and "hanging out." During the course of the evening, Rebecca consumed approximately four or five drinks of vodka.

At some point, Rebecca began to feel drunk, eventually becoming very sleepy and wanting to lie down. Although Rebecca had originally planned to sleep at her mother's house, she decided to spend the night at the home of one of her friends because she did not want her mother to find out that she had been drinking. As a result, Rebecca asked permission to spend the night at the residence of her friend, Jenna. Although Jenna was not at the party, Rebecca made this request because her mother knew and trusted Jenna.

Around midnight, Rebecca and Mr. McMinis left the party together to go to Rebecca's car. After a brief absence,[2] the two of them returned to the party. At the time that she and Trish left the party around 12:15, Anne asked Rebecca if she wanted to spend the night with them at Trish's house. However, Rebecca, who was playing a video game that involved dancing and singing at that point, declined Anne's invitation.

Subsequently, Rebecca became nauseous, went into a bathroom adjacent to the living room, in which most of the party-goers were "hanging out," and vomited. Although Mr. McMinis followed Rebecca into the bathroom for the purpose of checking on her, nothing of a sexual nature occurred between them at that time. After the two of them exited the bathroom together, Rebecca curled up on the living room couch while Mr. McMinis sat next to her and rubbed her back.

At the time that Kara and Britni, who thought that Rebecca had "consumed too much" or "wasn't sober," left the party at around 1:00 a.m., Rebecca was curled up on the couch while Mr. McMinis was sitting on one end and Defendant was sitting on the other. Although the two young women tried to get Rebecca to

[2]Rebecca and Mr. McMinis told inconsistent stories about what happened during their absence, but the discrepancies in their accounts have no real bearing on the issues which Defendant has raised on appeal and will not be recited in this opinion.

come home with them, she was incoherent and made no effort to get up. At that point, Defendant told Kara and Britni that they should not worry about Rebecca because "[i]t's not like anybody's going to take advantage of her." As a result of the fact that Defendant seemed coherent, Kara and Britni believed him and went home. Rebecca did not remember Kara and Britni leaving or any efforts that they made to get her to go with them.

Al, the host of the party, went to bed shortly after Kara and Britni departed. At the time that he left the living room, Rebecca was curled up on the couch, Mr. McMinis was sitting in a chair, and Defendant, who had been talking to Al, was standing. Al could not tell whether Rebecca was awake or asleep when he went upstairs.

The next thing that Rebecca remembered was waking up and feeling intense pain in her arms and her vagina. Although the room was dark, Rebecca realized that Defendant was on top of her and that his penis was inside her vagina. Despite telling Defendant to stop and attempting to push him off of her body, Rebecca's efforts at resistance proved unsuccessful. As she attempted to free herself, Rebecca looked to her right and saw a figure, whom she later determined to be Mr. McMinis, sitting in a chair and watching what was happening. Rebecca could not

understand why Mr. McMinis did not intervene to stop what Defendant was doing to her.

After Defendant got off of her, Rebecca, who did not remember the removal of any of her clothing, found her pants and underwear on the floor beside the couch. As she cried and attempted to put her pants back on, Defendant asked, "Why don't you f*** [Mr. McMinis]?" After Rebecca responded, "Why would I?", Defendant answered, "You just f***** me." Rebecca never said or did anything that should have led Defendant to believe that she wanted to have sexual intercourse with him.

Once she had grabbed the remainder of her personal belongings, Rebecca went outside and called her friend, Anne. During that conversation, Rebecca sobbed, indicated that Defendant had hurt her, and asked if Anne could come get her. As a result of the fact that Anne was unable to come get her, Rebecca called another friend, David Timmons, who picked her up and took her to his apartment. Upon arriving at Mr. Timmons' apartment and entering the bathroom, Rebecca realized that her tampon was stuck inside of her vagina.

Rebecca was initially afraid to tell her mother about what happened out of concern that she would get in trouble for lying about her whereabouts. When Anne came over that evening, Rebecca told her friend that, although she could not see what

was wrong, she was still feeling pain in her vagina. Upon examining Rebecca, Anne saw visible damage to Rebecca's vagina. After making this discovery, Anne convinced Rebecca to tell her mother what had happened.

On the following afternoon, Rebecca, who was accompanied by her mother, went to the emergency room at Duke Hospital in Raleigh, where a rape kit was taken. At the hospital, in the presence of her mother, Rebecca told Detective Gibson of the Raleigh Police Department about the incident in which she had been involved with Defendant. At that time, however, Rebecca only admitted to having had two drinks throughout the evening and claimed that Anne, rather than David Timmons, had picked her up from Al's house.

Two days later, Rebecca, again accompanied by her mother, was examined by Dr. Michael White, an expert in obstetrics and gynecology. At trial, Dr. White testified that, at the time of his examination, he observed an abrasion on Rebecca's vaginal wall that showed that there had "definitely [been] a forced vaginal penetration" and stated that it was highly unlikely that the injury which Rebecca had sustained had occurred during consensual sexual conduct.

2. Defendant's Evidence

Mr. McMinis[3] testified that he was alone in the bathroom with Rebecca on two different occasions on the night of the party at Al's house. On the first of these occasions, Mr. McMinis testified that Rebecca followed him into the bathroom and asked if she could watch him urinate; that, after they started kissing, Rebecca lowered her pants; and that Mr. McMinis briefly performed oral sex on Rebecca. On the second occasion, which occurred when Rebecca vomited, nothing of a sexual nature occurred.

After Rebecca's friends left and everyone else went to bed, Rebecca was seated on the couch flanked by Defendant and Mr. McMinis. At some point, Mr. McMinis got up and went to the kitchen; upon his return, he found Rebecca and Defendant kissing. Mr. McMinis walked back to the couch, Rebecca asked Defendant if he had a condom. At that point, Rebecca went to the bathroom alone. As she returned to the couch and sat back

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[3]The State notes in its brief that Mr. McMinis was indicted for first degree rape and first degree sex offense and ultimately pled guilty to having perjured himself in his testimony in the present case. As a result of the fact that appellate review in this jurisdiction is limited to the "record on appeal" and the "verbatim transcript of proceedings . . .," N.C.R. App. P. 9(a); *Cellu Products Co. v. G.T.E. Products Corp.*, 81 N.C. App. 474, 477-78, 344 S.E.2d 566, 568 (1986), and the fact that the existence of Mr. McMinis' guilty plea is not disclosed in the trial court, the State should not have alluded to this fact in its brief and we have not considered it in weighing the merits of Defendant's challenges to the trial court's judgment.

down, Rebecca began kissing Mr. McMinis and eventually raised her hips up so that he could remove her pants and underwear. As Rebecca performed oral sex upon Mr. McMinis, Defendant began having sexual intercourse with Rebecca. Although Mr. McMinis was about to have sexual intercourse with Rebecca, he desisted when she pushed him with her legs. According to Mr. McMinis, Rebecca was never asleep or unconscious during this entire encounter.

In addition, Defendant presented the testimony of Dr. Robert Kratz, an expert in emergency medicine, who examined Rebecca at Duke Hospital in Raleigh. According to Dr. Kratz, Rebecca did not claim to be in any pain at the time of the examination. Although he observed an abrasion at the entrance to Rebecca's vagina, Dr. Kratz testified that he could not determine what caused this injury. However, on cross-examination, Dr. Kratz stated that he did not believe that Rebecca's injuries were consistent with having engaged in a consensual sexual act.

Finally, Defendant presented the testimony of Dr. John M. Thorp, Jr., who was qualified as an expert in obstetrics and gynecology. Although he never personally examined her, Dr. Thorp reviewed Rebecca's medical records and testified that one could not determine whether the injury which Dr. Kratz and Dr.

White described would have resulted from a consensual or non-consensual act. However, Dr. Thorp also acknowledged that the absence of physical findings did not mean that non-consensual intercourse had not occurred.

B. Procedural History

On 6 January 2009, the Wake County grand jury returned a bill of indictment charging Defendant with second degree rape. On 6 March 2012, the Wake County grand jury returned a superseding indictment charging that Defendant had committed a second degree rape against Rebecca "by force and against [her] will" or while she "was asleep or similarly incapacitated." On 29 February 2012, Defendant filed a motion *in limine* seeking the exclusion of any evidence which the State might seek to adduce concerning the alleged rape of another individual.

The charge against Defendant came on for trial before the trial court and a jury at the 15 July 2012 criminal session of the Wake County Superior Court. After a jury had been selected, the trial court denied Defendant's motion *in limine* and allowed the admission of evidence concerning the alleged rape of a second young woman. In its instructions, the trial court allowed the jury to determine whether Defendant was or was not guilty of second degree rape on the theory that Rebecca "was asleep or similarly incapacitated" at the time of her encounter

with Defendant. On 24 July 2012, the jury returned a verdict convicting Defendant as charged. At the conclusion of the ensuing sentencing hearing, the trial court entered a judgment sentencing Defendant to a term of 73 to 97 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Substantive Legal Analysis

A. Admission of Prior Bad Act Evidence

In his initial challenge to the trial court's judgment, Defendant argues that the trial court erred by admitting testimony concerning an incident involving Defendant and another individual. More specifically, Defendant contends that the challenged evidence did not tend to show the existence of a common scheme or plan involving Defendant's conduct with Rebecca and his conduct with the third party involved in the other incident, that the challenged evidence did not involve an incident which was sufficiently similar to the events underlying the charges that had been lodged against Defendant in this case to permit the admission of the challenged evidence, and that the probative value of the challenged evidence was outweighed by the risk that its admission would unfairly prejudice Defendant. We do not find Defendant's arguments persuasive.

1. Relevant Facts

At trial, the State sought to obtain the admission of testimony by another young woman named E.R.,[4] who was an eighteen year old freshman at North Carolina State University on 4 February 2007. Along with two other friends, Erica went to a party at the College Inn apartment complex, a facility in which Defendant resided. Erica had been drinking at dinner and continued to consume alcohol at the party. At some point during the evening, Erica became separated from her two friends and went outside into the breezeway for the purpose of attempting to call them. As a result of the fact that it was cold outside, Defendant and certain of his friends invited Erica to make her phone calls from inside their apartment. Although Erica knew of Defendant through mutual friends associated with the football team, she did not know him personally.

At approximately 2:00 a.m., Erica reached her friends, who had already returned to their residence and were not, for that reason, in a position to give her a ride home. In light of that fact, Erica decided to sleep on the couch in the common room of Defendant's apartment. While she remained at Defendant's apartment, Erica continued to consume alcohol, including a number of shots of liquor. At some point during the night,

[4]E.R. will be referred to throughout the remainder of this opinion as Erica, a pseudonym used for ease of reading and to protect her privacy.

Erica's memory became "fuzzy," a fact which deprived her of any detailed recollection of subsequent events.

The next thing Erica remembered was being on top of Defendant as they were having sexual intercourse. At that time, Erica felt "like just Jello," did "not want[] to do that" and "want[ed] to get off." On the following morning, Erica woke up to find herself in a location which she did not recognize in bed with someone whom she did not know in a completely unclothed condition. On the floor beside the bed in which she was lying, Erica saw her clothes, which were in an undamaged condition, and a used tampon. Erica testified that she would not have had intercourse with anyone during her menstrual period.

As she put her clothes back on, Erica noticed that her pants had not been unbuttoned and that her underwear was still inside of her pants. Although the condition of Erica's clothing tended to suggest that her pants and underwear had not been taken off separately, Erica did not normally undress herself in that manner. Erica did not remember either removing her own pants or having them removed by Defendant. Once she had gathered up her clothes, Erica returned to her dorm.

After discussing the events of the previous evening with her roommates, Erica went to Rex Hospital. At the hospital, Erica was told that, in order to have Defendant prosecuted, she

would have to allow the taking of a rape kit and talk to law enforcement officers, steps which she declined to take at that time. After leaving the hospital, Erica talked the situation over with a friend, who convinced her to speak to the police. During her conversation with investigating officers, Erica described a previous occasion during which she had blacked out after consuming alcohol and said and did things that she could not remember at a later time. Although Erica stated that she did not remember consenting to having sexual intercourse with Defendant and that she did not believe that she would have agreed to engage in such activity with him, she acknowledged that she could have given such consent and simply did not remember having done so.[5]

2. Standard of Review

> When analyzing rulings applying [N.C. Gen. Stat. § 8C-1,] Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its [N.C. Gen. Stat. § 8C-1, Rule] 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 [N.C. Gen. Stat. § 8C-1,] Rule 404(b). We then review the

[5]When questioned by investigating officers, Defendant stated that, while he and Erica were both intoxicated, Erica had consented to have sexual intercourse with him.

> trial court's [N.C. Gen. Stat. § 8C-1,] Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008). An "[a]buse of discretion [occurs] where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

3. Admissibility of Erica's Testimony

N.C. Gen. Stat. § 8C-1, Rule 404(b) provides that, while "[e]vidence 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," such evidence may 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). As the Supreme Court has stated on many occasions, N.C. Gen. Stat. § 8C-1, 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* 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). As a result, evidence sought to be admitted pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b), "must be offered for a proper purpose, must be relevant,[6] [and] must have probative value that is not substantially outweighed by the danger of unfair prejudice to the defendant . . . ." *State v. Mohamed*, 205 N.C. App. 470, 486-87, 696 S.E.2d 724, 736 (2010) (quoting *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992)).

"[T]he rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). For that reason, "the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of [N.C. Gen. Stat.] § 8C-1, Rule 403." *State v. Davis*, 340 N.C. 1, 14,

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[6]According to N.C. Gen. Stat. § 8C-1, Rule 401, "relevant evidence" consists of any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

455 S.E.2d 627, 634 (quoting *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)), *cert. denied*, 516 U.S. 846, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995). "Prior crimes or acts by the defendant are deemed similar when there are 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both[.]'" *State v. Brockett*, 185 N.C. App. 18, 22, 647 S.E.2d 628, 632-33 (alteration in original) (quoting *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)), *disc. review denied*, 361 N.C. 697, 654 S.E.2d 483 (2007). The similarities between the crime charged and the prior acts deemed admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) need not, however, "'rise to the level of the unique or bizarre.'" *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991) (citation omitted).

According to well-established North Carolina law, "evidence of prior sex acts may have some relevance to the question of defendant's guilt of the crime charged if it tends to show a relevant state of mind such as intent, motive, plan, or opportunity." *Boyd*, 321 N.C. at 577, 364 S.E.2d at 119; *see also State v. Gordon*, 316 N.C. 497, 504-05, 342 S.E.2d 509, 513 (1986); *State v. DeLeonardo*, 315 N.C. 762, 770-71, 340 S.E.2d 350, 356-57 (1986). As this Court has previously noted, "in cases involving prior sex offenses, including rape, our courts

have been markedly liberal in the admission of [other bad acts] evidence." *State v. Harris*, 140 N.C. App. 208, 211, 535 S.E.2d 614, 617, *disc. review denied*, 353 N.C. 271, 546 S.E.2d 122 (2000); *see also State v. Jacob*, 113 N.C. App. 605, 608, 439 S.E.2d 812, 813 (1994) (stating that "North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges"). As a result, this Court has upheld the admission of evidence concerning a defendant's earlier conduct when he "used ministry and church activities as an excuse for spending time" with his previous victims, engaged in "similar activities" with the victims, and sexually abused the victims in a similar manner and in similar locations, *State v. Carpenter*, 147 N.C. App. 386, 392, 556 S.E.2d 316, 321 (2001), *disc. review denied*, 355 N.C. 217, 560 S.E.2d 143, *cert. denied*, 536 U.S. 967, 122 S. Ct. 2680, 153 L. Ed. 2d 851 (2002), and where, even though there were no "'unique or bizarre'" features associated with his conduct, the defendant's victims were the same age, the acts occurred under similar circumstances, the defendant used a similar approach in committing the prior acts, and the defendant was the stepfather to both victims. *State v. Brothers*, 151 N.C. App. 71, 76-77, 564 S.E.2d 603, 607 (2002), *disc. review denied*, 356 N.C. 681, 577 S.E.2d 895 (2003).

According to Defendant, the information contained in Erica's testimony was inadmissible because the events which she described were insufficiently similar to the events which occurred at the time of the alleged rape, so that the challenged evidence proved nothing more than that Defendant liked to go to parties and was sexually attracted to girls of approximately his own age. In concluding that the challenged testimony should be admitted, however, the trial court found that both Erica and Rebecca were approximately the same age and somewhat younger than Defendant, that both Erica and Rebecca had not had any prior relationship with Defendant aside from being aware of his identity as a football star, that the events involving Erica and Rebecca occurred approximately eight months apart at social gatherings where under-aged alcohol consumption was occurring, and that the defendant had sexual contact with both Erica and Rebecca in the early morning hours after most of the other partygoers had departed. In addition, as the State notes in its brief before this Court, both Erica and Rebecca had limited memories of what had occurred due to intoxication, neither Erica nor Rebecca remembered the removal of her clothing, and both Erica and Rebecca were in the same location as Defendant because they did not, for various reasons, have a ride home. In light of these significant similarities between the incidents in which

Erica and Rebecca were involved, we conclude that the trial court correctly determined that Erica's testimony was admissible for the purpose of showing that Defendant acted on the basis of a common scheme or plan to take advantage of impaired younger women who were stranded in the same location at which he was present in the early morning hours after the conclusion of a social event. *State v. Houseright*, __ N.C. App. __, __, 725 S.E.2d 445, 449 (2012) (upholding the admission of other bad act evidence tending to show the existence of "a plan to engage in sexual activity with young girls").

In seeking to persuade us to reach a different result, Defendant argues that the similarities upon which the trial court relied in upholding the admissibility of Erica's testimony were indistinguishable from those deemed inadequate in *State v. Gray*, 210 N.C. App. 493, 512, 709 S.E.2d 477, 490 (2011), *disc. review denied*, 365 N.C. 555, 723 S.E.2d 540 (2012), on the ground that these similarities established "little more than that the alleged perpetrator of both acts was attracted to young children, and that he used the fact that he was a welcome guest in the house where each child was staying to find time alone with that child in order to commit the assaults." We do not, however, believe that *Gray* is controlling in this instance given that the prior conduct at issue in *Gray* occurred more than

eighteen years before the sexual offense at issue at trial, *Gray*, 210 N.C. App. at 510, 709 S.E.2d at 489, and the fact that nothing in the record developed in *Gray* bears any resemblance to the fact that, in both instances at issue here, Defendant took advantage of slightly younger women who were in an intoxicated condition and had become stranded at the location in which he was present in the early morning hours following a party. As a result, we do not find Defendant's argument in reliance upon *Gray* to be persuasive.

In addition, Defendant argues on appeal, contrary to the approach that he adopted before the trial court[7], that the temporal proximity necessary to permit the admission of Erica's testimony was not present in this case. Although we question whether Defendant has properly preserved his temporal proximity argument for purposes of appellate review, *State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996) (holding that the defendant had failed to properly preserve his challenge to the admission of certain prior bad act evidence on temporal proximity grounds because the temporal proximity argument had been "made for the first time on appeal"), *cert. denied*, 519

[7]At trial, Defendant's trial counsel stated that, "[t]hen we get into temporal proximity. I'm not going to argue that. I think that temporal proximity . . . in this case, they're only a few months apart. We're not even going to waste the Court's time with any cases."

U.S. 1098, 117 S. Ct. 781, 136 L. Ed. 2d 725 (1997), we need not address this issue given that this Court has allowed the admission of evidence of prior misconduct which was substantially more distant from the conduct for which the defendant had been charged than is the case in this instance. *See State v. Frazier*, 344 N.C. 611, 615-16, 476 S.E.2d 297, 300 (1996) (describing instances in which the court has admitted evidence concerning prior instances of similar sexual misbehavior separated by an interval of more than two years, including a ten year disparity); *State v. Moore*, 173 N.C. App. 494, 502, 620 S.E.2d 1, 7 (2005) (holding that a seventeen month interval between the date upon which the crime charged had been committed and the date upon which the defendant had sexually assaulted another woman was not so long as to require the exclusion of challenged prior bad act evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 404), *cert. denied*, __ N.C. __, 634 S.E.2d 894 (2006). As a result, the trial court did not err by failing to exclude Erica's testimony on temporal proximity grounds.[8]

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[8]Although Defendant asserts that the trial court should have excluded Erica's testimony on temporal proximity grounds in light of *State v. Shane*, 304 N.C. 643, 655, 285 S.E.2d 813, 821 (1982), in which the Supreme Court held that the trial court erred by admitting evidence of a prior bad act which "occurred at [a] different place[], involved different women, w[as] separated [from the crime charged] by a period of *seven months*,

In addition, Defendant contends that, even if Erica's testimony were admissible for a purpose deemed permissible under N.C. Gen. Stat. § 8C-1, Rule 404(b), his objection to the admission of the challenged testimony should have been sustained pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, which provides for the exclusion of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." The determination required by N.C. Gen. Stat. § 8C-1, Rule 403, "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 648 (2001). In view of the significant similarities between the events underlying the charge which had been lodged

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and, in the latter occurrence, included the participation of another partner in the crime" despite the "striking similarity" between the charged and uncharged bad conduct, we do not believe that *Shane* is controlling in this instance. The present case involves a greater degree of similarity between the crime charged and the uncharged prior bad act than was the case in *Shane*, with our conclusion to this effect resting, in large part, upon the fact that Defendant in this case, unlike the defendant before the Court in *Shane*, claimed that both incidents in which he was involved stemmed from consensual conduct. As a result, we conclude that, given the "commonality" of Defendant's behavior in the incidents in question, "the [eight month] gap between the incidents did not 'negate[] the plausibility of the existence of an ongoing and continuous plan to engage . . . in such . . . activities.'" *Penland*, 343 N.C. at 654, 472 S.E.2d at 745 (quoting *Shane*, 304 N.C. at 656, 285 S.E.2d at 821).

against Defendant in this case and the events described in Erica's testimony and the fact that Defendant alleged that his contact with both Erica and Rebecca was consensual in nature, we see no basis for concluding that the trial court abused its discretion by failing to exclude Erica's testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 403. Our determination to this effect is reinforced by the fact that, after allowing the admission of Erica's testimony into evidence, the trial court instructed the jury that:

> [e]vidence has been received tending to show that [Defendant] engaged in sexual intercourse with [Erica] in February of 2007. This evidence was received solely for the purpose of showing that there existed in the mind of [Defendant] a plan, scheme, system, or design involving the crime charged in this case. If you believe this evidence, you may consider it, but only for the limited purpose for which it was received. You may not consider it for any other purpose.

As this Court has previously held, the delivery of such a limiting instruction can serve to mitigate the risk that a jury will consider other bad act evidence for an impermissible purpose during the course of its deliberations. *State v. Stevenson*, 169 N.C. App. 797, 802, 611 S.E.2d 206, 210 (2005); *see also State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 74-75 (2002) (holding that the admission of prior bad act evidence was not unfairly prejudicial for purposes of N.C. Gen. Stat. § 8C-1,

Rule 403, given that the trial court delivered an extensive limiting instruction delineating the permissible purposes for which the jury was entitled to consider the evidence in question), *cert. denied*, 537 U.S. 1133, 123 S. Ct. 916, 154 L. Ed. 2d 823 (2003). As a result, for all of these reasons, we hold that the trial court did not err by admitting Erica's testimony over Defendant's objection.[9]

B. Cross-Examination of Mr. McMinis

Secondly, Defendant contends that the trial court erred by allowing the prosecutor to threaten Mr. McMinis with prosecution for his role in Defendant's treatment of Rebecca in the jury's presence. According to Defendant, the trial court's conduct deprived the jury of the opportunity to fairly consider the credibility of Mr. McMinis' testimony, necessitating an award of appellate relief. We are not persuaded by Defendant's argument.

As we have already noted, Defendant called Mr. McMinis as a witness at trial. In essence, Mr. McMinis testified that the alleged rape was a consensual sex act, that he participated in the removal of Rebecca's pants, and that she had performed oral

[9]In his brief, Defendant emphasizes the fact that, prior to trial, a motion to join the case in which he was charged with raping Rebecca with a case in which he was charged with raping Erica for trial was denied. We do not, however, believe, and Defendant does not appear to specifically contend, that the denial of this joinder motion has any bearing upon the substantive analysis which we are required to conduct in light of his challenge to the admission of Erica's testimony.

sex on him while Defendant had sexual intercourse with her. On cross-examination, the prosecutor asked Mr. McMinis if he was aware that, in the event that the jury found that Rebecca was incapacitated at the time of the events in question, his testimony was, in essence, an admission that he had committed a first degree sexual offense for which he could receive a minimum sentence of twelve years imprisonment. In addition, the prosecutor inquired, over objections lodged by Defendant's trial counsel, concerning whether Mr. McMinis understood that, by acknowledging having been involved in the removal of Rebecca's pants, he was admitting to having been an accessory to the alleged rape. Ultimately, Defendant unsuccessfully moved for a mistrial on the grounds that the prosecutor had, in essence, threatened to prosecute Mr. McMinis in front of the jury and that the threats inherent in this portion of the proceedings unfairly prejudiced Defendant's chance for an acquittal.

As a general proposition, "the scope of permissible cross examination is limited only by the discretion of the trial court and the requirement of good faith." *State v. Locklear*, 349 N.C. 118, 156, 505 S.E.2d 277, 299 (1998), *cert. denied*, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999). In other words, the scope of the inquiry in which a cross-examiner is permitted to engage hinges upon the sound discretion of the

trial judge as long as the cross-examiner's questions are asked in good faith. *State v. Bronson*, 333 N.C. 67, 79, 423 S.E.2d 772, 779 (1992). According to well-established North Carolina law, "[q]uestions asked on cross-examination will be considered proper unless the record shows they were asked in bad faith." *State v. Lovin*, 339 N.C. 695, 713, 454 S.E.2d 229, 239 (1995). An "[a]buse of discretion [such as that which must be found to exist in order for this Court to award appellate relief based upon allegations that a cross-examiner's questions exceeded the permissible scope of cross-examination] results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (quoting *State v. Peterson*, 361 N.C. 587, 602, 652 S.E.2d 216, 227 (2007).

In challenging the trial court's refusal to intervene to preclude the challenged cross-examination questions, Defendant contends that the inquiries in question were tantamount to an announcement that Rebecca was telling the truth and that Defendant was guilty in violation of the prosecutor's duty to remain impartial and the fundamental legal principle that "counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his

own knowledge, beliefs and personal opinions not supported by the evidence." *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 69 (1978). However, our examination of the record reveals no indication that the challenged questions were posed in bad faith. Instead, in response to Defendant's objection, the prosecutor stated that he was "just making sure I understand exactly what he's just confessed to on the stand." In light of the other evidence in the record and the stated presupposition that underlay the prosecutor's questions, we are unable to see any basis for concluding that the challenged questions were posed in bad faith. Moreover, nothing in the language in which the challenged questions were couched strikes us as tantamount to an actual or implied expression of the prosecutor's personal opinion concerning Rebecca's credibility or Defendant's guilt. Finally, given the fact that Mr. McMinis' testimony provided the linchpin of Defendant's defense, we believe that the trial court could have reasonably concluded that the challenged questions represented an appropriate attempt to challenge Mr. McMinis' credibility by informing him that the account which he had given concerning the events which accompanied Defendant's sexual contact with Rebecca exposed him to potential criminal liability in the event that a fact finder concluded that Rebecca was incapacitated for the purpose of emphasizing the seriousness of

the matters before the trial court at Defendant's trial and the personal risk at which Mr. McMinis had placed himself in the event that this testimony was not truthful. As a result, we conclude that the trial court's decision to refrain from taking any action in light of the challenged prosecutorial questions was not "manifestly unsupported by reason or [] so arbitrary that it could not have been the result of a reasoned decision." *Whaley*, 362 N.C. at 160, 655 S.E.2d at 390.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).