NO. COA14-681
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Iredell County
Nos. 13 CRS 3175, 3177, 3179

CHRISTOPHER CHARLES HARRIS

Appeal by defendant from judgments entered 14 October 2013 by Judge W. David Lee in Iredell County Superior Court. Heard in the Court of Appeals 22 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the State.

Glover & Petersen, P.A., by James R. Glover, for Defendant.

ERVIN, Judge.

Defendant Christopher Charles Harris appeals from judgments entered based upon his convictions for three counts of statutory rape of a person who is 13, 14, or 15 years old. On appeal, Defendant argues that the trial court erred by allowing the admission of evidence that he had sexual contact with a friend of the alleged victim, who was his daughter, on the grounds that the evidence in question served no purpose other than to prove

that Defendant was a person of bad character and that any probative value that the challenged evidence might have had was substantially outweighed by its unfairly prejudicial effect. After careful consideration of Defendant's challenge to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

Lucy,[1] the victim in this case, was born on 19 August 1994 to Defendant and his wife. The couple also had three other children: Clinton, Audrey, and Ashley.[2] At the time of trial, Clinton was 21, Audrey was 20, Lucy was 19, and Ashley was 17.

At trial, Lucy testified that Defendant had been sexually assaulting her on a periodic basis since she was six or seven years old. The abuse that Defendant inflicted upon her began one morning when Defendant was walking Lucy and Audrey down the dirt road on which they lived so that the two children could catch the bus that would take them to school. About halfway

[1]"Lucy" is a pseudonym used for ease of reading and to protect the individual's privacy.

[2]"Clinton," "Audrey," and "Ashley" are pseudonyms used for ease of reading and to protect the privacy of the individuals in question.

from their residence to the bus stop, Defendant stopped walking, dropped his pants, asked Lucy to give him a "blow job," and put his penis into her mouth. After the completion of the sexual act that Defendant had Lucy perform, Defendant finished walking Lucy and Audrey to the end of the road, where the two girls got on the bus and went to school. Subsequently, Defendant asked Lucy to perform oral sex on him two or three times a week.

When Lucy was twelve years old, Defendant digitally penetrated her vagina for the first time. At that time, the family was living in a house located on South Lackey Street in Statesville. On that occasion, Lucy, Ashley, and Defendant were at the family home. After the two of them entered Defendant's bedroom alone, Defendant unbuttoned and unzipped Lucy's pants and inserted two fingers into her vagina. As a result of Defendant's conduct, Lucy started bleeding. At Lucy's insistence, Defendant removed his fingers from her vagina and told Lucy to clean up before her mother returned home. After her mother's arrival at the family home, Lucy told her mother that she believed that she had just started having her menstrual period.

When Lucy was 13 or 14 years old, Defendant engaged in sexual intercourse with her for the first time. On that occasion, Defendant told Lucy to come into the bedroom, forcibly

placed himself on top of her, and put his penis into her vagina. After Lucy threatened to scream, Defendant stopped what he was doing. Subsequently, however, Defendant had sexual intercourse with Lucy on numerous occasions, with these episodes having occurred at least once a month.

In December 2010, when she was 16, an incident occurred that resulted in the conception of Lucy's daughter, Susie.[3] Although Defendant was not living in the family home on Park Drive in Statesville at the time, he came to that location to talk with Lucy about her decision to drop out of school. At the time that Defendant came to the Park Drive residence, Ashley was there in addition to Lucy. After Defendant entered the residence, he told Lucy to go into the bedroom so that they could have a private discussion about her decision to drop out of school. Once Defendant and Lucy had entered the bedroom, Defendant told Lucy that she could drop out of school if she had sex with him. Although Lucy told Defendant that she did not want to do that, Defendant placed her on the bed, removed his clothes and her pants, and had vaginal intercourse with her. Once the act of intercourse had been completed, Lucy, who was crying, got dressed and returned to the living room. After entering the living room, Defendant asked Lucy and Ashley if

[3]"Susie" is a pseudonym used for ease of reading and to protect the child's privacy.

they were hungry and took them to the Village Inn in Statesville for pizza.

At some point during 2011, Detective Amy Dyson with the Special Victims Unit of the Iredell County Sheriff's Department began attempting to determine who Susie's father was. In May 2012, Detective Dyson collected buccal swabs from Lucy, Susie, and Defendant and sent the swabs to Season Seferyn, an analyst at Marshall University Forensic Science Center, for DNA testing. After conducting the requested analysis, Ms. Seferyn concluded, to a 99.9999 percent probability, that Defendant was Susie's father.

At trial, the State called one of Lucy's friends, K.M.[4], as a witness. In the course of her trial testimony, Katie described an incident involving Defendant and herself that occurred in May 2009, when she was 15. On that occasion, Katie and Lucy spent the night in the camper in which Lucy's family was living at the time. After talking for a while, Defendant, Lucy, and Katie turned in for the night using the same bed, with Defendant on one side, Lucy in the middle, and Katie on the other side.

[4]K.M. will be referred to throughout the remainder of this opinion as Katie, a pseudonym used for ease of reading and to protect the individual's privacy.

As a result of the fact that she had a bad burn on her leg, Lucy switched places with Katie shortly after the three of them retired so that Lucy could sleep better. During the night, Defendant began touching Katie's buttocks underneath her clothing and then touched her genital area on the exterior of her clothing. In addition, Defendant touched Katie's back with his penis. Although Katie told Defendant to stop, Defendant attempted to pick Katie up and place her on his penis. At that point, Katie and Lucy left the bed and went to sleep in the living room.

After the children left the bedroom, Defendant entered the living room and asked them to refrain from telling anyone what he had done because he did not want to get in trouble and lose his children. Once Katie and Lucy assured Defendant that they would not report his conduct to anyone else, Defendant asked Katie to show him her breasts and informed her that he would not get into trouble if she complied with this request. Katie, however, refused to act in accordance with Defendant's proposal.

On the way to school the following day, Katie told a friend about Defendant's conduct. In addition, Katie informed a counselor at her high school about Defendant's activities. After receiving this information, the counselor contacted

Katie's mother and the Iredell County Department of Social Services.

2. Defendant's Evidence

When Lucy was interviewed by a social worker during the investigation of Katie's accusations, she told the social worker that Katie's allegations were not true and that Defendant had never done anything inappropriate to her, her sisters, or Katie. The social worker found no evidence of sexual abuse during her investigation into Katie's allegations. In light of the fact that the camper in which he lived was immediately adjacent to the camper in which Katie claimed to have been molested and the fact that he could hear whatever went on in the camper in which the rest of the family lived, Clinton testified that he did not believe that Defendant had done anything to Katie. Finally, Ashley testified that nothing untoward appeared to have happened on the date upon which Defendant came by the family home for the purpose of talking with Lucy about her desire to drop out of school.

B. Procedural History

On 5 August 2013, the Iredell County grand jury returned bills of indictment charging Defendant with seven counts of first degree sexual offense; three counts of statutory rape of a person who is 13, 14, or 15 years old; two counts of first

degree rape; and one count of second degree rape. The charges against Defendant came on for trial before the trial court and a jury during the 7 October 2013 criminal session of the Iredell County Superior Court. At the conclusion of the State's evidence, the trial court dismissed two of the first degree sexual offense charges and two of the first degree rape charges. On 11 October 2013, the jury returned verdicts finding Defendant guilty of three counts of statutory rape of a person who is 13, 14 or 15 years old and announced that it could not reach a unanimous verdict with respect to the remaining charges, resulting in the declaration of a mistrial with respect to those charges. On 14 October 2013, the trial court entered judgments sentencing Defendant to three consecutive terms of 240 to 297 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

In his sole challenge to the trial court's judgments, Defendant contends that the trial court erred by allowing the admission of Katie's testimony concerning Defendant's activities on the occasion when she spent the night in the camper with Defendant and Lucy. More specifically, Defendant contends that the acts described in Katie's testimony were not sufficiently similar to the acts that Defendant was charged with having

committed to warrant the admission of Katie's testimony and that the unfairly prejudicial effect of Katie's testimony substantially outweighed any probative value that it might have. We do not find Defendant's argument persuasive.

A. Applicable Legal Principles

N.C. Gen. Stat. § 8C-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.

The list of purposes for which "other bad act" evidence may be admitted set out in N.C. Gen. Stat. § 8C-1, Rule 404(b), "is not exclusive, and such 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. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (citation omitted), *cert. denied*, 516 U.S. 994, 116 S. Ct. 530, 99 L. Ed. 2d 436 (1995).

According to well-established North Carolina law, N.C. Gen. Stat. § 8C-1, Rule 404(b), represents a general rule of inclusion allowing the admission of "other bad act" evidence, subject to an exception requiring the exclusion of such evidence in the event that the only probative value of that evidence is to show that the defendant has a 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). Evidence that is deemed admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b), may still be excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, which provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. Finally, even if the challenged evidence was unlawfully admitted, the defendant is not entitled to an award of appellate relief unless he or she also shows that "there is a reasonable probability 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." N.C. Gen. Stat. § 15A-1443(a).

In order to prevent the admission of evidence that serves no purpose other than to demonstrate the defendant's propensity to engage in criminal activity, the proffered evidence must be relevant to a contested issue at trial, i.e., the evidence must tend to make the existence of any fact that is of consequence to the determination of the case more or less probable than would

otherwise be the case, *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007); N.C. Gen. Stat. § 8C-1, Rule 401, and satisfy "the requirements of similarity and temporal proximity" between the charged offense and the proffered "other bad act" evidence. *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). However, it is not necessary that the similarities between the crime charged and the "other bad act" involve unique or bizarre characteristics; instead, all that is required is that there be some unusual facts present in both situations sufficient to permit a reasonable inference that the same person committed both acts. *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991). "[T]his Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (quoting *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988)).

B. Standard of Review

Although the Supreme Court "has not used the term de novo to describe its own review of [evidence proffered pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b)], [it has] consistently engaged in a fact-based inquiry under [N.C. Gen. Stat. § 8C-1, Rule 404(b)], while applying an abuse of discretion standard to

the subsequent balancing of probative value and unfair prejudice under [N.C. Gen. Stat. § 8C-1, Rule 403]." *Id.* at 130, 726 S.E.2d at 158. As a result, when "the trial court has made findings of fact and conclusions of law to support [a ruling made pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b)]," "we look to whether the evidence supports the findings and whether the findings support the conclusions." *Id.* at 130, 726 S.E.2d at 159. The legal question of whether the proffered "other bad act" evidence is admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b), is reviewed *de novo* on appeal, while the trial court's determination pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, is reviewed for an abuse of discretion. *Id.* "The test for abuse of discretion is whether the trial court's ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Chapman*, 359 N.C. 328, 348–49, 611 S.E.2d 794, 811 (2005) (internal citations, alteration, and quotation marks omitted).

C. Validity of Trial Court's Evidentiary Determination

1. Relevance Analysis

At trial, the State contended that Katie's testimony concerning the manner in which Defendant behaved toward her in the camper was properly admitted for the purpose of showing the existence of a common scheme or plan to sexually abuse girls to

whom Defendant had access in his home. At the time that the trial court found that Katie's testimony was admissible, the trial court found that:

> the testimony of [Katie] is logically relevant to the earlier testimony of [Lucy] and that the passage of time may well serve to further demonstrate that there was a continuous plan or scheme. I find that this alleged wrong as to which [Katie] testified occurred in 2009 at a time when she was about 15 years old. That she and the alleged victim in this case are very close in age, in that the nature of the acts as to which she testified included – included improper touching and fondling of her vagina on the outside, on her bottom on the inside, her back. That there's evidence that he rubbed his penis on her back. And after she asked him to stop and move from the bedroom where they had all been in bed, he once again picked her up; and as she indicated sat her on his lap such that she . . . could feel his penis. That all of this is logically relevant to the facts and circumstances that have been testified to by [Lucy]. That it is very close in time and I find that there are sufficient similarities that the evidence should be received for the limited purpose of the State attempting to prove that there existed in the mind of the Defendant a plan, scheme, system, or design involving the crime charged . . . .

Although Defendant contends that the trial court's decision to allow the admission of Katie's testimony is inconsistent with our decision in *State v. Register*, 206 N.C. App. 629, 698 S.E.2d 464 (2010), we are not persuaded by this argument.

In *Register*, a defendant who had been convicted of committing several sex crimes against a minor argued on appeal that the trial court erred by admitting the testimony of four individuals who claimed that the defendant had sexually abused them when they were children. *Id.* at 636, 698 S.E.2d at 470. In rejecting the defendant's argument, this Court noted the "strikingly similar pattern of sexually abusive behavior by defendant:"

> (1) defendant was married to each of the witnesses' mothers or aunt, (2) the sexual abuse occurred when the children were prepubescent, (3) at the time of the abuse, defendant's wife was away at work while he was home looking after the children, and (4) the abuse involved fondling, fellatio, or cunnilingus, in most instances taking place in defendant's wife's bed. This evidence presents a traditional example of a common plan.

Id. at 641, 698 S.E.2d at 472-73. After carefully reviewing the record, the degree of similarity between the incident described in Katie's testimony and the incidents described in Lucy's testimony is equivalent to that held to be sufficient in *Register*. The two girls were quite similar in age, with Katie being 15 at the time that she was allegedly assaulted by Defendant, while Lucy, who was 14, was being regularly molested by Defendant. Defendant's wife was not at home during either the incident described by Katie or the incidents described by

Lucy. In each instance, Defendant was providing care for the children. Moreover, the incidents described by both Katie and Lucy involved a variety of sexual acts that took place in the privacy of a bedroom contained in the structure in which the family was living. Finally, given that Lucy began the night in the position that Katie occupied at the time that Defendant allegedly had sexual contact with her, a reasonable juror could infer that Defendant, at least initially, intended to continue his abuse of Lucy. The fact that the acts that Defendant allegedly engaged in with Lucy were not identical to the acts that Defendant engaged in with Katie, while relevant to the required analysis, does not suffice, standing alone, to undercut the strength of the common plan or scheme shown by Katie's testimony. As a result, given the liberality with which the appellate courts in this jurisdiction have approved the admission of "other bad act" evidence in child sex abuse cases, *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159, we hold that Katie's testimony was admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b), for the non-propensity purpose of showing the existence of a common scheme or plan that affected both Katie and Lucy pursuant to which Defendant took advantage of early teen-aged girls in a bedroom in the family residence when

Defendant's wife was absent and when Defendant was responsible for providing care for the affected children.

2. Balancing Analysis

In addition, Defendant contends that, even if Katie's testimony was admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b), the trial court should have excluded her testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, on the grounds that the probative value of Katie's testimony was substantially outweighed by the risk that its admission would unfairly prejudice the jury against Defendant. Defendant's argument lacks merit.

At the time that it announced its decision to admit Katie's testimony, the trial court stated that the jury should be allowed to hear otherwise admissible evidence

> unless the probative value is substantially outweighed by the nature of unfair prejudice, confusion, or misleading the jury. All those reasons set out in [N.C. Gen. Stat. § 8C-1,] Rule 403, I carefully considered that aspect of this proffer in undertaking that balancing test in light of all the evidence and considering the totality of the circumstances that are presently before the Court have determined that the probative value of this evidence for the limited purpose being offered by the State is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence. So I am going to allow the State

> in appropriate limiting instructions to offer this evidence for the sole purpose of attempting to prove that there existed in the mind of the Defendant a plan, scheme, system or design involving the crime charged in the case.

After carefully reviewing the record, we cannot conclude that the trial court's decision to allow the admission of Katie's testimony after engaging in the balancing process required by N.C. Gen. Stat. § 8C-1, Rule 403, constituted an abuse of discretion. In view of the fact that Katie's testimony tended to validate the credibility of Lucy's testimony by establishing that Defendant engaged in a common scheme or plan of having sexual contact in relatively private surroundings with young girls who were entrusted to his care in the absence of Defendant's wife, Katie's testimony had material probative value. In addition, the trial court attempted to minimize any unfair prejudice that might result from the admission of her testimony by delivering a limiting instruction concerning the purposes for which the jury was entitled to consider Katie's testimony and allowing Defendant a fair opportunity to cross-examine her. *See State v. Shamsid-Deen*, 324 N.C. 437, 447, 379 S.E.2d 842, 848 (1989) (holding that the trial court did not err by admitting evidence concerning prior acts of sexual misconduct in which Defendant engaged in the face of an objection lodged pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, given that the

defendant cross-examined the witnesses who provided the challenged testimony and that the trial court gave an appropriate limiting instruction). As a result, the trial court did not err by holding that the probative value of Katie's testimony was not substantially outweighed by the risk of unfair prejudice resulting from its admission.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant's challenges to the trial court's judgments lack merit. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO ERROR.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).