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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-1139

Filed: 15 September 2020

Currituck County, No. 18 CRS 117-118

STATE OF NORTH CAROLINA

v.

JORDAN OWNBY, Defendant.

Appeal by defendant from judgments entered 25 July 2019 by Judge J. Carlton Cole in Currituck County Superior Court. Heard in the Court of Appeals 12 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Lee J. Miller, for the State.

Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant-appellant.

YOUNG, Judge.

This appeal arises out of convictions on two counts of attempted second-degree sexual exploitation of a minor. The trial court did not err in denying Defendant's motion to dismiss, nor did the trial court err in admitting testimonial evidence of Defendant's prior bad acts. Accordingly, we find no error.

I. Factual and Procedural History

Jordan Ownby (“Defendant”) was in a youth group at Fellowship Baptist Church. The youth group allows older members of the church to act as leaders and mentors to the children, and Defendant was one of the older members of the group. Defendant became very close with a few of the younger children in the group. They would do things outside of church such as play games in the neighborhood, go fishing, drive around in Defendant’s car and go shopping. Defendant’s relationship with at least two of the boys got to the point where he moved in and lived with their families for some time.

Eventually the nature of Defendant’s relationship with the boys changed, and James, Robert and Wright¹ accused Defendant of using Snapchat to request pictures of their penises.

When James was fifteen, Defendant began asking him for pictures of his genitals every night for at least three months. Defendant was twenty-one years old. When James refused to send pictures of his genitals, Defendant got mad, cursed at James and told him that he didn’t want anything to do with him. James never sent the requested pictures and blocked Defendant on Snapchat.

When Robert was fourteen years old, Defendant began asking him for pictures of his genitals via Snapchat. The requests continued almost every night for a few

¹ We use pseudonyms to protect the juveniles’ identities.

months, and Defendant even offered to buy Robert fishing gear and to give him money if he sent Defendant the nude pictures. Despite Robert telling Defendant “no,” Defendant continued to ask. Defendant would get frustrated and tell Robert that he did not want anything to do with him. Robert blocked Defendant on Snapchat and told Wright about it.

Wright was familiar with Defendant’s actions, because Defendant sent Wright the same requests. However, Wright had divulged sensitive information to Defendant in a private conversation prior to the requests and Defendant used that information as leverage. One night, Defendant told Wright that it would “be a shame if everybody found out about your history.” Wright was afraid and sent Defendant a picture of his genitals.

Robert finally told his father about Defendant’s behavior. Defendant contacted Robert’s father via text message and repeatedly apologized for what he had done and prayed for forgiveness. Robert’s parents contacted the Currituck County Sheriff who then contacted the North Carolina State Bureau of Investigation (“SBI”). The SBI was unable to access Defendant’s messages during the investigation because the messages had been deleted and were never stored on Snapchat or on the victims’ phones. On 9 April 2019, Defendant was charged with two counts of attempted second-degree sexual exploitation of a minor. On 25 July 2019, a jury found Defendant guilty on both counts, and the trial court sentenced him to an active prison

sentence terms of 16-29 months in case 18 CRS 117, and a consecutive term of 16-29 months, suspended for 48 months with supervised probation, in case 18 CRS 118. Defendant entered his notice of appeal in open court.

II. Motion to Dismiss

a. Standard of Review

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

b. Analysis

Defendant contends that the trial court erred in denying Defendant’s motion to dismiss because the testimony of the two minor victims, without more, is insufficient. We disagree.

A person commits second degree sexual exploitation of a minor if, knowing the character or content of the material, he “[d]istributes, transports, exhibits, receives,

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sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.” N.C. Gen. Stat. § 14-190.17(a)(2) (2020). The definition of “sexual activity” includes “the lascivious exhibition of the genitals or pubic area” of a minor. *State v. Corbett*, 264 N.C. App. 93, 100, 824 S.E.2d 875, 880 (2019) (citing N.C. Gen. Stat. § 14-190.13(5)(g) (2020)). The term “lascivious” is defined as “tending to arouse sexual desire” in the defendant. *State v. Hammett*, 182 N.C. App. 316, 322-23, 642 S.E.2d 454, 458-59, *appeal dismissed and disc. review denied*, 361 N.C. 572, 651 S.E.2d 227 (2007). Furthermore, written materials sent to minor victims may be considered to show that an act taken by a defendant was for the purpose of arousing or gratifying his sexual desire. *State v. McClary*, 198 N.C. App. 169, 174, 679 S.E.2d 414, 418 (2009).

In order to establish the elements of an attempted sex crime against a minor, the State must show: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense. *State v. Sines*, 158 N.C. App. 79, 85, 579 S.E.2d 895, 899 (2003).

Defendant sent dozens of Snapchat messages to James and Robert over many months containing the same request to see their genitals. Defendant took additional steps in furtherance of the attempted exploitation by offering money and gifts in exchange for nude photos. Defendant also used his “older brother” relationship in

attempt to coerce James and Robert into sending him the pictures. When they refused, he expressed his frustration and threatened to not have anything else to do with them. Defendant even admitted that his messages were indecent and repeatedly asked for forgiveness for his conduct. The State also offered additional evidence of Defendant's intent by showing that Defendant had already successfully solicited and received nude pictures of another teenager's genitals at least once before by using similar behavior and conduct. The evidence was uncontroverted at trial. This was substantial evidence of each essential element of second-degree exploitation of a minor, and of Defendant being the perpetrator of such offense. Accordingly, the trial court did not err in denying Defendant's motion to dismiss.

III. Rule 404(b) and 403 Evidence

a. Standard of Review

"[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).

b. Analysis

Defendant contends that the trial court erred in admitting testimonial evidence of Defendant's prior acts, because the evidence was not admitted for a proper purpose, was highly inflammatory, and the unfair prejudice outweighed any probative value. We disagree.

In general, 404(b) allows the admission of any evidence, "as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. However, this rule is "constrained by the requirements of similarity and temporal proximity;" accordingly, while similarities between the charged crime and the 404(b) evidence need not "rise to the level of the unique and bizarre," there must be "some unusual facts present in both crimes that would indicate that the same person committed them." *Id.* at 131, 726 S.E.2d at 159.

Wright's testimony served as 404(b) evidence against Defendant. This testimony showed that Defendant used his position of power and trust in the church's youth group to ask Wright for pictures of his genitals via Snapchat. Wright was a minor when the requests began, Defendant used the same social media application to solicit the pictures, Defendant used nearly identical language to ask for the pictures, the requests were always at night, and Defendant expressed frustration when Wright refused, just as he did with James and Robert. This evidence was admissible to show that Defendant's intent and prior acts against Wright were

sufficiently similar to his intent and acts against James and Robert. Wright's testimony helped further explain Defendant's motive in attempting to get pictures of young boys' penises and also helped explain why Defendant acted similarly with James and Robert. Wright's testimony was both relevant and properly admitted to show that Defendant's motive was "a circumstance tending to make it more probable" than not that Defendant committed the charged offenses. *State v. Brown*, 211 N.C. App. 427, 433, 710 S.E.2d 265, 270 (2011).

Defendant contends that Wright's testimony was inadmissible to prove identity, however, Defendant failed to show that any plain error occurred. Defendant simply restates James and Robert's testimony and argues that identity and mistake were never at issue. Defendant also contends that Wright's testimony was not admissible to show that Defendant's conduct was a part of a common scheme or plan. However, Wright's testimony was introduced to explain how Defendant's consistent pattern of conduct and relevant prior acts were sufficiently similar to the charged crimes, not to show that Defendant has a propensity to be an adulterer or sexual deviant. This evidence gave context to the charged offenses and showed that Defendant's prior conduct was a part of a larger common plan or scheme to sexually exploit James and Robert. Lastly, Defendant contends that Wright's testimony about the request for pictures and the blackmail were too dissimilar to be admitted. This Court has already rejected that argument and determined that testimony regarding

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similar sex acts against an adult and a minor are both relevant and admissible under Rule 404(b). *State v. Godbey*, 250 N.C. App. 424, 440, 792 S.E.2d 820, 831-32 (2016).

The trial court heard this evidence because it shows that Defendant's prior acts were sufficiently similar to the crimes charged and establishes that Defendant had the motive and intent to engage in those crimes. The State also moved to admit the testimony for the purpose of establishing identity, common plan or scheme, knowledge, absence of mistake and a lack of accident. The testimony was not offered for the purpose of proving Defendant's propensity to commit the charged crime.

This evidence is not unfairly prejudicial to Defendant under Rule 403. The evidence is relevant and goes directly to Defendant's guilt. The 404(b) evidence established identity, a common scheme or plan, knowledge, and a lack of mistake or accident in Defendant's repeated requests for pictures of minor boys' genitals. Since Defendant cannot show that the admission of the 404(b) evidence was unfairly prejudicial, we find that the trial court properly admitted the 404(b) evidence.

NO ERROR.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).