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NO. COA14-555
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

Stanley County
No. 10 CRS 50736, 50738-39

ROGER DALE HOLLEMAN

Appeal by defendant from judgments entered 22 October 2013 by Judge Tanya T. Wallace in Stanley County Superior Court. Heard in the Court of Appeals 22 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellant Defender Jillian C. Katz, for defendant.

ELMORE, Judge.

This case was tried in Stanley County Superior Court, Judge Tanya T. Wallace presiding, beginning on 15 October 2013 upon superseding bills of indictment charging indecent liberties with a child (10 CRS 50736); second degree sexual offense and sexual offense-parental role (10 CRS 50737); second degree sexual offense and sexual offense-parental role (10 CRS 50738); and

second degree sexual offense and sexual offense-parental role (10 CRS 50739)¹. Prior to trial, the State voluntarily dismissed the indictment in 10 CRS 50737. On 22 October 2013, the jury found Rodger Dale Holleman (defendant) guilty of the these charges. The trial court sentenced defendant to three consecutive terms of imprisonment: 73 to 96 months in 10 CRS 50738, 60 to 81 months in 10 CRS 50739, and 16 to 20 months in 10 CRS 50736. Defendant now appeals. After much consideration, we hold that defendant received a trial free from error.

I. Background

A. Pre-trial Bill of Particulars

Defendant was indicted on sexual offense charges relating to his step-daughter Kelly on 3 May 2010.² The offense dates in the original indictments are as follows: the offenses charged in 10 CRS 50736, 10 CRS 50738, and 10 CRS 50739 were alleged to have occurred between 20 March 2005 and 20 September 2005. On 18 October 2012, defense counsel filed a motion asking for a filing of a bill of particulars. Defendant was subsequently charged in superseding indictments on 3 December 2013 for the above referenced offenses. The offense dates alleged in the

¹ The charges of Sexual Battery against defendant were dismissed.

² Pseudonyms are used to protect the identity of the victims in this case.

superseding indictments were as follows: the offense charged in 10 CRS 50736 was alleged to have occurred between 1 March 2006 and 30 June 2006, the offenses charged in 10 CRS 50738 were alleged to have occurred between 1 August 2007 and 31 December 2007, and the offenses charged in 10 CRS 50739 were alleged to have occurred between 1 January 2008 and 30 June 2008.

By means of an order entered 18 December 2012, Judge Theodore S. Royster, Jr. directed the State to furnish defendant with a bill of particulars setting forth a particularized statement of the criminal activity for which defendant stood accused, including the particular sexual acts that the State intended to prove at trial, as well as a narrowed timeline for the offense dates. Judge Royster reasoned that there was no way defendant could effectively prepare his defense based on the overly broad timeline alleged in the indictments. On 18 January 2013, the State furnished defendant's counsel with a bill of particulars that provided more detail about the sexual abuse allegations but did not narrow the time periods for any charge except the offenses alleged in 10 CRS 50737 (which was later dismissed by the State).

Defendant filed a motion to dismiss based on the State's failure to comply with Judge Royster's order in its entirety.

Judge Lindsay Davis denied defendant's motion, without prejudice. Judge Davis recognized that the State had not complied with Judge Royster's order because the State failed to narrow the offense dates further than what was originally provided for in the indictments. Defendant subsequently filed a second motion to dismiss based on the State's non-compliance with Judge Royster's order. At a second pre-trial hearing, Judge Julia Lynn Gullet found that the State "has complied with Judge Royster's order to the best of their information and belief after due diligence. The State has narrowed the dates as much as possible based on the investigation into the allegations." Judge Gullet stated that "applicable case law provides that a range of dates is sufficient for the indictment, and is a matter for the jury on credibility." Judge Gullet further concluded that she was "in no way" overruling Judge Royster or Judge Davis' orders. The case proceeded to trial.

B. Evidence at Trial

The State's evidence at trial tended to show the following: Defendant married Penny Holleman in October 2004. Penny had two daughters from a prior marriage, Kelly and Helen, who were in the ninth and fifth grades at the time. Penny and her daughters moved into defendant's residence. At trial, Kelly testified

that in November 2005, she asked defendant for ideas about how to earn spending money for Christmas. Defendant, a postal-worker, agreed to pay Kelly to massage his back and legs with an electric massager after work. Kelly agreed and earned \$100. Kelly alleged that defendant had a similar arrangement with her sister, Helen.

Over defense counsel's renewed objections to the testimony relating to the massages, Kelly testified that after Christmas defendant asked that she continue massaging him. Kelly alleged that after one year, defendant moved the massages from the living room to his bedroom, where he started to remove an item of his clothing before each massage session. Kelly alleged that her mother was present during the massages. Kelly testified that eventually defendant was naked for the massages, and he had Kelly massage "his penis and his testicles and his butt . . . [with] lotion." These massages allegedly occurred "[f]ive or six to seven days out of the week." Kelly testified that if she refused to massage defendant, he would assign her chores as punishment.

Kelly also testified about an incident which occurred in the spring of 2006, when she was fifteen. Allegedly, Kelly asked defendant if she could have a boy visit her at the house.

Before he would agree, defendant asked Kelly if she "would let him see [her] boobs[?]" Kelly pulled up her shirt for ten seconds to allow defendant to view her breasts. Kelly stated that when she walked away, defendant pulled her to the floor and attempted to raise her shirt and fondle her breasts. She told defendant to stop and he did, stating "he knew when to stop, and other boys don't know when to stop, and he had given [her] a test, and [she] had failed it."

Kelly also testified about multiple incidents that occurred when she was a senior in high school. The State asked Kelly at trial, what, if anything, happened in August 2007 through June 2008 in your bedroom? Defense counsel objected on the basis that the question was overly broad and did not reflect the dates stated in the indictments. The trial court overruled the objection. Kelly responded that occasionally defendant would wake her, pin her arms down, and rub his penis against her face and mouth. She clarified that defendant never put his penis in her mouth but he did touch it to her lips. Kelly also testified that defendant placed his penis in her face in his bedroom one time between August 2007 and June 2008.

Over defendant's objection, the trial court allowed Helen to testify about her own experience giving defendant massages.

Helen's testimony corroborated Kelly's in that Helen also alleged that defendant asked her to massage him when he was fully clothed and nude. In addition, there was evidence that in April 2008, defendant's son, Todd, called the Department of Social Services (DSS) to report that he had observed Kelly massaging defendant's testicles as defendant lay naked on his bed. DSS launched an investigation but ultimately concluded that the allegation was unsubstantiated, because Kelly, who was seventeen at the time, informed DSS that defendant "has never touched me other than hugging me." It was not until several years after Kelly had moved out of defendant's residence that she reported the alleged sexual abuse to DSS. At that time, Helen was placed in the custody of a family friend based on the DSS's recommendation.

The defendant presented the following evidence at trial: Defendant's son, Todd, testified that he had lied to DSS in 2008 when he reported that he had observed Kelly massaging defendant's testicles. In addition, defendant testified on his own behalf at trial. He denied having ever touched either Kelly or Helen inappropriately. He contended that he and Kelly had a disagreement over money and the car he had purchased for her, which led Kelly to make a false accusation of sexual abuse.

II. Analysis

A. Bill of Particulars

Defendant's first issue on appeal concerns what he contends to be a fatal variance between the offenses charged and the time period in which the offenses occurred as alleged in the indictments and as revealed by the evidence elicited at trial. Defendant specifically argues that the trial court erred in denying his motion to dismiss because the bill of particulars was inadequate to allow defendant to prepare a defense. We disagree.

"[I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). Under N.C. Gen. Stat. § 15A-925, when a defendant believes he needs more information to prepare an adequate defense, he "may request a bill of particulars to obtain information to supplement the facts contained in the indictment." *State v. Randolph*, 312 N.C. 198, 210, 321 S.E.2d

864, 872 (1984). "If any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, the court must order the State to file and serve a bill of particulars." N.C. Gen. Stat. § 15A-925(c) (2013). The decision concerning whether to order a bill of particulars rests within the sound discretion of the trial court. *State v. Seaboard Air Line Ry.*, 149 N.C. 508, ___, 62 S.E. 1088, 1089 (1908). If the trial court grants a defendant's motion for the filing of a bill of particulars, "the question of sufficient compliance with the order is likewise properly made to rest in the court's discretion." *Id.* "It is well understood that the action of the lower court [in holding that the State complied with the trial court's order] will not be reviewed or disturbed on appeal, unless there has been manifest abuse in respect to defendant's prejudice[.]" *Id.*

Defendant's indictments for the charged sexual offenses allege that the offenses charged in 10 CRS 50736 occurred from March 2006 through June 2006; the offenses charged in 10 CRS 50739 occurred between January 2008 through June 2008; and the offenses charged in 10 CRS 50738 occurred between August 2007 through December 2007. While the State's response to defendant's motion for a bill of particulars did not narrow

these dates further, the State did clarify the acts of sexual misconduct alleged. As such, the trial court found that the State substantially complied with the order for a bill of particulars and accordingly denied defendant's motion to dismiss on the grounds that defendant was unable to adequately prepare his defense. Upon a review of the record, we see no evidence that the trial court abused its discretion in making this ruling.

We find it worthy to note that "[s]tatutory and case law both reflect the policy of this jurisdiction that an inaccurate [or overly broad] statement of the date of the offense charged in an indictment is of negligible importance except under certain circumstances." *State v. Hicks*, 319 N.C. 84, 91, 352 S.E.2d 424, 428 (1987). N.C. Gen. Stat. § 15-155 (2013) expressly provides that no judgment shall be reversed or stayed because an indictment omits stating "the time at which the offense was committed in any case where time is not of the essence of the offense, nor [because it states] the time imperfectly[.]" "This policy of leniency as to the time of the offenses stated in an indictment governs so long as the defendant is not thereby deprived of his defense." *Hicks*, at 91, 352 S.E.2d at 428.

On appeal, defendant contends that he was prejudiced based on the fact that "the span of dates [was] still too wide as to afford him the chance to offer an alibi defense" and because he was surprised when Kelly testified that the basis for the offenses charged in 10 CRS 50739 occurred for the first time in 2008 when the indictment provided a date range of August through December 2007. In *State v. Effler*, the defendant argued that he was deprived of the right to a fair trial because the bill of particulars provided that the charged rape occurred on or about 8 June 1982 "in the afternoon hours" at the defendant's residence and the testimony elicited at trial suggested that the offense occurred between 6:30 p.m. and 9:00 p.m. 309 N.C. 742, 749, 309 S.E.2d 203, 207 (1983). The defendant contended that this discrepancy led to a "trial by ambush" because "he produced in court only those witnesses who had knowledge about the events that occurred in the afternoon hours of the day in question." *Id.* Our Supreme Court held that "[i]f there was a 'trial by ambush' . . . it was orchestrated solely by the defendant" because "the State made a good faith effort to provide [the defendant] with the approximate date and time of the offense." *Id.* at 749-750, 309 S.E.2d at 207. In addition, the State provided defendant with notice in the indictment that

the victim was a child and therefore the information should not be relied upon to any degree of certainty. *Id.* at 750, 309 S.E.2d at 208. Importantly, our Supreme Court noted:

The record is devoid of any indication whatsoever that defense witnesses were unavailable; that defendant was surprised in any way by the State's evidence; or that defendant intended to present an alibi defense. In post-trial motions and on appeal, no affidavit or statement has been presented regarding the prospective testimony of any witness not called at trial. In sum, the defendant has failed to meet his burden of establishing prejudice.

Id. In the instant case, the trial court found that the State substantially complied with the trial court's order for the filing of a bill of particulars. More importantly, as in *Effler*, the record in the instant case is similarly devoid of any indication that defense witnesses were unavailable, that defendant was surprised by the State's evidence, or that defendant intended to present an alibi defense. On appeal, defendant briefly alleges he was prejudiced in his efforts to prove his alibi defense but names no witness he intended to call at trial. As noted above, this Court will not overrule the trial court's determination that the State complied with the order for the filing of a bill of particulars unless defendant

can show that there has been manifest prejudice. Defendant has failed to meet his burden.

B. 404(b) Evidence

Defendant contends that the trial court erred by admitting testimony pursuant to N.C. Gen. Stat. § 8C-2, Rule 404(b) regarding the prior sexual misconduct of defendant. Defendant specifically argues that the evidence of his acts of prior sexual misconduct (the alleged inappropriate massages) should not have been admitted because the evidence was not sufficiently similar to the charged offenses. We disagree.

[W]hen analyzing rulings applying 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 404(b) ruling, as it did here, 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, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Rule 404(b) lists multiple purposes for which evidence of prior bad acts may be admitted, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. §

8C-1, Rule 404(b) (2013). Our courts view of Rule 404(b) as a rule of inclusion of relevant evidence of prior bad acts unless the only reason the evidence is offered is to show defendant's propensity to commit a crime like the act charged. *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (citation and quotation omitted).

"North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges." *State v. Jacob*, 113 N.C. App. 605, 608, 439 S.E.2d 812, 813 (1994). "To be admissible as showing a common plan, the evidence of prior conduct must be similar and not too remote in time." *State v. Frazier*, 121 N.C. App. 1, 9, 464 S.E.2d 490, 494 (1995). A prior act is "similar" if it "tend[s] to support a reasonable inference that the same person committed both the earlier and later acts." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991). Thus, similarity and temporal proximity are two constraints that govern the admission of evidence under Rule 404(b). *State v. Summers*, 177 N.C. App. 691, 696, 629 S.E.2d 902, 906 (2006).

Once the trial court makes a determination that the evidence is of the type and offered for a proper purpose under Rule 404(b), it must make a determination of relevancy. *State*

v. Bynum, 111 N.C. App. 845, 848, 433 S.E.2d 778, 780 (1993). Relevancy is defined as "any tendency to make a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 401). Finally, upon establishing that the evidence offered is of the type in question, that its purpose is other than to show propensity, and that it is relevant, the trial court must look to Rule 403 to balance the probative value of the evidence against its prejudicial effect. N.C. Gen. Stat. § 8C-1, Rule 403 (2013).

In the instant case, the trial court allowed Kelly and Helen to testify concerning the alleged naked massages in order to show defendant's common scheme, design, or plan. The trial court found that the testimony about the massages was

[s]ufficiently similar to the scheme or design presented by the state on voir dire, that there was a pattern in the form of grooming that showed an increasingly improper role played by the defendant in his household or in his home beginning with massages of a type which would be normally acceptable . . .

Defendant specifically argues that the testimony of Kelly and Helen about the alleged inappropriate massages was

inadmissible at trial as it was not sufficiently similar to the conduct alleged in the charged offenses. We are not persuaded.

In *State v. Sneed*, 108 N.C. App. 506, 510, 424 S.E.2d 449, 451 (1993), this Court found that a 1967 prior act by a defendant was sufficiently similar to the 1990 charged act where in both instances, "[the] defendant gained the trust of his victims, lured them into an automobile and then took them to a different location where they were sexually assaulted."

In *Frazier*, *supra*, the defendant argued that the testimony of two victims should not have been admitted because it was not sufficiently similar to the conduct for which defendant stood trial. In *Frazier*, five females testified that defendant looked after them when they were young and began his misconduct by touching them and fondling them. *Frazier*, 121 N.C. App. at 10, 464 S.E.2d at 495. The defendant began to touching the girls more invasively as they grew older, and eventually engaged in sexual intercourse with all but one of them. *Id.* The evidence showed that the defendant threatened to send them away and/or threatened to stop taking care of their financial needs if they disclosed the abuse. *Id.* Relying on *Sneed*, this Court concluded that the evidence of prior acts of sexual abuse by the defendant in *Frazier* was sufficiently similar to the acts

described by the two witnesses to be admissible at trial. *Id.* This Court noted that each of the witnesses testified to similar forms of abuse in which the defendant was the perpetrator, thus demonstrating a distinct pattern over a protracted period. *Id.*

In the instant case, both Kelly and Helen testified that the massages were not inappropriate initially because defendant was fully clothed and the massages were performed in the living room. However, Kelly and Helen each alleged that the massages progressed to a point at which defendant was naked and he had the girls massage him in his bedroom. As in *Frazier*, defendant's conduct became increasingly invasive and defendant allegedly threatened the girls with additional chores should they disclose the abuse. Based on our holding in *Frazier*, we conclude that "the [massage] conduct was not so dissimilar as to render it not part of defendant's pattern of sexual conduct with youthful female family members." *Id.* Accordingly, the testimony was both admissible to show a common plan or scheme under Rule 404(b) and relevant.

In addition, defendant argues that the testimony concerning the massages should have been excluded under Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice. In advancing this argument,

defendant relies on *State v. Maxwell*, 96 N.C. App. 19, 24-25, 384 S.E.2d 553, 556-57 (1989), a case in which the trial court found that testimony that the defendant was frequently nude in the home in front of the children, fondled himself, and had an adulterous affair was highly prejudicial and inadmissible to show a common plan or scheme when defendant was charged with sexually abusing his adopted daughter. *Maxwell* can be distinguished from the instant case. In this case, Kelly and Helen reported that defendant requested that they, and in particular Kelly, perform the inappropriate massages on defendant after work. These massages involved fondling and rubbing defendant's genitalia. The crimes for which defendant was charged involved the alleged behavior of pressing his penis against Kelly's mouth in an attempt force her to perform fellatio and the inappropriate fondling of Kelly's breasts. The substantial similarity between the crimes charged and the prior incidents of sexual misconduct in the form of inappropriate massages convinces this Court that the trial court did not err in admitting the evidence under Rule 403.

Lastly, defendant advances an additional argument as to why the trial court erred in admitting Helen's testimony regarding the massages. Specifically, defendant argues that Helen's

testimony was inadmissible because the State had previously dismissed the charge of indecent liberties against defendant that was premised on Helen's allegations of performing inappropriate massages. In making this argument, defendant relies on *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992). In *Scott*, our Supreme Court ruled that it was a violation of Rule 403 to admit "evidence that defendant committed a prior alleged offense for which he has been tried and acquitted may not be admitted in a subsequent trial for a different offense when its probative value depends, as it did here, upon the proposition that defendant in fact committed the prior crime." *Id.* at 42, 413 S.E.2d at 788. However, *Scott* is not instructive in the instant case. Instead, the State contends, and we agree, that *State v. Campbell*, 142 N.C. App. 145, 541 S.E.2d 803 (2001) is on point and therefore controlling. In *Campbell*, the defendant argued that the trial court erred in allowing testimony by the victim describing certain sexual acts when the criminal charges pertaining to those sexual acts had been voluntarily dismissed by the State. *Id.* at 149, 541 S.E.2d at 805. This Court held that a voluntary dismissal by the State did not render the testimony regarding a purported act inadmissible because "a voluntary dismissal of a criminal charge

does not prevent the State from obtaining a new indictment based on the same acts.” *Id.* We overrule defendant’s argument with respect to this issue.

III. Conclusion

In sum, defendant has failed to convince this Court that the trial court erred by failing to grant his motion to dismiss based on the fact that the bill of particulars was inadequate to allow defendant to prepare a defense. The trial court also did not err in admitting Kelly and Helen’s testimony under Rules 404(b) and Rule 403. Accordingly, we hold that defendant received a fair trial free from error.

No error.

Judges BRYANT and ERVIN concur.

Report per Rule 30(e).