IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1205

Filed: 1 August 2017

Wake County, Nos. 12 CRS 201966-967

STATE OF NORTH CAROLINA, Plaintiff,

v.

MITCHELL DANIEL PASTORE, Defendant.

Appeal by defendant from judgments entered 22 December 2015 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Court of Appeals 18 April 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melissa L. Trippe, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

STROUD, Judge.

Defendant Mitchell Pastore appeals from his convictions of assault with a deadly weapon inflicting serious injury, assault on a female, first degree rape, first degree sex offense, first degree kidnapping, possession with intent to sell or deliver marijuana, possession of cocaine, and intentionally maintaining a dwelling house for the keeping of a controlled substance. On appeal, defendant argues that the trial

court erred by admitting evidence of an alleged sexual assault that occurred four years prior to the crimes charged. We find no error in the trial court's judgment.

I. Background

The State's evidence at trial tended to show that Lynda[1] met defendant on 17 September 1996. Approximately 3 months after meeting defendant, the two began a casual sexually active relationship. The relationship remained consistent between 1996 until 2012. They would typically meet at defendant's house during a period of time set by defendant and use recreational drugs provided by defendant. They would then talk or watch television. Defendant enjoyed when Lynda dressed up "very scantily" in outfits he provided. A typical night may have involved oral sex, massages, and defendant defecating on Lynda. The couple very rarely engaged in vaginal intercourse. While Lynda would perform oral sex, defendant would videotape and photograph her in the outfits he had her wear. Until January of 2012, defendant had never been violent toward Lynda.

On 25 January 2012, through an exchange of text messages, Lynda and defendant agreed to meet at his residence that evening, to begin at 8:30 p.m. and to end at 11:00 p.m. When Lynda arrived at defendant's house, he was not there. She waited a short time and then drove to the Wakefield Bar, a near-by tavern she knew he frequented. Defendant was sitting at the bar drinking and talking to the

[1] Pseudonyms are used throughout to protect the victims' identities and for ease of reading.

bartender. Lynda confronted him. They remained at the tavern for approximately ten minutes before defendant stated, "[l]et's go around the back and hit some golf balls." Defendant was angry when Lynda asked if she could hit some, and started calling her "selfish" and told her she was "invading [his] space." Lynda then drove to defendant's house in her own car.

When they got to defendant's house, they continued to exchange words regarding defendant's failure to be at the house at the appointed time. Defendant then hit Lynda in the head, pulled her hair and threw her to the pavement, causing her knees to bleed. When Lynda turned to leave, defendant grabbed her and told her, "[i]f you run, I will kill you . . . come go with me. We're going to go around the house in the . . . crawl space." (Defendant had set up a television viewing area with some furniture in the area under his house but it was not finished like an interior room.) Once they went into the crawl space, defendant again began hitting Lynda in the head with his fist, kicking and punching her and screaming "you slut, you whore, you bitch, you selfish -- ". He also put his hands around her neck, grabbed her arms and kicked her in the stomach. Lynda was screaming and yelling, at which point defendant told her "[i]f someone hears you, I'm going to kill you. If you try to run, I'm going to kill you." Holding onto her, he guided her out of the crawl space and into the house. They went into the downstairs bedroom and "did a lot of cocaine." Lynda felt sick and went to the bathroom to vomit. While she was in the bathroom, defendant

hit her hard in the right eye, causing it to split open. He continued to hit her in the head and then told her to "[c]lean all that shit up." While Lynda was cleaning the bathroom, defendant went into the kitchen and got a gun and started hitting her with it.

After cleaning up the bathroom floor, Lynda put away the cleaning supplies and threw the paper towels away in the kitchen. While in the kitchen, Lynda reached for a knife on the counter. Defendant saw her and hit her so hard that she landed in the adjacent living room. Defendant took Lynda upstairs and they took a bath together. Once they got out of the bathtub, defendant brought her to his master bedroom. Defendant attempted anal and vaginal intercourse with Lynda, but was not successful. Defendant then insisted on performing oral sex on Lynda. While she was positioned on defendant's body, she was able to use her hand to arouse him. Once defendant ejaculated, he told Lynda she could leave. Lynda then drove up the road and called 911.

Lynda was taken to a nearby hospital where she received treatment for her injuries. Officers were sent to defendant's residence and surrounded his home. Defendant came out of his home and was arrested. Defendant was charged with assault with a deadly weapon inflicting serious injury, assault on a female, felony strangulation, first degree rape, possession with intent to sell and deliver marijuana, felony possession of cocaine, maintaining a dwelling for purposes of keeping

controlled substances, attempted first degree sexual offense, and first degree kidnapping.

At trial, Elizabeth testified on behalf of the State. Elizabeth and defendant met in the fall of 1998. Elizabeth was defendant's son's daycare teacher at the time. Their relationship progressed into a casual sexual relationship. She would go to his home and they would consume alcohol, cocaine and marijuana, all of which defendant supplied. Defendant always set the time frame in which the visits were to take place. At first, Elizabeth wore her normal clothes when she would visit defendant, but beginning in 2004, she began wearing schoolgirl outfits.

As defendant continued to use cocaine, his personality changed, and he became aggressive, mean and angry. He would yell at Elizabeth for any little thing that he perceived she had done wrong. He would grab her arms and shoulders and grab her by the hair. Once he became aggressive, Elizabeth thought it was necessary to leave defendant's home. However, there were times when he would not allow her to leave. On those occasions, he would threaten to harm her; to post the photographs that he had taken of her and make them public; and to have her son taken from her. The only way Elizabeth was able to leave was when defendant was satisfied with their encounter.

During their sexual acts, defendant wore women's lingerie. Elizabeth did not enjoy dressing in outfits, nor did she enjoy it when defendant would dress up. She

did not enjoy the amount of time spent performing fellatio on him, engaging in "anal play," nor did she enjoy the times when he had her urinate and defecate on him and vice-versa. Elizabeth felt very degraded by the way defendant treated her and was fearful of his threats to blackmail and humiliate her.

During the summer of 2008, Elizabeth and defendant went to a gay nightclub in Raleigh. Elizabeth did not remember leaving the nightclub but "came to" on defendant's bedroom floor. The floor was covered in blood and they were engaged in anal sex. Defendant threw a towel with some cleaner at Elizabeth and made her clean up the blood and feces off the floor. Defendant did not think Elizabeth did a good job cleaning so he kicked her out of the house. Elizabeth had to call a friend to pick her up and take her home. It was approximately 3:00 a.m. at the time she left his home.

After defendant was arrested on the charges related to the assault of Lynda, he contacted Elizabeth. He told her that they needed to get married so that she would not testify against him. On the morning of Elizabeth's testimony she received an email from defendant. The email consisted of a forwarded string of emails from 2014 between defendant and Elizabeth, in which the term "whore" was used numerous times. After receiving this email, Elizabeth was afraid to testify in court but was able to overcome her fear and give testimony.

On 22 December 2015, the jury found defendant guilty on all charges and convicted him. The trial court arrested judgment on the convictions for maintaining a dwelling for the purpose of keeping a controlled substance and first degree kidnapping. The trial court entered a single judgment consolidating all of the other convictions. Defendant was sentenced accordingly.

Defendant appeals.

II. Admissibility of prior acts

Defendant's argument on appeal is that the trial court's admission of Elizabeth's testimony about the alleged sexual assault four years prior to the crimes charged was error when it had no probative value to prove any material fact other than the defendant's bad character. Defendant contends that the admission of this evidence was prejudicial. Prior to trial, the State filed a notice of its intent to introduce evidence of prior acts of violence and sexual assault of Elizabeth. The parties and court agreed that the issue of admissibility of this evidence would be determined after a voir dire examination of Elizabeth during trial. During the voir dire, Elizabeth testified about her relationship with defendant from 1999 to 2015 and an alleged sexual assault committed by defendant in 2008, four years prior to the events that were the subject of the charges against defendant. The trial court ruled that this evidence was admissible over the defense's objection.

Defendant's argument hinges on two parts: that the sexual assault Elizabeth testified to was neither sufficiently similar to the offense charged nor sufficiently proximate in time to be properly admitted under North Carolina Rule of Evidence 404(b).

A. Standard of Review

In pertinent part, Rule 404(b) provides that

> 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). "Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them." *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012) (citation and quotation marks omitted). Determining the similarities and remoteness of the crimes is conducted on a case-by-case analysis, and the degree of similarity required is "that which results in the jury's *reasonable* inference that the defendant committed both the prior and present acts." *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (citation and quotation marks omitted). It is not required that the similarities between the two incidents rise to a unique and bizarre level. *See State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635 (2000).

In *State v. Coffey,* 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990), our Supreme Court described Rule 404(b) as 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.

Though Rule 404(b) is a rule of inclusion, it is still "constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah,* 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted).

The standard of review set forth by the Supreme Court for issues arising out of Rules 404(b) and 403 evidentiary rulings is as follows:

> 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.

Beckelheimer, 366 N.C. at 130, 726 S.E.2d at 159 (emphasis added). "Thus, a trial court's ruling will be reversed on appeal only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Mitchell*, 240 N.C. App. 246, 251, 770 S.E.2d 740, 744 (2015) (citation and quotation marks omitted).

B. Analysis

On appeal, defendant contends that the trial court erred in admitting his prior alleged offense under Rule 404(b) because there were no unusual similarities between the prior offense and the offense charged, and the prior offense was too remote in time to be probative of the ultimate issue. We are not persuaded by defendant's arguments.

1. Similarity of Evidence Presented

Similarity is necessary for a finding of relevance. "When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value." *State v. Gray,* 210 N.C. App. 493, 499, 709 S.E.2d 477, 483 (2011).

Evidence that "lacks probative value" is inadmissible. N.C. Gen. Stat. § 8C-1, Rule 402. For prior misconduct to be considered similar under Rule 404(b), there must be "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both." *State v. Dunston,* 161 N.C. App. 468, 473, 588 S.E.2d 540, 544 (2003). Courts in this State are most liberal in allowing prior misconduct by the defendant to be admitted in cases involving charges of sexual assault. *See Beckelheimer,* 366 N.C. at 130, 726 S.E.2d at 159.

The cases relied upon by defendant are distinguishable from the case at bar. Defendant cites to *Gray,* 210 N.C. App. 493, 709 S.E.2d 477, where the testimony

differed as to the gender of the victim, the sexual acts, and associated behaviors thereto. In *Gray*, this Court found the trial court erred in admitting Rule 404(b) evidence of a sexual assault that occurred 18 years prior to the crime charged because there was no evidence of an ongoing pattern of crimes between the prior offense and the crime charged. *Id.* at 493-521, 709 S.E.2d at 477-96. Defendant also cites to *State v. Moore*, 309 N.C. 102, 305 S.E.2d 542 (1983), where the contested testimony differed as to time of day, location of assault, degree of violence of assault, and nature of the sexual act. In *Moore,* our Supreme Court found the trial court erred in admitting evidence that the defendant had committed a subsequent unrelated crime, where the differences were more numerous and of greater significance than the few similarities that existed between the two crimes. *Id.* at 103-09, 305 S.E.2d at 543-46. *See also State v. White,* 135 N.C. App. 349, 349-54, 520 S.E.2d 70, 70-74 (1999) (testimony differed as to manner of access into location of assault; consciousness of victim; and nature of sexual assault).

Unlike in the cases above, in the case at bar, Elizabeth's testimony describes events eerily similar to those described by the prosecuting witness. Both witnesses testified as to the length and nature of their relationships with defendant. Lynda had been involved with defendant for 16 years before the charged offense took place, and Elizabeth had been involved with defendant for 12 years before her alleged sexual assault. Both women's relationships with defendant had progressed into casual

sexual relationships. Defendant always set the time in which the encounters with these women would take place, with a specific time for them to meet – which is not unusual – but also a specific time the women were expected to leave his home – which is rather unusual. The visits with both women began with the consumption of alcohol and recreational drugs, followed by dressing up in outfits typically provided by defendant. With regard to sexual acts, a typical evening with both women would involve oral sex and massages, infrequent vaginal intercourse, and urination or defecation on the other. Defendant took photographs of both women during the sexual acts. Both women described incidents during which defendant became angry and demanded that the women clean bodily fluids or excrement off the floor. Both women experienced defendant's drastic personality changes. Defendant became disparaging of the women when he was unsatisfied with something they had done and was verbally and physically abusive to the women, grabbing their arms, shoulders and hair and on occasion when the women tried to leave, he would not allow them to do so until he was satisfied with that particular encounter.

The evidence presented by Elizabeth is replete with facts that are sufficiently similar to those described by Lynda and even rise to the level of being unique and bizarre. *See Aldridge,* 139 N.C. App. 706 at 714, 534 S.E.2d at 635. The trial court did not abuse its discretion by admitting Elizabeth's testimony because it was sufficiently similar to Lynda's. *See Beckelheimer*, 366 N.C. at 127, 726 S.E.2d at 156.

2. Proximity in Time Between the Offenses

Defendant next argues that the two alleged assaults were separated by four years, and that the temporal gap lessens the probative value of the prior alleged assault as evidence of anything other than bad character.

> Remoteness in time between an uncharged crime and a charged crime is more significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan. In contrast, remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility.

State v. Stager, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991) (citations omitted) (Holding that ten years between the crimes was not too remote under Rule 404(b)). Our Supreme Court "has been liberal in allowing evidence of similar offenses in trials on sexual crime charges." *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996). The Court has previously found that ten to twelve years between sexual crimes was not too remote in time where the facts of the crimes were sufficiently similar. *See Beckelheimer*, 366 N.C. at 129, 726 S.E.2d at 158. Thus, lack of temporal proximity does not always render prior misconduct evidence legally irrelevant.

Again, defendant relies on *Gray,* which is more harmful than helpful to his argument on temporal remoteness. In pertinent part, *Gray* explains that

> when the evidence challenged by a defendant suggests an ongoing and repetitive course of conduct by that defendant, a longer period of time in which the defendant has allegedly

> been *continuing* the similar conduct tends to make the evidence more relevant, not less, for proving a common scheme or plan.

210 N.C. App. at 507, 709 S.E.2d at 487 (citation and quotation marks omitted). *Gray* illustrates how the evidence here, in the most specific way possible, establishes a continuing pattern on the part of defendant that goes directly to the offenses charged. *Id.*

In the case at bar, there is evidence of behavior by defendant of similar acts repeated over time that show a pattern that fits the charged offenses of rape and attempted sex offense. Elizabeth's testimony described an incident involving defendant that occurred in 2008, whereas the event which is the subject of the charges facing defendant in the present case occurred in 2012 -- only four years later. Additionally, the women's relationships with defendant overlapped with respect to the time periods in which they occurred and with respect to the events which are at issue here. The trial court did not err in its determination of Rule 404(b) which was fully supported by the evidence. *See Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 158-59.

III. Conclusion

For the reasons stated above, we find no error in the trial court's judgments.

NO ERROR.

Judges BRYANT and DAVIS concur.

Report per Rule 30(e).