IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-366

Filed 7 May 2024

Pender County, No. 21 CRS 50088

STATE OF NORTH CAROLINA

v.

JAMES EDWARD GLENDENING

Appeal by Defendant from Judgment entered 2 September 2022 by Judge Richard Kent Harrell in Pender County Superior Court. Heard in the Court of Appeals 10 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Farrah R. Raja, for the State.

Mason, Mason, and Smith, by Bruce A. Mason and Sarah C. Thomas, for Defendant.

HAMPSON, Judge.

James Edward Glendening (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of Assault on a Female. The Record on Appeal tends to reflect the following:

On 22 February 2021, Defendant was indicted on one count of Second-Degree Forcible Sexual Offense, one count of Sexual Battery, and one count of Assault on a Female. The matter came on for trial on 29 August 2022.

The State's evidence at trial showed the victim and her husband were hosting a party at their home on 28 November 2020. Defendant and his wife were guests at the party. Testimony showed Defendant became intoxicated during the party.

The victim testified that during the party, Defendant approached her and the two engaged in conversation during which Defendant expressed that "you always tickled my fancy." Later during the evening, the victim testified she was having a conversation with another guest in the kitchen. The victim further testified she felt skin-to-skin contact with a hand from behind. The hand ran up her dress touching her inner thigh, vagina, and buttocks. The victim turned around and saw Defendant very close to her and walking next to her.

The State also called Marshall Kotchasak, another party guest, as a witness. Prior to his testimony, the trial court inquired into the State's intent to introduce Kotchasak's testimony about a prior incident under Rule 404(b) of the North Carolina Rules of Evidence. The State forecast this testimony would reflect an incident five years prior to the incident in this case where Kotchasak observed Defendant touch the buttocks of a woman while Defendant was intoxicated and socializing with others, including the woman's boyfriend. Over Defendant's objection, the trial court allowed the State to present the Rule 404(b) evidence as evidence of intent.

In relevant part, Kotchasak testified that in 2015, he was deployed to Korea with Defendant and the victim's husband. During this time, the three men and others were at a bar one night where they met up with a couple—a boyfriend and girlfriend. Kotchasak observed Defendant becoming intoxicated during the evening. He then observed Defendant grabbing and squeezing the girlfriend's buttocks multiple times without consent. The boyfriend asked Kotchasak to tell Defendant to stop. However, Defendant persisted and so eventually the three men left the bar.

At the conclusion of Kotchasak's testimony, Defendant again objected to the testimony regarding the incident in Korea. The trial court overruled the objection. However, the trial court gave a limiting instruction to the jury:

> Members of the jury, evidence has been received tending to show that in 2015, [Defendant] grabbed the buttocks of a woman in a bar. This evidence was received solely for the purpose of showing that the defendant had the intent which is the necessary element of a crime charged in this case. If you believe this evidence, you may consider it but only for the limited purpose for which it was received. You may not consider it for any other purpose.

Following the close of all evidence, the trial court submitted the case to the jury. The jury subsequently returned verdicts finding Defendant not guilty of Second-Degree Forcible Sexual Offense and Sexual Battery but finding Defendant guilty of misdemeanor Assault on a Female. On 2 September 2022, the trial court sentenced Defendant to confinement of 60 days suspended pending completion of 12 months of

supervised probation. Defendant timely filed written Notice of Appeal on 16 September 2022.

Issue

The sole issue on appeal is whether the trial court erred in allowing the Rule 404(b) evidence from Kotchasak regarding the prior incident in Korea as evidence of Defendant's intent on the evening of the incident in this case.

Analysis

"We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). North Carolina Rule of Evidence 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that [the person] acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). However, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake . . . ." *Id.* Accordingly, "North Carolina Rule of Evidence 404(b) is a rule of inclusion, not exclusion." *State v. Fink*, 252 N.C. App. 379, 390, 798 S.E.2d 537, 544 (2017) (citation omitted). "In determining whether the prior acts are offered for a proper purpose, the ultimate test of admissibility is whether the [prior acts] are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of . . . Rule 403." *State v. Martin*, 191 N.C. App. 462, 467,

665 S.E.2d 471, 474 (2008) (alterations in original) (citation and quotation marks omitted).

"[A] prior act or crime is similar if there are some unusual facts present in both crimes [.]" *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007) (citation and quotation marks omitted). Here, the State was prosecuting Defendant for an assault and sexual assault on a woman based on facts that at a social gathering, Defendant was becoming inebriated and approached another man's wife from behind to touch her buttocks and vagina. The State's 404(b) evidence reflected five years earlier, Defendant, again in a social setting where he was becoming inebriated, repeatedly grabbed and squeezed the buttocks of the girlfriend of another man. While the incidents may not have been identical, "nothing in our caselaw indicates that the previous acts described in 404(b) testimony must be completely identical to the acts charged in order to be admissible[.]" *State v. Waddell*, 239 N.C. App. 202, 206, 767 S.E.2d 921, 924 (2015). Here, there are some unusual facts present in both instances to render the evidence sufficiently similar.

Moreover, with respect to the temporal aspect of the 404(b) analysis: "Significantly, our Supreme Court has been 'markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in rule 404(b).'" *State v. Blackwell*, 133 N.C. App. 31, 35, 514 S.E.2d 116, 119 (1999) (quoting *State v. Cotton*, 318 N.C. 663, 666, 351 S.E.2d 277, 279 (1987)), *cert. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999). "That Court has held that a ten-year gap between

incidents does not render evidence of the prior bad act too remote in time to be admissible under 404(b)." *State v. Williamson*, 146 N.C. App. 325, 333-34, 553 S.E.2d 54, 60 (2001). In this case, the gap between the alleged incidents was five years. Considering our caselaw, we cannot conclude this five-year gap made the 404(b) evidence of the prior incident too remote in time to be excluded as a matter of law.

Finally, Rule 403 does not require exclusion of the State's Rule 404(b) evidence in this case. Where a trial court determines evidence is offered for a proper purpose and is relevant, the trial court must then balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. *State v. Bynum*, 111 N.C. App. 845, 848-49, 433 S.E.2d 778, 780 (1993) (citation omitted). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2021). "Unfair prejudice . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (citation and quotation marks omitted). We review a trial court's decision to admit or exclude evidence under Rule 403 for an abuse of discretion. *Bynum*, 111 N.C. App. at 849, 433 S.E.2d at 781 (citation omitted). The trial court abuses its discretion where "its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Jones*, 151 N.C. App. 317, 325, 566 S.E.2d 112, 117 (2002) (citation and quotation marks omitted).

Here, the trial court did not abuse its discretion in balancing the probative value of the evidence against its prejudicial effect. To the contrary, the trial court conducted voir dire on the evidence, heard arguments concerning its admissibility, and provided an instruction to the jury limiting their consideration of the evidence to the issue of intent. *See State v. Welch*, 193 N.C. App. 186, 193, 666 S.E.2d 826, 831 (2008).

Thus, the trial court properly considered the temporal nature and similarity of the incidents and balanced the probative value of the State's 404(b) evidence against its prejudicial effect. Therefore, the trial court did not err in admitting evidence of the prior incident limited solely for the purpose of showing Defendant's intent to commit assault on the victim. Consequently, there was no error in admitting this evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence.

Conclusion

Accordingly, there was no error at trial, and we affirm the Judgment against Defendant.

NO ERROR.

Judges COLLINS and THOMPSON concur.

Report per Rule 30(e).