IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1258

Filed: 20 September 2016

Mecklenburg County, Nos. 12 CRS 255562–65, 12 CRS 255567–68, 12 CRS 255570

STATE OF NORTH CAROLINA

v.

FITZGERALD MCKINLEY RICE

Appeal by defendant from judgments entered 2 April 2015 by Judge William R. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 June 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General David L. Elliott, for the State.

Michael E. Casterline for defendant-appellant.

BRYANT, Judge.

Where defendant is unable to establish that he was prejudiced and denied a fair trial as a result of the trial court's admission of Rule 404(b) evidence, we find no error in the judgments of the trial court.

On 26 December 2012, sometime between 10:00 and 11:00 p.m., defendant, Fitzgerald McKinley Rice, approached Hannah,[1] who lived in the East Crest

[1] A pseudonym is used in place of the sexual assault survivor's name.

Apartments in Charlotte, North Carolina, and asked for a cigarette. Defendant then asked for oral sex. Hannah told him she did not trade sex for money, but did agree to a "hand job" for five dollars. Defendant asked Hannah if she wanted to "party." She and defendant got into the backseat of defendant's friend's vehicle, and they went to purchase drugs. Once in the vehicle, defendant became sexually aggressive and started grabbing Hannah's breasts and attempting to force her to touch his penis.

When they arrived at defendant's apartment, defendant had Hannah go to the back room at the end of the hallway. Defendant smoked crack cocaine and demanded that Hannah do the same. She inhaled once to appease him and, at that point, defendant again became aggressive and told Hannah she owed him for what she just smoked. Defendant tried to remove her shirt. She fought back, but defendant eventually managed to remove her shirt. Hannah manually stimulated defendant as she had agreed to do when they first met. Defendant, however, attempted to force Hannah to perform fellatio on him by pushing her head down. She refused, but he grabbed her neck, squeezed it so hard she could not breathe, and kept demanding that she "suck this d**k." When defendant released her neck, she performed fellatio on him.

Next, defendant grabbed Hannah by her hair and pulled her over to a bed which was covered with magazine pages of pornographic images. Defendant demanded that she masturbate while lying on top of him. When Hannah did not do

what defendant demanded, he punched her in the face approximately five times. After Hannah's nose began to bleed, defendant pointed to a pornographic picture of a woman masturbating and told Hannah to do what the woman in the photo was doing. Hannah did so, but defendant was not satisfied. He forcibly grabbed her breasts, pulled her to the side of the bed by her hair, and grabbed a wine bottle which he tried to force into her anus. Defendant attempted to put his fingers in her anus, then attempted to put his penis in her anus before performing oral sex on Hannah. Defendant again demanded that she perform oral sex on him. Hannah was crying during the assault and screamed at least two times for help. Defendant told her she needed to "gangster up," which Hannah took to mean "toughen up," and defendant told Hannah that "[she] needed to do what he wanted [her] to do or [Hannah] wasn't going to be walking out of there."

At some point, defendant left the room and Hannah attempted to get dressed and leave. Defendant returned to the room and said that Hannah was to have sex with another man, defendant's nephew, who came into the room. The nephew took his clothes off and put a condom on and defendant again stated that "if [she] didn't do it [she] was not going to be walking out of there." Defendant's nephew had vaginal intercourse with Hannah. The nephew left a small baggie with white rocks in it on the corner of the bed and said it was for Hannah. She did not take the baggie with her, and attempted to leave. Defendant told her he did not want her to leave, but she

was eventually able to leave and walk home. Once home, she called a friend who encouraged her to call the police.

In the early morning hours of 27 December 2012, Hannah called 911 and reported that she had been forcibly abducted into a car and raped. When police responded to Hannah's apartment, she repeated that she had been kidnapped and raped. Hannah had a black eye and marks on her neck. Other injuries included bruises on her breast, scratches, and abrasions around her anus. She later admitted that she had not been abducted, but had voluntarily gotten into a car with a man who had invited her to a party at his apartment. Hannah told the police that she declined defendant's offer to pay for sex, but she did not tell them she had agreed to masturbate defendant for five dollars.

After taking Hannah's statement, the police put her in a patrol car and drove to the apartment building she had described on Central Avenue, less than two blocks away. Defendant answered the door and was cooperative, allowing police to walk through the apartment. Defendant was then taken down to the patrol car, where Hannah identified him as the man who had assaulted her.

On 14 January 2013, defendant was indicted on five counts of second-degree sexual offense, two counts of attempted second-degree sexual offense, one count of second-degree kidnapping, and one count of assault by strangulation. He was tried in

Criminal Superior Court of Mecklenburg County from 23 March to 2 April 2015 before the Honorable W. Robert Bell, Judge presiding.

The State's evidence showed that Hannah's DNA was present in swabs taken from defendant's fingers after he was arrested. Her DNA was also present on the neck of the wine bottle collected from defendant's bedroom, on a magazine page collected from the bedroom, and on a cutting from a washcloth collected from the bathroom in defendant's apartment.

After the State offered evidence from Hannah and several police officers who responded to the incident, the State sought to present evidence of previous assaults perpetrated by defendant. Defendant's attorney objected, based on defendant's motion *in limine* to exclude that evidence. After hearing arguments of counsel, the trial court ruled that the State's proposed 404(b) evidence was more probative than prejudicial, and the witnesses' testimony would be allowed.

Before hearing the 404(b) evidence, and before each individual 404(b) witness testified, the trial judge first instructed the jury, (with little variation), as follows:

> [T]he testimony is not being offered for the purpose of proving the character of . . . [d]efendant or that he acted in conformity with that character. It is being allowed solely for the purpose of showing motive, intent, plan or scheme, modus operandi or a pattern of activity over time. You may consider it only to the extent that it shows those things and to the extent that you believe it.

Carla[2] was the first 404(b) witness.

On 14 November 1995, Carla and her boyfriend gave defendant a ride home. Defendant invited them up to his apartment for drinks. Carla followed defendant into the bathroom at the back of his apartment while her boyfriend remained in the living room. When she did not consent to giving defendant oral sex, defendant grabbed her throat and forced her to the ground. He then sat on the toilet and forced her to perform oral sex, holding her by the hair. During part of the assault, defendant hit her in the forehead and held a knife to her throat. Carla's boyfriend attempted to get Carla to leave with him, at which point defendant told Carla "if [she] [said] anything [he was] going to f**k [her] up, [he was] going to kill [her]." Carla told her boyfriend that she could not leave with him. Carla's boyfriend left, but apparently called the police. After Carla's boyfriend left, defendant dragged her into the living room by her wrists and forced her to perform oral sex again. Defendant then turned her around and started feeling her anus. When police arrived at the apartment door, defendant told Carla to "go get [her] clothes on and don't f**king say anything or [he] [would] kill [her]."

Serena, the second 404(b) witness, testified that during the late hours of 5 December and the early morning of 6 December 1997, she went with a friend to a party where everyone was getting high. Defendant arrived around the time the party

[2] A pseudonym is also used in place of the names of each of the three 404(b) sexual assault survivors.

was ending and both he and Serena and Serena's friend needed a ride home. They got in a car with a white male driver. Defendant paid the driver in crack cocaine in exchange for the ride. Upon arriving at defendant's apartment, he invited the driver, Serena, and her friend up to his apartment and they all went inside. Once in his apartment, defendant grabbed Serena's hair and forced her into a back bedroom. Defendant told Serena "you are going to suck my d**k" and grabbed her by the throat. He made her perform oral sex and penetrated her anally with his penis. He made her look at pornography, telling her to "do just exactly what they do" in the pornographic pictures. He made her masturbate, urinated in her mouth, and made her drink her own breast milk. He punched her in the eye and then took her to his brother and told him to have sex with her, but defendant's brother refused. At some point, defendant also threatened to kill Serena.

The State's third 404(b) witness, Danielle, testified that on 31 August 2001, she was using crack cocaine in someone's apartment on Central Avenue. At some point, Danielle followed defendant and another man to a back room where Danielle believed they were going to smoke drugs. Defendant started taking his clothes off, and when the other man left, Danielle tried to leave as well. Defendant slammed the door and told Danielle that she was "either going to f**k [defendant] or die." A struggle ensued, and defendant hit Danielle in the head with a hammer at least four

or five times. Defendant managed to remove Danielle's shirt during the struggle, but she ultimately escaped and was able to run and find a police officer.

After hearing all the evidence, defendant was found guilty by the jury of four counts of second-degree sexual offense, two counts of attempted second-degree sexual offense, and assault by strangulation. He was acquitted of one of the second-degree sexual offense charges, and a mistrial was declared based on a hung jury as to the second-degree kidnapping charge. Judge Bell entered a consolidated judgment for one attempted sexual offense and the assault by strangulation conviction, and entered separate judgments for each of the other convictions. The sentences were made to run consecutively with a total sentence of 840 to 1,372 months in the Department of Corrections. Defendant gave notice of appeal during sentencing.

On appeal, defendant argues that the trial court erred and abused its discretion by allowing excessive 404(b) evidence of prior assaults, in violation of Rules 404(b) and 403 of the North Carolina Rules of Evidence. Defendant contends that the 404(b) evidence, even if relevant, was so inflammatory that it was unfairly prejudicial to defendant that he was denied his right to a fair trial. We disagree.

> Though this Court has not used the term de novo to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of probative value and unfair prejudice under Rule 403. . . . [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 . . . 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, 158–59 (2012) (internal citation omitted).

Rule 404(b) evidence may be admitted for numerous purposes, including to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). Additionally, "this Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes enumerated in Rule 404(b)." *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987) (citation and quotation marks omitted). Indeed, 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). "To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is

constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154–55, 567 S.E.2d 120, 123 (2002) (citations omitted).

"Prior acts are sufficiently similar 'if there are some unusual facts present in both crimes' that would indicate the same person committed them." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890–91 (1991)). It is not necessary that the similarities "rise to the level of the unique and bizarre." *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988).

In order to show that the 404(b) evidence was so prejudicial to defendant such that it rises to the level of reversible error, a defendant must also demonstrate a reasonable possibility that had the error in question not been committed a different result would have been reached. N.C. Gen. Stat. § 15A-1443(a) (2015); *see, e.g.*, *State v. Scott*, 318 N.C. 237, 244–45, 347 S.E.2d 414, 418 (1986) (concluding cross-examination about the defendant's "bizarre and inappropriate" sexual relations "inflamed the jury against defendant and contributed to the guilty verdict they otherwise might not have reached").

Here, there were sufficient similarities among the prior assaults involving Carla, Serena, and Danielle for them to be admissible under Rule 404(b). All three witnesses recounted incidents with strikingly similar patterns of violence, threats, and abusive sexual behavior to support the State's theory of "motive, intent, plan or

scheme, modus operandi or a pattern of activity over time." All of the sexual assault victims—Hannah, Carla, Serena, and Danielle—were assaulted in defendant's apartment on Central Avenue, and, despite the fact that Hannah originally stated she was "abducted" and taken to defendant's apartment, all of the victims went to defendant's apartment willingly, albeit to varying degrees of "willingness." In each case, the assault was perpetrated primarily in the back bedroom of defendant's apartment.

Further, in all four assault cases, the following also occurred: (1) defendant grabbed each victim by the throat; (2) defendant either used crack cocaine or it was present in the apartment; (3) defendant threatened to kill the victim; (4) defendant hit, punched, or struck the victim in the face or head; and (5) defendant used similar vulgar language in forcing sex acts and/or threatening life. With Hannah, Carla, and Serena, defendant (1) demanded and forced each victim to perform oral sex; (2) attempted anal sex or otherwise assaulted each victim by placing his hands, fingers, penis, or, in Hannah's case, a wine bottle, in or around the victim's anal region; and (3) grabbed each victim by the hair. Finally, with respect to Hannah and Serena, defendant showed each victim pornography, demanded that each masturbate, and also offered each victim to another person for sex.

Here, defendant's prior acts with Carla, Serena, and Danielle are sufficiently similar to defendant's actions with Hannah, such that " 'there are some unusual facts

present in [all four] crimes' that would indicate the same person committed them." *See Beckelheimer*, 366 N.C. at 131, 726 S.E.2d 156, 159 (quoting *Stager*, 329 N.C. at 304, 406 S.E.2d at 890–91). Defendant even concedes that

> [t]he evidence of previous assaults may have had some probative value. As in the present case, each of the three women had been promised a party or drugs to persuade them to go up to [defendant's] apartment. Each of the prior assaults were initiated in the back bedroom of the apartment on Central Avenue, and the assaults occurred after the women resisted a demand for oral sex.

As such, defendant makes no argument that the prior acts were not sufficiently similar, but rather contends that the quantity of the evidence and its graphic and shocking nature, was excessive to the point of unfairly prejudicing the jury against defendant, denying him his right to a fair trial.

The N.C. Supreme Court has held that the "[d]efendant has the burden under N.C.G.S. § 15A-1443[a] of demonstrating that but for the admission of the evidence [in violation of Rule 404(b)], there is a reasonable possibility that the jury would have reached a verdict of not guilty." *State v. Badgett*, 361 N.C. 234, 248, 644 S.E.2d 206, 214 (2007) (alterations in original) (citation and quotation marks omitted).

Defendant is unable to establish that absent the admission of his prior sexual misconduct, the jury would have reached a different result. The trial court instructed the jury regarding the Rule 404(b) witnesses prior to each witness's testimony and again during the final jury charge. The jury is presumed to have adhered to this

mandate, and defendant, therefore, cannot demonstrate prejudice. *See State v. Thompson*, 359 N.C. 77, 112, 604 S.E.2d 850, 875 (2004) ("We presume, as we must, that the jury followed the instructions submitted to it by the trial court." (citation omitted)).

We note that during deliberation, the jury asked the trial court several questions including the following: (1) "Can we get a copy of the charge with respect to each of the nine specific crimes alleged?"; (2) "Can we get a copy of [Hannah's] first written statement given to Office[r] Yao the morning of the incident?"; (3) "Must we believe [Hannah] was confined or restrained for the purpose of assaulting her by strangulation in order to find [defendant] guilty of the kidnapping charge?"; and (4) "Does a purpose of the restraint, confinement or removal have to be an intention to commit assault by strangulation[.]" (Emphasis added).

The jury's several questions to the trial court indicate that the jury was carefully deliberating and working through each element of each crime with which defendant was charged. Furthermore, the jury's not guilty verdict for one count of second-degree sexual offense, and a mistrial on the second-degree kidnapping charge indicate that the jury was not reacting emotionally to the evidence, including the 404(b) evidence, but that it carefully considered each separate charge and whether there was evidence to satisfy them beyond a reasonable doubt as to each separate charge.

We also note that even absent the testimony of defendant's prior acts of sexual misconduct, there was sufficient evidence to establish defendant's guilt. Hannah immediately reported the attack and identified defendant as her attacker. Hannah had a black eye, marks on her neck, bruises on her breast, and scratches and abrasions around her anus, consistent with her detailed report of defendant's attack. Further, Hannah's DNA profile was found on the fingers of defendant's right and left hands, and both the wine bottle and a washcloth recovered from defendant's apartment contained Hannah's DNA. This evidence served to corroborate Hannah's account of her violent sexual assault.

Given the evidence along with the trial court's limiting instructions to the jury regarding the 404(b) evidence and the jury's careful and considered deliberation, defendant failed to establish that he was prejudiced and denied a fair trial by the trial court's admission of the 404(b) evidence. Accordingly, the trial court did not abuse its discretion in admitting such evidence and we find no error in the judgment of the trial court.

NO ERROR.

Judges TYSON and INMAN concur.

Report per Rule 30(e).