IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-565

Filed: 18 December 2018

Caldwell County, No. 17 CRS 50087

STATE OF NORTH CAROLINA

v.

JOSEPH HARLON GODFREY

Appeal by defendant from judgment entered 8 December 2017 by Judge Gregory R. Hayes in Caldwell County Superior Court. Heard in the Court of Appeals 31 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth J. Weese, for the State.

Gillette Law Firm PLLC, by Jeffrey W. Gillette, for defendant-appellant.

ZACHARY, Judge.

Defendant Joseph H. Godfrey appeals from a judgment entered upon a jury verdict finding him guilty of first-degree sex offense with a child. Defendant argues that his guilty verdict resulted from the trial court having improperly allowed the jury to hear evidence of his prior bad acts, and that therefore he is entitled to a new trial. We find no error.

Background

Defendant is the victim's uncle by marriage. In December 2016, the victim reported to the Caldwell County Sheriff's Office that Defendant had sexually

assaulted her "many times" when she was a child, including a final incident that took place on or about 1 May 2004 when the victim was twelve years old (the "May 2004 incident"). This was the first time that the victim had told anyone about the assaults. According to the victim, she decided to come forward in 2016 because "[i]t was brought to [her] attention . . . that there was someone within the family, at a young age, that was groped." Detective Roger Crosby was assigned to the case.

In an attempt to obtain evidence to corroborate the victim's account some twelve years after the fact, the victim "volunteered to the idea of placing a recording device upon her person and approaching [Defendant] at his residence . . . in order to get him to have a casual conversation about what happened to her when she was young." Detective Crosby agreed to this plan, which the victim successfully executed on 5 January 2017. The victim recorded Defendant making various incriminating statements, and Defendant was thereafter arrested and indicted for one count of first-degree sex offense with a child, specifically for the May 2004 incident. Defendant was tried before a jury beginning on 4 December 2017.

At trial, the victim testified that Defendant had served as her "sole care provider" during childhood while her father was incarcerated for fifteen years and her mother "worked two and three jobs to support [the victim and her] brother." In May 2004, the victim was staying with Defendant at his home and was twelve years old. The victim recalled that she was outside playing with her cousins and that when

she ran inside to grab something to drink, Defendant came up to her, stuck his hands in each of her pockets, and pulled her into the laundry room. The victim testified that Defendant "removed my clothing. He removed my underwear. He removed my pants. And he set me up on top of his washing machine." According to the victim, Defendant then "chose to use his middle finger . . . on his hand, and insert[ed] it in my vagina." This happened for "a few minutes" until the victim "started to freak out on [Defendant]," because he had "pulled his finger out" and "his pants all the way down," which the victim believed meant that he was about to rape her. At that point the victim kicked Defendant and ran. As she ran out of the front door, she fell and broke her wrist. The victim testified that she began crying and that a few moments later Defendant came up behind her and asked her what was wrong. The victim did not remember anything further about the incident.

The victim was able to estimate the date on which the May 2004 incident occurred based on the date that the doctor treated her broken wrist, which was just before her brother's birthday. The victim also testified that she kept getting urinary tract infections after the incident, but that she never told anyone why because she "was scared and . . . had nobody that [she] felt like [she] could trust." The victim testified that there was no further sexual contact between her and Defendant after the May 2004 incident.

In addition, the victim testified concerning the “bed incident,” which occurred about a month or two prior to the May 2004 incident, but was not charged in Defendant’s indictment. The victim testified that she stayed the night at Defendant’s house and was sharing a bed with her younger cousin, Defendant’s daughter. While her cousin was asleep, Defendant “comes and crawls in the . . . bed where I am, to be beside of me . . . . And he started feeling on my legs, and at that time, he stuck his middle finger in my vagina.” This lasted “a few minutes” and afterward she “freaked out, just as I always do. I got up and ran towards the kitchen area . . . and he went to the bathroom that was closest to the bed, to wash his hands.” She did not tell anyone about that incident because, she explained, “I was scared. And once again, I didn’t have anyone that I actually trusted that would believe me.”

The trial testimony of the victim included another incident that she claimed occurred about two years earlier, when the victim was staying with Defendant at his place in Lick Mountain (the “Lick Mountain incident”). That incident was not charged in Defendant’s indictment. The victim explained the Lick Mountain incident as follows:

> If I’m not mistaken, I did have strep, and I had a high fever and a very nauseous stomach. And I’d asked him repeatedly to call my mother to come get me, and he would not do so. He started wrest—like, he started off tickling me on the floor, and he went to, like, wrestle around with me and carried me to his bed.

When Defendant got her to his bed, "[h]e, once again, penetrated my vagina with his middle finger." The incident lasted "just a few minutes" and she did not tell anybody about it because she "didn't have trust that people would believe [her]."

Detective Crosby's report following the victim's initial statement did not include any indication that the victim had disclosed that digital penetration occurred during the May 2004 incident. Defendant's daughter—with whom the victim said she was sharing a bed during the bed incident—also testified at trial. Defendant's daughter testified that she had no recollection of anything similar to what the victim had testified to, and that

> I'm a very light sleeper, and I think if she would have got up and run like she said, I would have definitely woke up. I had a little, single-size bed that my grandmother gave me. It's a day bed, and so I could barely fit in it, let alone if she was with me, my dad. No way could he have fit.

The State also offered the audio recording and transcript of the seventy-five minute conversation between the victim and Defendant into evidence. The victim eventually prompted Defendant to talk about their earlier sexual encounters by telling Defendant that "I wish we would have, like, done more." When she asked what he remembered, Defendant responded, "[t]he first hand [ride] you ever took." The victim and Defendant proceeded to talk about the May 2004 incident, the bed incident, and the Lick Mountain incident, each of which Defendant said he remembered. Later in the conversation, Defendant told the victim that he "had a hole

drilled in th[e] wall" at his Lick Mountain house and "used to watch [the victim] take showers" in order to see her digitally penetrating herself. The victim also testified at trial about watching pornography with Defendant on multiple occasions prior to the May 2004 incident, during which Defendant "would put my hand on his erected penis." Defendant admitted in the recorded conversation that he remembered watching pornography with the victim when she was young.

Defendant repeatedly objected to the introduction of evidence of the bed incident and the Lick Mountain incident, as well as various portions of the recorded conversation. Defendant argued that the challenged evidence must be excluded under Rule 404(b) of the North Carolina Rules of Evidence because it was being offered to influence the jury "to simply convict him based on all of the other allegations that he's not charged with." Additionally, Defendant argued that the circumstances surrounding the May 2004 incident and the circumstances surrounding the two other incidents were not sufficiently similar and were too remote in time from one another, thus rendering the admission of this evidence unduly prejudicial under Rule 403. The State, however, argued that the prior incidents were admissible under Rule 404(b) because they were being offered to show "a common plan or scheme," rather than Defendant's propensity to commit the charged offense. The State noted that each of the incidents involved digital penetration, all occurred "in a very compact area of

time," and that the victim's young age "show[ed] the escalation for grooming" for sexual acts.

The trial court concluded that Defendant's prior acts could be admitted for the proper purpose of showing, *inter alia*, that Defendant had a "common plan or scheme" to digitally penetrate the victim. The trial court found that both of the earlier incidents were sufficiently similar to, and not too remote in time from, the May 2004 incident for which Defendant was on trial. The court concluded that while the prior acts were "of course prejudicial," they were "more probative on the issue of whether or not . . . there was a common plan or scheme and whether or not that relates to the 2004 incident." The trial court therefore admitted evidence of each of the prior acts into evidence. The trial court repeatedly instructed the jury that it was to consider the evidence of Defendant's prior acts solely for the limited purposes for which the evidence was offered.

The jury found Defendant guilty of first-degree sex offense with a child on 8 December 2017. Defendant was sentenced to 288 to 355 months' imprisonment based on the sentencing provisions in effect in 2004. Defendant gave oral notice of appeal in open court.

On appeal, Defendant argues that his judgment must be vacated and a new trial ordered because the trial court erroneously permitted the jury to base its

conviction upon the improper introduction of evidence of Defendant's prior acts. We disagree.

Standard of Review

The standards of review from a trial court's Rule 404(b) and 403 rulings are distinct from one another. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). "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." *Id.*

Rule 403 and Rule 404(b)

Evidence is generally admissible so long as it is relevant. N.C. Gen. Stat. § 8C-1, Rule 402 (2017). "Relevant evidence" is defined as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* § 8C-1, Rule 401 (2017). Even where relevant, however, Rule 404 limits the introduction of character evidence, including evidence of a defendant's past crimes, wrongs, or acts. *Id.* § 8C-1, Rule 404 (2017). Pursuant to Rule 404(b), "[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." *Id.* § 8C-1, Rule 404(b). Otherwise, however, Rule 404(b) is "a clear general rule of *inclusion*," and will allow such evidence to be admitted so long as it is relevant to any fact or issue other than

"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, 289 S.E.2d 48, 54 (1990). For example, Rule 404(b) contains a non-exclusive list of other proper purposes "for which evidence of prior acts may be admitted, including 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.' " *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (quoting N.C. Gen. Stat. § 8C-1, Rule 404(b)). Moreover, "prior acts testimony need not involve incidents for which the defendant was actually convicted of a crime." *State v. West*, 103 N.C. App. 1, 10, 404 S.E.2d 191, 197-98 (1991).

" '[T]his Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant.' " *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (quoting *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)). This is particularly true "when those offenses involve the same victim as the victim in the crime for which the defendant is on trial." *State v. Miller*, 321 N.C. 445, 454, 364 S.E.2d 387, 392 (1988). "Such evidence is often viewed as showing a 'common scheme or plan' by the defendant to sexually abuse the victim." *State v. Faircloth*, 99 N.C. App. 685, 689, 394 S.E.2d 198, 201 (1990) (citing *State v. Shamsid-Deen*, 324 N.C. 437, 444, 379 S.E.2d 842, 847 (1989)).

Nevertheless, "[a]lthough relevant" for a proper purpose under Rule 404(b), Rule 403 provides that "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." N.C. Gen. Stat. § 8C-1, Rule 403 (2017). It is in this context that the admissibility of evidence under Rule 404(b) is initially "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). While the level of similarity between the acts need not "rise to the level of the unique and bizarre," *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988),

> [f]actual disparity or the stretch of time dilute commonalities, and the probative value of the analogy attaches less to the acts than to the character of the actor. Conversely, testimony regarding a[n] [act] that was virtually identical committed less than seventy-two hours before the [act] for which the defendant is on trial lends more ballast to the act than to the character of the actor.

State v. Price, 326 N.C. 56, 69, 388 S.E.2d 84, 91 (internal citation and quotation marks omitted), *vacated and remanded on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990). Thus, "[w]hen prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *West*, 103 N.C. App. at 9, 404 S.E.2d at 197.

Bed Incident and Lick Mountain Incident

Defendant contends that it was error for the trial court to allow the jury to hear testimony concerning the bed incident and the Lick Mountain incident because they

"were not relevant and not sufficiently similar to the May 2004 incident," and because the "only purpose . . . was to portray [Defendant's] bad character and imply his propensity to act in conformity with such character." We disagree.

Defendant was indicted for violation of N.C. Gen. Stat. § 14-27.4 (2004), which provided that "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.4(a)(1) (2004). The trial court instructed the jury that "[a] 'sexual act' means any penetration, however slight, by an object into the genital opening of a person's body."

All three incidents involved the same type of sexual act. The victim testified that during the May 2004 incident Defendant "chose to use his middle finger . . . and insert[ed] it in my vagina[.]" She similarly testified concerning the bed incident and the Lick Mountain incident, stating that Defendant used his middle finger to penetrate her, and that the May 2004 assault "was the same thing" that Defendant did during those prior incidents. In the recorded conversation between Defendant and the victim, Defendant told the victim that he had to use one finger because "[y]ou was too small." The victim also testified that the Lick Mountain incident, the bed incident, and the May 2004 incident all occurred while she was staying with Defendant.

In short, the May 2004 incident, the bed incident, and the Lick Mountain incident each involved the same victim, the same specific alleged mode of penetration, and the same circumstance—while the victim was under Defendant's supervision. Thus, the bed incident and the Lick Mountain incident were sufficiently similar to the May 2004 incident, and evidence of these incidents was relevant to show that the May 2004 incident was part of a common scheme or plan by Defendant to take advantage of the victim by digitally penetrating her while she was under his control. *See, e.g.*, *Miller*, 321 N.C. at 454, 364 S.E.2d at 392 ("The evidence that defendant had committed another sex offense against the same child, his young son, . . . was admissible under Rule 404(b)."); *State v. Curry*, 153 N.C. App. 260, 265, 569 S.E.2d 691, 695 (2002) ("[T]he ages of the victims, the manner in which Defendant pursued them and gained their trust . . . [,] and the sexual conduct in which Defendant had engaged with the victims are all sufficiently similar to be probative of Defendant's intent and common plan or scheme."). Accordingly, evidence of the bed and Lick Mountain incidents was properly admitted under Rule 404(b).

Defendant next argues that testimony concerning the Lick Mountain incident should have nevertheless been excluded because it was too remote in time from the May 2004 incident, thereby diminishing its probative value in showing a common scheme or plan. While Defendant is correct that the Lick Mountain incident is alleged to have occurred two or three years prior to the May 2004 incident, we do not find

that this stretch of time inherently rendered the evidence of the Lick Mountain incident so remote in time as to eliminate its probative value. *E.g.*, *Curry*, 153 N.C. App. at 265, 569 S.E.2d at 695 ("These acts, which were continuously performed over the course of ten years cannot be said to be too remote in time to be inadmissible."). This is particularly so in light of its striking similarity to the bed and May 2004 incidents. *See, e.g.*, *Faircloth*, 99 N.C. App at 690, 394 S.E.2d at 201 ("[T]his case involves three incidents of similar conduct against the same victim within a 28-month span. We do not believe, on these facts, that the time period is so great as to erode the relevance of the first two incidents to the charged offense."); *State v. Roberson*, 93 N.C. App. 83, 85, 376 S.E.2d 486, 488 ("The intervening [five] years do not dilute the similarities especially when considered in light of [the victim's] testimony that [the] defendant had touched her in the same way during the year before the trial."), *disc. review denied*, 324 N.C. 435, 379 S.E.2d 247 (1989).

We likewise reject Defendant's argument that admission of testimony regarding the bed and Lick Mountain incidents was so "highly prejudicial" that the trial court had to reject admission of the testimony pursuant to Rule 403. The trial court concluded that evidence of the bed incident was "indeed, prejudicial[,] . . . but it appears to be more probative on the 2004 allegation than it is prejudicial, and so that will be admitted." The trial court also concluded that evidence of the Lick Mountain incident "appears to be more probative on the issue of whether or not the actual

alleged offense occurred than it is prejudicial, because once again, it involved fingers to the vagina." Such determinations were fully within the trial court's discretion, and we find no abuse thereof. *See State v. Stevenson*, 169 N.C. App. 797, 801-02, 611 S.E.2d 206, 210 (2005) ("The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court, which we leave undisturbed unless the trial court's ruling is manifestly unsupported by reason or so arbitrary it could not have been the result of a reasoned decision[.]" (internal citations and quotation marks omitted)). The trial court gave limiting instructions as to the purpose for which the testimony was being admitted, and the allowance of testimony concerning two additional incidents was not so cumulative or likely to mislead the jury as to constitute an abuse of discretion. *See, e.g.*, *id.* at 802, 611 S.E.2d at 210 (holding that the trial court did not abuse its discretion where it provided a limiting instruction confining the permissible use of the prior acts testimony). Accordingly, we find no error in the trial court's admission of the testimony regarding the bed incident and the Lick Mountain incident under Rule 403.

Other Prior Bad Acts

Next, Defendant argues that the trial court erred by allowing the jury to hear (1) the portion of the recorded conversation in which Defendant stated that he "had a hole drilled in th[e] wall" at his Lick Mountain house and "used to watch [the victim] take showers"; (2) the portion of the recorded conversation in which Defendant asked

the victim if she remembered "[t]he first hand [ride] you ever took"; and (3) the recorded conversation and the victim's testimony that Defendant had the victim watch pornography with him on several occasions, during which Defendant "would put [the victim's] hand on his erected penis."

First, Defendant argues that the trial court conducted an erroneous inquiry concerning the admissibility of evidence that Defendant "had a hole drilled in th[e] [bathroom] wall." The trial court concluded that this act was "similar to the prior events. I'm not sure about temporal proximity, but I'm not sure I have to make that decision on this issue, because the shower incident comes in by his own statement, by a statement against interest."

Defendant argues, and correctly so, that this prior act falls within the scope of Rule 404(b), thus requiring analysis thereunder. *See, e.g.*, *State v. Doisey*, 138 N.C. App. 620, 626, 532 S.E.2d 240, 244-45, *disc. review denied*, 352 N.C. 678, 545 S.E.2d 434 (2000). However, Defendant offers no specific argument as to why that prior act, in light of the particular circumstances of this case, was inadmissible under Rule 404(b) or should have been excluded under Rule 403. Accordingly, any argument to that point is deemed abandoned. *See State v. Joiner*, 237 N.C. App. 513, 522, 767 S.E.2d 557, 563 (2014) ("It is not the job of this Court to make [the] Defendant's argument for him." (citing *Viar v. N.C. Dep't. of Transp.*, 359 N.C. 400, 402, 610, S.E.2d 360, 361 (2005)); N.C.R. App. P. 28(b)(6); *see also State v. Turner*, 239 N.C.

App. 450, 455, 768 S.E.2d 356, 359 (2015) ("[A] trial court's ruling . . . should not be set aside merely because the court gives a wrong or insufficient reason for it." (brackets omitted)).

Next, Defendant argues that it was error for the trial court to admit Defendant's recorded statement to the victim that he remembered "[t]he first hand [ride] you ever took." The date of the incident to which this statement referred was not provided. However, Defendant notes that when taken in conjunction with the victim's testimony, assuming "this was a form of penetration, it must have referred to the incident at Lick Mountain or something prior to that." Defendant thus argues that, "without indication of temporal proximity, the jury could only take this as evidence of propensity on [Defendant's] part[,]" and that it should have therefore been excluded. However, because of the similarity of this description to the other events, as discussed *supra*, we conclude that the trial court did not err in admitting this statement on the grounds of temporal proximity. Moreover, "[w]hile remoteness of another offense is relevant to its admissibility to show *modus operandi* or a common scheme or plan, remoteness usually goes to the weight of the evidence, not its admissibility." *State v. Hall*, 85 N.C. App. 447, 451, 355 S.E.2d 250, 253 (internal citation omitted), *disc. review denied*, 320 N.C. 515, 358 S.E.2d 525 (1987).

Finally, Defendant argues that it was error for the trial court to admit the evidence that the victim and Defendant watched pornography together. Defendant

maintains that "[w]hile these statements may have been relevant to some generalized scheme or plan to gain sexual gratification from [the victim], they do not appear to bear on the critical issue in this case—whether or not [Defendant] penetrated [the victim's] genitalia." However, even assuming that this was admitted in error, Defendant cannot establish that he was prejudiced thereby.

In order to warrant a new trial, a defendant must show that he was prejudiced by the alleged error; that is, that there exists "a reasonable possibility that had the error not been committed a different result would have been reached at the trial." *State v. Hernandez*, 188 N.C. App. 193, 204, 655 S.E.2d 426, 433 (2008) (citing N.C. Gen. Stat. § 15A-1443). Where "abundant evidence" exists to otherwise support a defendant's guilty verdict, "the admission of evidence, even though technically incompetent, will not be held prejudicial when [the] defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result." *State v. Williams*, 275 N.C. 77, 89, 165 S.E.2d 481, 489 (1969).

Here, there was overwhelming evidence presented to the jury establishing that Defendant digitally penetrated the victim during the May 2004 incident. This included evidence of the bed and Lick Mountain incidents showing a common scheme or plan to perform the same act, the victim's detailed testimony describing the May 2004 incident, and Defendant's various admissions in the recorded conversation. The

sum of this evidence was more than sufficient to support the jury's guilty verdict of first-degree sex offense against a child. Thus, even assuming, *arguendo*, that the trial court erred in concluding that the statements that Defendant watched pornography with the victim were admissible under Rule 404(b) and Rule 403, we conclude that Defendant was not prejudiced thereby.

Conclusion

For the reasoning contained herein, Defendant received a fair trial, free from error.

NO ERROR.

Judges CALABRIA and TYSON concur.