NO. COA 13-321

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

STATE OF NORTH CAROLINA,

Plaintiff,

v. Forsyth County
No. 10 CRS 58769

MARK AUSTIN OWENS,

Defendant.

Appeal by defendant from judgment entered 31 October 2012 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 11 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Crumpler Freedman Parker & Witt, by David B. Freedman and Timothy D. Stewart, for defendant-appellant.

STEELMAN, Judge.

Where the State's 404(b) evidence was sufficiently similar to and not too remote in time from the charged crime, and the trial court conducted careful consideration of the presented evidence, the trial court did not err in admitting the 404(b)

evidence. Where there was substantial evidence presented as to each element of the crime of sexual battery, the trial court did not err in denying defendant's motion for directed verdict.

I. Factual and Procedural Background

WJL was a retired female hospital worker residing in Kernersville, North Carolina. In May of 2010, WJL broke her ankle. She was prescribed physical therapy for her injury. In May or June of 2010, Mark Austin Owens (defendant), a licensed physical therapist, began coming to her residence to perform physical therapy on her knee and ankle. After several visits, defendant began to massage parts of WJL's body other than her ankle and knee, including her groin and breast area.

On 26 August 2010, defendant was charged with misdemeanor sexual battery. On 4 May 2011, defendant was found guilty in District Court. That same day, defendant, in open court, gave notice of appeal to Superior Court.

On 5 December 2011, the State gave Notice of Intent to Use 404(b) Evidence; specifically that it intended to call DB, another of defendant's patients, whom defendant was alleged to have touched inappropriately On 2 March 2012, Judge Joseph E. Turner entered an order allowing the State to present the testimony of DB, pursuant to Rule 404(b) of the North Carolina Rules of Evidence.

This matter was tried before Judge Spivey and a jury at the 29 October 2012 Session of Criminal Superior Court for Forsyth County. At trial, defendant renewed his objection to the admission of the 404(b) evidence, and Judge Spivey "pursuant to the previous judge's order [] again den[ied] the motion."

On 31 October 2012, the jury found defendant guilty of sexual battery. Defendant was sentenced as a Misdemeanor Level I offender to 60 days imprisonment. This sentence was suspended and defendant was placed on supervised probation for 18 months.

Defendant appeals.

II. Admission of DB's testimony at trial

In his first argument, defendant contends that the trial court erred in admitting the testimony of DB pursuant to Rules 404(b) and 403 of the North Carolina Rules of Evidence. We disagree.

A. Standard of Review

On appeal, our review is limited 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*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

Defendant does not challenge any findings of fact in this case; therefore, these findings are presumed to be supported by competent evidence and are binding on this Court on appeal. *See State v. Phillips*, 151 N.C. App. 185, 190, 565 S.E.2d 697, 701 (2002). We review Judge Spivey's conclusions of law based upon his orally adopted findings of fact. *Beckelheimer*, 366 N.C. at 127, 726 S.E.2d at 158-59.

B. Rule 404(b) Evidence

At the 2 March 2012 pretrial hearing Judge Turner ruled DB's testimony admissible for the purposes of proving defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident. At trial, Judge Spivey narrowed the permissible purposes to those showing defendant's common plan, opportunity, absence of mistake, and absence of accident.

Rule 404(b) of the North Carolina Rules of Evidence 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). Rule 404(b) is a rule of inclusion "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, 279, 389 S.E.2d 48, 54 (1990) (emphasis in original). "It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *State v. Stager*, 329 N.C. 278, 302, 406 S.E.2d 876, 890 (1991) (citations omitted).

Defendant contends that since the testimony elicited from DB at trial concerned a different patient, a different year, a different setting, a different event, and a different act that the acts were not similar and should not have been admitted.

Defendant contends that the facts of this case are analogous to those in *State v. Shane*, 304 N.C. 643, 285 S.E.2d 813 (1982), and that it was error for the trial judge to hold that the facts pertaining to the incident with DB were sufficiently similar to the facts of the incident with WJL. In *Shane*, the trial court allowed testimony concerning allegations of prior sexual conduct by defendant. *Shane*, 304 N.C. at 648, 285 S.E.2d at 817. The Supreme Court acknowledged "striking similarit[ies] between the alleged factual occurrences at the Tahiti Health Club [] and defendant[']s [] alleged encounter

with a prostitute [seven months prior]." *Id.* at 655, 285 S.E.2d at 820. However, the Court ruled that the 404(b) evidence, despite its similarities, was inadmissible because the "events occurred at different places, involved different women," and "were separated by a period of *seven months*." *Id.* at 655, 285 S.E.2d at 821. Because the facts in *Shane* are dissimilar to the facts in this case, *Shane* is not controlling.

In *Shane*, the Supreme Court specifically noted that the only purpose that the State argued to support admission of the 404(b) evidence was common scheme or plan. *Id.* at 654, 285 S.E.2d at 820. One of the crimes involved a second alleged offender and the evidence was improperly admitted as extrinsic impeachment evidence on rebuttal. *Id.* at 652-54, 285 S.E.2d at 819-20. Further, the victim involved in the 404(b) act in *Shane* did not testify at trial, nor was there any specific identifiable act that was detailed as to "the time or the place or the victim or any of the circumstances of defendant's alleged prior misconduct." *Id.* at 652, 285 S.E.2d at 819 (citations omitted).

In the instant case, notable similarities exist between defendant's conduct with WJL and DB: WJL and DB both suffered physical disabilities which impeded their mobility and necessitated their use of walkers or assistance from others to walk any distance, and both WJL and DB had been prescribed

medication, including painkillers, which left them more vulnerable than a normal person. Defendant, using his position as a physical therapist, was able to gain access to his victims and place himself in situations where he would be alone with his victims

Finally, the two years between the two incidents does not render them too remote in time. In *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996), the North Carolina Supreme Court held that a passage of seven years did not render inadmissible testimony of alleged acts by a defendant used to prove the existence of a common plan to sexually abuse female family members.

Based upon WJL and DB's physical disabilities, their prescribed medication increasing their vulnerability, and defendant's abuse of his status as a physical therapist, we hold that Judge Spivey correctly concluded that DB's testimony was admissible for the purpose of proving defendant's common plan, opportunity, absence of mistake, and absence of accident.

This argument is without merit.

C. Rule 403

Defendant also contends that, even if DB's testimony was admissible under Rule 404(b), that the evidence should have been excluded under Rule 403 of the North Carolina Rules of Evidence as being more prejudicial than probative.

At trial, defendant renewed his objection to the 404(b) evidence prior to DB testifying. Judge Spivey, after hearing arguments from counsel, carefully considered the evidence and narrowed the permissible purposes for which the 404(b) evidence could be used. Prior to DB's testimony, Judge Spivey instructed the jury that the 404(b) evidence could be considered only for the limited purpose for which it had been received..

In the instant case, "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give a proper limiting instruction to the jury." *Beckleheimer*, 366 N.C. at 133, 726 S.E.2d at 160 (citation omitted). "Moreover, the judge gave the appropriate limiting instruction." *Id.* at 133, 726 S.E.2d at 161. Given the similarities between the alleged conduct of defendant as to WJL and DB, the trial judge's careful tailoring of the purposes for which the 404(b) evidence was admitted, we hold that the trial court did not abuse its discretion in admitting DB's testimony.

III. Denial of Defendant's Motion for Directed Verdict

In defendant's second argument, he contends that the trial court erred by denying defendant's motions for directed verdict and judgment notwithstanding the verdict.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 344 N.C. 67, 75, 430 S.E.2d 914, 918 (1983)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

B. Analysis

N.C. Gen. Stat. § 14-27.5A defines sexual battery as follows:

> (a) A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual

> abuse, engages in sexual contact with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.5A.

Defendant challenges the sufficiency of the State's evidence as to the elements requiring a use of force against the will of the other person, and a purpose of sexual gratification, arguing that: "[WJL] never testified that she told Defendant-Appellant to refrain from touching her, and he contends that he massaged her for medical treatment, not sexual gratification."

The evidence at trial, taken in the light most favorable to the State, tended to show that: defendant went to WJL's house for the sole purpose of providing physical therapy to her leg and ankle; that defendant rubbed WJL's breasts with his hands on two separate occasions; that, although WJL did not specifically tell defendant to stop, she never gave him permission to rub her breasts and she told him that he was hurting her. WJL testified she felt scared while defendant was abusing her

The facts of this case are analogous to those in *State v. Viera*, 189 N.C. App. 514, 658 S.E.2d 529 (2008). In *Viera*, we

held that evidence was sufficient to show that defendant, who held himself out as a licensed massage therapist, engaged in sexual contact with victims by force during massage sessions by using his apparent status to induce victims to lie naked and submit to unwanted sexual contact, so as to support two convictions for sexual battery. *Viera*, 189 N.C. App. at 518-19, 658 S.E.2d at 531-32. In the instant case, defendant utilized his apparent status as a physical therapist to induce his victims to enter positions of near complete vulnerability. "Through this coercion, he forced them to submit to the unwanted sexual contact. Defendant's implicit threat was delivered through his abuse of his position of trust and relative authority" as a professional physical therapist. *Id.* at 518, 658 S.E.2d at 531.

Viewing the evidence presented at trial in the light most favorable to the State, we hold that the State presented substantial evidence as to each element of the crime of sexual battery and the trial court properly submitted the charge to the jury.

This argument is without merit.

NO ERROR.

JUDGES HUNTER, ROBERT C., and BRYANT concur.

Report per Rule 30(e)