IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1273

Filed: 3 December 2019

Alamance County, No. 16 CRS 051226

STATE OF NORTH CAROLINA

v.

ROCKY DUSTIN NANCE, Defendant.

Appeal by Defendant from judgments entered 24 April 2018 by Judge James K. Roberson in Alamance County Superior Court. Heard in the Court of Appeals 4 June 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Mark Hayes for the Defendant-Appellant.

McGEE, Chief Judge.

Rocky Dustin Nance ("Defendant") appeals from the trial court's judgment entering a jury verdict convicting him of second degree forcible sexual offense, assault inflicting serious physical injury, and assault inflicting serious injury with a minor present. Defendant contends the trial court committed reversible error by refusing

to allow cross-examination under Rules 412 and 403 of the North Carolina Rules of Evidence. We find no error.

I. Factual and Procedural Background

This case arises from an alleged physical and sexual assault in the presence of Defendant's minor daughter. The evidence at trial tended to show that Defendant arrived at the home of Ms. Whitney Gillespie around 2:00 a.m. on the morning of 11 March 2016. Defendant and Ms. Gillespie had a romantic relationship between 2009 and 2015 and had a daughter together, but were no longer formally dating. Ms. Gillespie was expecting Defendant to stay at her home that night because Defendant wanted to spend his birthday, the next day, with their daughter.

When Defendant arrived, Ms. Gillespie heard Defendant outside on her porch talking loudly on the phone to Ms. Ashley Grant, Defendant's ex-girlfriend. Ms. Gillespie understood that Ms. Grant had a restraining order against Defendant. Ms. Gillespie went out to the porch, told Defendant, "[y]ou need to get off the phone[,]" and asked if he "want[ed] to go back to jail[.]" Defendant responded by cursing Ms. Gillespie.

Ms. Gillespie testified she went back inside her home and Defendant followed her into the kitchen. Defendant got "closer and closer" to Ms. Gillespie and "continually kept getting in [her] face" until she "pushed [Defendant] to get him out of [her] face." Defendant "got angry and [] grabbed [Ms. Gillespie] by [her] throat"

while pushing her against a door. Defendant and Ms. Gillespie then realized that their daughter was standing in the dining room nearby. Defendant released Ms. Gillespie, who took their daughter into the bedroom and closed the door.

Ms. Gillespie returned to the kitchen and attempted to grab her purse from the kitchen counter, but Defendant pushed her again. Ms. Gillespie and Defendant exchanged physical hits until Defendant began to choke her again and ultimately threw her down to the floor. Ms. Gillespie and Defendant continued to fight on the floor until the struggle caused Ms. Gillespie's sweatpants to slide off, leaving her exposed from the waist down. Ms. Gillespie testified that Defendant then "jammed his hand up inside of [her] vagina as hard as he could and [she] kicked back. . . . [She] kicked back as hard as [she] could. And [Defendant] did it again." Defendant stood up, kicked Ms. Gillespie in the stomach, and then left Ms. Gillespie's home.

Ms. Gillespie called her friend, Ms. Megan Stewart, and Defendant's ex-girlfriend, Ms. Grant, shortly after Defendant left. Both women understood that something harmful had happened and went over to Ms. Gillespie's home. Ms. Stewart testified that she found "[Ms. Gillespie] laying [sic] in the kitchen with [her daughter] over top of her[.]" Ms. Stewart left and picked up Ms. Heather Edwards, another friend of Ms. Gillespie. Ms. Stewart dropped off Ms. Edwards at Ms. Gillespie's home, then left because she had to work the next morning. Ms. Grant, Ms. Edwards, and Ms. Gillespie then called the police around 5:30 a.m. on the morning of March 11,

about two and a half hours after Ms. Gillespie's altercation with Defendant ended. Around 10:00 p.m. that evening, Ms. Gillespie posted a photo to Snapchat with a caption reading, "Happy Dirty 30, RDN. Cheers to your new orange jumpsuit POS."

Defendant was indicted for second degree forcible sexual offense, assault inflicting serious physical injury, and assault inflicting serious injury with a minor present. At trial, Defendant attempted to introduce evidence of a prior trial wherein Ms. Gillespie and Ms. Edwards each testified against the defendant, Mr. Ramirez. Ms. Gillespie allegedly testified in that trial on 19 February 2016, approximately three weeks before her present altercation with Defendant, that Mr. Ramirez sexually assaulted her via "hands on genital area" contact. The trial court did not allow Defendant to illicit any testimony regarding the prior trial of Mr. Ramirez, stating that the evidence was disqualified under Rules 412 and 403 of the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rules 403, 412 (2015).

The jury convicted Defendant on all charges. Defendant appeals.

II. Analysis

Defendant's sole argument on appeal is that the trial court erred by refusing to allow Defendant to cross-examine Ms. Gillespie regarding her participation in the prior trial of Mr. Ramirez. The trial court prevented Defendant's proposed cross-examination under Rules 412 and 403 of the North Carolina Rules of Evidence. Our review of a trial court's decision to limit the scope of cross-examination under Rule

412 is deferential to " 'the sound discretion of the trial court, and its ruling thereon will not be disturbed absent a showing of abuse of discretion.' " *State v. Edmonds*, 212 N.C. App. 575, 579, 713 S.E.2d 111, 115 (2011) (quoting *State v. Herring,* 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988)). Likewise, "[w]hether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990) (citations omitted).

The State argues that Defendant failed to properly preserve its objection to the application of Rule 412 for appellate review by not making a sufficient offer of proof at trial. *See, e.g., State v. Martin*, 241 N.C. App. 602, 605–08, 774 S.E.2d 330, 332–34 (2015). Assuming, *arguendo*, Defendant properly preserved this issue, we hold that the trial court committed no error.

Our Courts have often stated the well-established principle that a criminal defendant has a constitutional right to cross-examine the witnesses against him, but have also recognized that this right of confrontation is not unlimited. *State v. Newman,* 308 N.C. 231, 254, 302 S.E.2d 174, 187–88 (1983). The prohibition from cross-examining a witness about his or her prior sexual acts found in Rule 412 is one such limitation that does not violate a defendant's right of confrontation. *State v. Autry*, 321 N.C. 392, 398–99, 364 S.E.2d 341, 345 (1988); *State v. Fortney*, 301 N.C. 31, 36–43, 269 S.E.2d 110, 112–16 (1980).

Rule 402 of the North Carolina Rules of Evidence states that "[a]ll relevant evidence is [generally] admissible[,]" while "[e]vidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2015). Rule 412 of the North Carolina Rules of Evidence renders irrelevant, and therefore inadmissible, evidence of "sexual activity of the complainant other than the sexual act which is at issue[,]" unless that evidence falls into one of four enumerated exceptions. N.C. Gen. Stat. § 8C-1, Rule 412(a), (b) (2015). Our Supreme Court has stated that Rule 412 is effectively "a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims." *Fortney*, 301 N.C. at 37, 269 S.E.2d at 113.[1] With that in mind, the purpose of Rule 412 is "to protect the [prosecuting] witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has little relevance to the case and has a low probative value." *State v. Younger*, 306 N.C. 692, 696, 295 S.E.2d 453, 456 (1982) (citation omitted).

But the rule was "not intended to act as a barricade against evidence which is used to prove issues common to all trials." *Id.* at 697, 295 S.E.2d at 456. For instance, past statements or conduct involving sexual activity may be used to show a witness's motive or bias in accusing a defendant, or to impeach a witness's statements. Indeed,

[1] Although *Fortney* and *Younger*, below, discussed the prohibition against evidence of a witness's sexual activity as it was originally codified in N.C. Gen. Stat. § 8-58.6 (1981), a precursor to Rule 412, our Supreme Court has explained that "Rule 412 is the embodiment of its predecessor, [Section] 8-58.6." *State v. Stanton*, 319 N.C. 180, 187, 353 S.E.2d 385, 389 (1987) (citation omitted).

"[t]he motive or bias of the prosecuting witness is an issue that is common to criminal prosecutions in general and is not specific to only those crimes involving a type of sexual assault." *Martin*, 241 N.C. App. at 610, 774 S.E.2d at 336; *State v. Goins*, 244 N.C. App. 499, 523–24, 781 S.E.2d 45, 61 (2015) (citation omitted) (holding that "specific pieces of evidence that could show [the prosecuting witness] had a reason to fabricate his allegations against [d]efendant" were admissible and "certainly relevant" despite sexual content); *Younger*, 306 N.C. at 696, 295 S.E.2d at 456 (holding that a "prior inconsistent statement made by [the] prosecuting witness ha[d] a direct relation to the events surrounding [the] alleged rape").

However, even if a defendant's proposed use of evidence of a witness's past sexual activity is arguably for an acceptable purpose other than those contemplated by Rule 412, the evidence may be still be excluded if it presents a risk of unfair prejudice under Rule 403 of our Rules of Evidence. *Goins*, 244 N.C. App. at 525, 781 S.E.2d at 62; N.C. Gen. Stat. § 8C-1, Rule 403 (2015) ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]"). In summary, if the "probative value of the proffered evidence in challenging the witness'[s] credibility is high, and the degree of prejudice present by virtue of reference to previous sexual activity is low, the proffered evidence is relevant and therefore defendant has a right to use the evidence for at least impeachment purposes." *State v. Bass*, 121 N.C. App. 306, 310, 465 S.E.2d 334, 336 (1996).

In the present case, the testimony Defendant intended to present included an allegation of sexual abuse of Ms. Gillespie. This Court has previously concluded that prior alleged sexual abuse falls into the definition of "sexual activity" as described by Rule 412. *State v. Ollis,* 318 N.C. 370, 374, 348 S.E.2d 777, 780 (1986); *Bass*, 121 N.C. App. at 309–10, 465 S.E.2d at 336. Nonetheless, Defendant concedes that it is clear from the record no attempt was made by Defendant to except Defendant's proposed questioning from the scope of Rule 412 through one of the enumerated categories. Instead, Defendant contends that his proffered cross-examination regarding the prior trial of Mr. Ramirez would solicit information tending to show Ms. Gillespie's bias, motive, or opportunity in prosecuting Defendant—purposes which reflect on the witness's credibility, are relevant in all trials, and which we have held do not necessarily invoke Rule 412.

Defendant argues that the evidence was a "crucial component" of his alternative theory of the case: that Ms. Gillespie (1) was jealous because Defendant was on the phone with another woman; (2) had friends who were willing to vouch for one another; (3) had a similar past experience of sexual abuse from which she could fabricate the events of the present case; and (4) had ample time to plan with her friends and develop a story prior to calling the police. Under this theory, Ms. Gillespie's alleged prior sexual abuse by Mr. Ramirez supplies the common past

experience—assault by "hands on genitalia" contact—from which Ms. Gillespie and her friends may have fabricated the events of the present case.

Our Court has held that prior accusations of sexual assault are admissible despite Rule 412, but only where at least some evidence shows that those prior accusations were false. *Compare State v. Baron*, 58 N.C. App. 150, 153, 292 S.E.2d 741, 743 (1982) (holding trial court erred by excluding sexual assault allegations where "[d]efense counsel sought only to introduce evidence of the prior allegedly false statements" and "made no representation that the complainant had engaged in previous sexual activities"), *with State v. Anthony*, 89 N.C. App. 93, 97, 365 S.E.2d 195, 197 (1988) (holding no error in trial court's exclusion of sexual assault allegations because "[n]o evidence . . . was introduced from which the trial court could conclude that the allegations were false"). Here, Defendant has not presented any evidence that Ms. Gillespie's prior testimony accusing Mr. Ramirez of sexual assault was false. Rather, Defendant contends that, regardless of the truth of her accusations, Ms. Gillespie was only able to create her account of events against Defendant because of her prior experience with sexual abuse. Though Defendant proposes a purpose that would reflect on Ms. Gillespie's credibility as a prosecuting witness, we have held that it is not an acceptable alternative purpose under Rule 412.

In *State v. Bass*, the defendant sought to admit evidence suggesting that the prosecuting witness had been sexually abused once before in a manner similar to

what was alleged against the defendant. *Bass*, 121 N.C. App. at 309, 465 S.E.2d at 336. Similar to Defendant's argument in the present case, the defendant in *Bass* contended that "the evidence of prior abuse, if introduced, would show that the victim had prior knowledge of sexual matters and therefore had the ability to lie." *Id.* This Court held that the evidence was not admissible to show a lack of character for truthfulness because there was no evidence that the witness's prior accusations were false, and that allowing the evidence for the defendant's broad assertion of similarity was "unsupported by the law of this jurisdiction:"

> Defendant's only contention is that the proffered evidence is relevant to the witness'[s] credibility merely because it would show that the witness had some of the requisite information that she would need to have in order to lie if she so desired. Defendant's contention is contrary to Rule 412 and unsupported by the law of this jurisdiction. To agree with defendant's contention would be to substantially restrict the effect of Rule 412, and allow admission of a wide variety of previous sexual activities over Rule 412 objection. A defendant could argue in a similar manner for admission of evidence concerning almost any prior sexual abuse.

Id. at 311, 465 S.E.2d at 337.

Further, in *Bass*, the prosecuting witness was only six years old, likely had no other sexual experience, and would therefore have had no other source from which she could create a story of abuse. *Id.* at 308, 465 S.E.2d at 335. Still, we held that the proffered evidence was "irrelevant and therefore inadmissible for any purpose under Rule 412." *Id.* at 311, 465 S.E.2d at 336. In the present case, Ms. Gillespie is

an adult mother, and, even giving credence to Defendant's theory of the case, it is unfathomable that she would not have been able to construct a story involving sexual assault but for her experience of prior sexual abuse.

We note Defendant's assertion that Ms. Gillespie's prior testimony was materially relevant to his theory of the case because (1) it occurred in close proximity to the events of the present case, and (2) Ms. Edwards also testified at Mr. Ramirez's trial. However, Defendant's arguments before the trial court did not make this point as clearly as it is explained in his brief on appeal. Given this lack of clarity, it is reasonably likely that the risk of prejudice inherent in the substance of Ms. Gillespie's prior testimony would have outweighed any probative value in this evidence. *See State v. McCarroll*, 336 N.C. 559, 564, 445 S.E.2d 18, 21 (1994) (holding that, where the factfinder was unlikely to give credence to the surrounding evidence, it was left with "the testimony of the prosecuting witness that she had had a sexual experience with someone other than the defendant[], which should have been excluded under Rule 412[, and] might run afoul of [Rule 403]"). The evidence of Ms. Gillespie's alleged prior sexual abuse by Mr. Ramirez bore very little, if any, probative value, while the risk that the jury would accept the evidence for Defendant's proffered reasons presented a great opportunity for unfair prejudice.

III. Conclusion

The trial court did not abuse its discretion by not allowing Defendant to cross-examine Ms. Gillespie regarding a prior instance of sexual activity because the evidence was not for an admissible purpose under Rule 412 and the probative value of the testimony was substantially outweighed by its potential for unfair prejudice. Therefore, we find no error.

NO ERROR.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).