NO. COA14-449
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Carteret County
No. 09 CRS 54928

CHARLES LINDBERG GILLIKIN, III

Appeal by defendant from judgment entered 19 September 2013 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 8 October 2014.

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

W. Michael Spivey for defendant-appellant.

STEELMAN, Judge.

Defendant failed to establish that the admission of evidence under Rule 404(b) resulted in prejudice, and failed to preserve for review the admission of other evidence.

I. Factual and Procedural Background

A. State's Evidence

Trista Polk and defendant had an intermittent romantic relationship from 2007 until October 2009. During this time they

sometimes lived together and they had a son born in January, 2009. Ms. Polk ended the relationship in October 2009 after the events giving rise to the criminal charges against defendant.

In October 2009 defendant and Ms. Polk were living apart. On 4 October 2009 defendant called Ms. Polk and asked for a ride to her apartment. Ms. Polk picked up defendant, but soon let him out of the car because "he was drunk and he was starting a fight." Shortly after Ms. Polk arrived home, defendant walked in uninvited and Ms. Polk "could tell he was drunk and angry." After Ms. Polk put her son to bed and returned to the living room, she could see "anger rising" in defendant, and repeatedly asked him to leave, but he refused. Defendant became more angry and started punching the couch near her head, yelling that she would not leave the house alive, and threatening to kill her if she screamed. Ms. Polk was frightened because on another occasion when defendant had been drinking, he pushed and hit her. She tried to call the police, but her phone was dead.

Defendant and Ms. Polk went to the kitchen, where defendant grabbed knives from a drawer, attempted to slit his wrists, and held knives to Ms. Polk's neck, threatening to "slice her throat" if she screamed for help. Defendant then held a knife to Ms. Polk's throat and forced her to lie on her stomach on the floor. He tried unsuccessfully to have forcible anal

intercourse, and then raped her vaginally. After the rape, defendant "acted like nothing happened" and told Ms. Polk that "everything would be fine in the morning." He also told her to shower so she could not prove that he raped her. Ms. Polk went to her bedroom and got her son. She tried to leave the apartment, but defendant kicked down her bedroom door, followed her outside, and forced her back into the apartment at knifepoint. A few minutes later Ms. Polk sprayed defendant with pepper spray. He then allowed her to leave with the baby, but he followed her to the parking lot, where she pepper sprayed him again. Ms. Polk ran to the apartment of a neighbor, Jonathan Bell, and called the police. After speaking with a law enforcement officer, Ms. Polk was examined at a hospital. Ms. Polk identified photographs showing her broken bedroom door, the injuries she sustained during the attack, and pepper spray on the walls of her apartment.

On cross-examination, Ms. Polk acknowledged that defendant stayed with her on the Thursday and Friday nights before this incident, which occurred on Sunday, and that she had called him repeatedly on Saturday trying to locate him. In August 2009 Ms. Polk obtained a restraining order against defendant after an incident of domestic violence, and defendant moved into a motel. However, Ms. Polk visited defendant six or seven times at the

motel, and they had consensual sex several days before the alleged rape.

Several witnesses corroborated Ms. Polk's testimony. Jonathan Bell lived in the same apartment complex as Ms. Polk and testified that on the night of 4 October 2009, Ms. Polk came to his door with her baby and asked to use his phone, telling him that defendant had held a knife to her throat and that she had "maced" him. After she called 911, Ms. Polk started crying. Sheila Martin, a sexual abuse nurse examiner at Carteret County General Hospital, examined Ms. Polk on 5 October 2009. Ms. Polk reported tenderness in her anal area, and Nurse Martin observed redness and a tear in her rectal area, which was consistent with attempted anal penetration. Ms. Polk had a scratch on one leg and bruising to her arms and shoulders. Ms. Polk's account of her attack to Nurse Martin corroborated her trial testimony. Morehead City Police Sergeant Heather Rose responded to Ms. Polk's 911 call on 5 October 2009 and took a statement from Ms. Polk, who was visibly upset and crying.

The State also elicited testimony from Jennifer Williams, defendant's ex-wife. They were married in 2001 and separated in April 2006, at which time their daughter was five years old. In April 2006 Ms. Williams obtained a domestic violence protective

order against defendant. She read from the application for the protective order, in which she stated under oath that

> Charles has come home drunk and wanted to have sex. . . . I would not. [H]e started arguing with me, told me I wasn't "worth nothing." He then tried to make up and wanted sex. . . . I told him no. He had told me he wanted a divorce and that I needed to leave. I did not. So he told me he'd make me have sex with him. I was trying to get up to leave, and he pushed me on the bed. I was screaming and kicking, hoping a neighbor would hear and call the police. He then put the pillow over my face to keep me from screaming. . . . I said, "No, get off[.]" [H]e pulled my underwear off and started having sex with me. When he finished, I got up to leave and he went to bed and to sleep[.]

During this incident defendant punched a hole in the sheetrock wall next to her head.

B. Defendant's Evidence

Defendant testified that he and Ms. Polk had an intimate relationship with periods of separation from December 2007 until his arrest in October 2009. They had a son born in January 2009. Their relationship included vaginal, anal, and oral sex. In August 2009 defendant and Ms. Polk moved into an apartment. A few days later defendant was arrested and jailed after a fight with Ms. Polk. She obtained a restraining order barring defendant from having contact with her, but when defendant was released from jail, they renewed their sexual relationship.

Between August and October 2009 defendant was jailed on two other occasions after altercations with Ms. Polk.

Defendant and Ms. Polk spent the nights of Thursday and Friday 1-2 October 2009 at her apartment. On Saturday 3 October 2009 Ms. Polk sent defendant text messages about their relationship, but he did not respond. Defendant spent Saturday night with a woman named Sarah. On Sunday he and Ms. Polk planned to spend the night together. At around 9:00 p.m., Ms. Polk picked defendant up in her car, but when she questioned him about the previous night, he got out and walked to her apartment. After defendant and Ms. Polk put their son to bed, they had consensual sex. During their sexual activity, defendant mistakenly called Ms. Polk by the name "Sarah," the woman he had been with the night before. Ms. Polk became angry, started "ranting and raving" and threatened to falsely accuse defendant of rape, so that he would "go away for a long time." Defendant tried to leave the apartment and Ms. Polk sprayed him with pepper spray. Defendant denied raping Ms. Polk or handling knives on 5 October 2009. He testified that the knife marks on his arm were from a previous suicide attempt, and that he and Ms. Polk had broken the door to her bedroom when they backed into it while kissing. Sarah Guthrie testified that defendant

spent the night of 3 October 2009 with her and that Ms. Polk called repeatedly while they were together.

C. Procedural History

"On 2 November 2009, defendant was indicted for . . . two counts of first-degree rape and one count each of first-degree kidnapping, first-degree burglary, and common law robbery. Defendant was tried by jury on 13 September 2010 on all offenses. At the close of trial, the jury returned verdicts finding defendant guilty of three lesser included offenses: second-degree rape, false imprisonment, and misdemeanor larceny." *State v. Gillikin*, 217 N.C. App. 256, 260-61, 719 S.E.2d 164, 167 (2011) (*Gillikin I*). On 6 December 2011 this Court filed *Gillikin I*, granting defendant a new trial due to error in the trial court's reinstructions to the jury.

Defendant was tried on the charge of second-degree rape before a jury at the 16 September 2013 Session of Criminal Superior Court of Carteret County. On 18 September 2013 the jury returned a verdict finding defendant guilty of second-degree rape. The trial court sentenced defendant to a prison term of 100 to 129 months.

Defendant appeals.

II. Admission of Rule 404(b) Evidence

In his first argument, defendant contends that the trial court erred by allowing his ex-wife "to testify that he had non-consensual sexual relations with her during their marriage where the only issue for the jury to decide was whether the sexual relations between [defendant] and [Ms. Polk] were consensual." Assuming, *arguendo*, that the court erred in admitting this evidence, defendant has failed to establish that the error was prejudicial.

A. Standard of Review

N.C. Gen. Stat. § 1A-1, Rule 404(b) provides that "[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. 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." "Rule 404(b) is 'a clear general rule of inclusion.' . . . [Rule 404(b) evidence] 'is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (quoting *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990), and *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995). In addition, "if the trial court concludes the

evidence is relevant to something other than the defendant's propensity to commit the crime, as well as sufficiently similar and temporally related to the crime charged, the evidence may be excluded under Rule 403 if the trial court determines that admission of the evidence would result in unfair prejudice, confusion of the issues, or would mislead the jury. N.C. Gen. Stat. § 8C-1, Rule 403." *State v. Noble*, __ N.C. App. __, __, 741 S.E.2d 473, 479-80, *disc. review denied*, 367 N.C. 251, 749 S.E.2d 853 (2013). "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." *Beckelheimer* at 130, 726 S.E.2d at 159.

B. Legal Analysis

At trial, the State introduced testimony from Jennifer Williams, defendant's ex-wife, about an incident during their marriage when defendant forced her to have nonconsensual sex. Over defendant's objection, this testimony was admitted under Rule 404(b) as evidence tending to show that "there existed in the mind of the defendant a plan, scheme, system or design" regarding the offense charged in the instant case. On appeal, defendant argues that Ms. Williams's testimony did not meet the requirements for admission under Rule 404(b), that its probative value did not substantially outweigh its prejudicial effect, and

that the evidence was admitted for the improper purpose of showing Ms. Polk's lack of consent. However, because defendant has failed to show prejudice, as required by N.C. Gen. Stat. § 15A-1443(a), we do not reach the issue of the admissibility of this evidence.

N.C. Gen. Stat. § 15A-1443(a) provides in relevant part that a "defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." Therefore, "to be entitled to a new trial, defendant must show that there is a reasonable possibility that, had the evidence not been admitted, a different result would have been reached at his trial." *State v. Brown*, 176 N.C. App. 72, 81, 626 S.E.2d 307, 314 (2006). "It is the defendant's burden not just to show error but also to show that defendant was prejudiced by the error. N.C. Gen. Stat. § 15A-1443 (a) (2003). The erroneous admission of evidence 'will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.'" *State v. McMillian*, 169 N.C. App. 160, 165, 609 S.E.2d 265, 268-69 (2005)

(quoting *State v. Smith*, 155 N.C. App. 500, 508, 573 S.E.2d 618, 624 (2002) (internal citation omitted).

In the instant case, defendant characterizes his trial as "a 'he said, she said' case where the jury had to decide whether to believe [Ms. Polk] or [defendant.]" He fails to acknowledge that Ms. Polk's testimony was strongly supported and corroborated by other evidence. The substance of Ms. Polk's testimony was that defendant tried to cut himself with kitchen knives; that he threatened her with a knife while he attempted to have anal sex and raped her vaginally; that when she tried to leave through her bedroom, defendant broke down the door; and that she escaped by spraying defendant with pepper spray and calling 911 from a neighbor's apartment. The neighbor, Mr. Bell, testified that Ms. Polk asked to call 911 and that she "started crying after she got off the phone." The nurse who examined Ms. Polk at the hospital observed scratches and bruises on Ms. Polk and a tear in her rectal area, and Ms. Polk's report to the nurse corroborated her trial testimony. Ms. Polk gave a similar statement to Sergeant Rose, who observed that Ms. Polk was visibly upset and crying. Other evidence established the presence of pepper spray in Ms. Polk's apartment, the cuts on defendant's arm, and the fact that Ms. Polk's bedroom door was broken. Thus, Ms. Polk's trial testimony was corroborated by her

account of the rape to others; by the physical condition of her apartment; by her demeanor on the night of the incident; and by the results of the physical examination at the hospital.

On the other hand, defendant testified that during consensual sex, he mistakenly called Ms. Polk by the name of another woman, which made Ms. Polk so angry that she brought false charges of rape against him. The other woman testified that Ms. Polk had called repeatedly while defendant was at her house. Although this evidence tended to show that Ms. Polk was jealous, it does not support the pathological vindictiveness that defendant attributed to Ms. Polk. The witnesses who saw Ms. Polk on the night of this incident observed her to be crying and upset, rather than angry. The presence of scratches, bruising, and a rectal tear on Ms. Polk's body is inconsistent with defendant's testimony that they had consensual sex. Ms. Polk's testimony that defendant broke her bedroom door during a struggle is inherently more credible than defendant's testimony that the door broke when they fell against it while kissing. We conclude that the evidence offered at trial presented more than the simple "swearing contest" posited by defendant, and that the State offered substantial evidence to support Ms. Polk's testimony.

Defendant's discussion of the prejudice from Ms. Williams's testimony consists of his conclusory statement that "[a]dmitting the testimony of Mr. Gillikin's ex-wife in a case this close unfairly tipped the scales in the State's favor." However, defendant fails to acknowledge the strength of the State's evidence. Nor has defendant offered an analysis of the alleged prejudice resulting from Ms. Williams's testimony in the context of the other evidence, or any substantive explanation of why it is reasonably probable that he would not have been convicted if this testimony had been excluded. As discussed above, "nonconstitutional errors warrant reversal only when 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' 'The burden of showing such prejudice under this subsection is upon the defendant.' . . . Our review of the record reveals that defendant has not met his burden of establishing that, but for the [alleged] error there is a reasonable possibility that the jury would have reached a different result." *State v. Lopez*, 363 N.C. 535, 542, 681 S.E.2d 271, 275-76 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a)). Because we hold that defendant has failed to demonstrate a reasonable probability that the admission of Ms.

Williams's testimony changed the outcome of the trial, we do not reach the issue of whether this testimony was properly admitted.

III. Application for Domestic Violence Protective Order

In his second argument, defendant contends that the trial court erred "by allowing the State to present evidence over defendant's objection that exceeded the scope of its ruling allowing Rule 404(b) evidence." Ms. Williams's testimony that defendant raped her while they were married was presented to the jury by having Ms. Williams read aloud from her application for a domestic violence protective order, in which she described the assault. At the close of the State's evidence, this document, State's Exhibit 54, was published to the jury. Defendant argues on appeal that it was error to allow the jury to review this document because in addition to describing the sexual assault the application for a domestic violence protective order contained other allegations about defendant that were prejudicial. Defendant has not preserved this issue for appellate review.

Defendant contends that "when the State offered its Rule 404(b) exhibit, it sought to give the jury all of the material, including the material it told the court it would exclude as being prejudicial. Defendant objected. The court overruled the objection and admitted the exhibit." Review of the trial

transcript reveals that although defendant objected to Ms. Williams's testimony about the alleged assault during their marriage, he did not object when the State announced its intention to publish the application for a domestic violence protective order to the jury, as evidenced by the following colloquy:

> THE COURT: Do you wish to publish certain exhibits, please, Mr. Spence [(prosecutor)]?
>
> [PROSECUTOR]: Yes, sir, I do. And Mr. Mills [(defense counsel)] and I have worked during the recess with getting these in some kind of order so we could do it expeditiously. Your Honor, the State intends to publish . . . State's [45], which is a photograph. State's [44], a photograph. State's [43], a photograph. State's [39], a photograph. State's [38], a photograph. State's [37], a photograph. State's [46], the Sexual Assault Data Form Sheila Martin completed. . . . State's [48], statement of Chris Madsen. . . State's [35], statement of Jonathan Bell, handwritten. State's [50], picture of knife. State's [49], picture of knife. And State's [54], which is the item that Ms. Williams just testified to. And I have copies of all those for the jurors also.
>
> THE COURT: Sheriff, take possession of those exhibits and publish them among the several jurors, please.

(emphasis added). The transcript indicates that defendant did not object to the jury viewing the exhibit and even assisted the prosecutor in organizing documents for the jury's review.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure provides in relevant part that "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and must have "obtain[ed] a ruling upon the party's request, objection, or motion." Rule 10(a)(4) provides that "[i]n criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." In the instant case, "because defendant did not 'specifically and distinctly' allege plain error as required by North Carolina Rule of Appellate Procedure 10(c)(4), defendant is not entitled to plain error review of this issue. N.C. R. App. P. 10(c)(4)." *State v. Dennison*, 359 N.C. 312, 312-13, 608 S.E.2d 756, 756 (2005).

Conclusion

For the reasons discussed above, we conclude that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).