

NO. COA14-528

NORTH CAROLINA COURT OF APPEALS

Filed: 3 February 2015

STATE OF NORTH CAROLINA

v.

Cumberland County
No. 12 CRS 59816

MARCUS WADDELL

Appeal by Defendant from judgment entered 18 September 2013 by Judge James F. Ammons, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 20 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Caroline Farmer, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jillian C. Katz, for Defendant.

McGEE, Chief Judge.

Marcus Waddell ("Defendant") appeals his conviction of felony indecent exposure, which involved Defendant publically exposing himself in the presence of a fourteen-month-old male child. Defendant contends that the trial court impermissibly allowed testimony of two adult women at trial who described previous instances where Defendant allegedly exposed himself in public. We disagree.

I. Background

At the time the following events occurred, Victoria Hardin ("Ms. Hardin"), an adult woman, worked at a law firm on Dick Street in downtown Fayetteville, located several blocks from the Cumberland County courthouse ("the courthouse"). Ms. Hardin left work on 25 July 2012 at approximately 4:30 in the afternoon, accompanied by her mother and fourteen-month-old son. While they made their way to Ms. Hardin's car, a man, identified at trial as Defendant, approached Ms. Hardin with his pants down, called out to get her attention, and began shaking his penis at her and moving his hand "up and down." Ms. Hardin and her mother quickly entered Ms. Hardin's car, along with Ms. Hardin's son. As Ms. Hardin attempted to put her car in reverse, Defendant moved behind the car and began doing jumping jacks. Defendant then walked down Dick Street and was apprehended by the police shortly thereafter.

At trial, the State presented testimony from two adult women who reported other instances of Defendant exposing himself in public. The trial court allowed this testimony under N.C. Gen. Stat. § 8C-1, Rule 404(b) to show intent, plan, or absence of mistake by Defendant ("the 404(b) testimony"). The jury found Defendant guilty of felony indecent exposure. Defendant appeals.

II. Analysis

The elements of felony indecent exposure are that an adult willfully expose the adult's "private parts" (1) in a public place, (2) "in the presence of" a person less than sixteen years old, and (3) "for the purpose of arousing or gratifying sexual desire." N.C. Gen. Stat. § 14-190.9(a1) (2013). On appeal, Defendant requests a new trial on the grounds that the trial court erred by admitting the 404(b) testimony.

"We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b) of the North Carolina Rules of Evidence." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012). Under Rule 404(b), evidence of other crimes, wrongs, or acts may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment[,] or accident" by a defendant, although such evidence "is not admissible to prove the character of [the defendant] in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). The rule also is "constrained by the requirements of similarity and temporal proximity" between the earlier acts and the offense with which the defendant is charged.¹ *State v. Al-Bayyinah*, 356 N.C. 150, 154-55, 567 S.E.2d

¹ Defendant's arguments on appeal apply only to the similarity prong of 404(b), and we will limit our analysis

120, 123 (2002) (citation omitted). In order to satisfy the similarity prong of Rule 404(b), "the similarities need not be unique and bizarre." *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (citation and quotation marks omitted). A prior incident is sufficiently 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). Testimony offered pursuant to Rule 404(b) may be inadmissible if the details it will reveal are entirely "generic to the act" it describes. See *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123.

Defendant first challenges the 404(b) testimony on the grounds that this testimony provided only "generic features of the charge of indecent exposure." In support of this contention, Defendant relies on *Al-Bayyinah*. In *Al-Bayyinah*, the defendant was charged with attempted robbery of a particular grocery store. *Id.* at 151-52, 567 S.E.2d at 121. The trial court allowed 404(b) testimony of previous robberies of the same store, but that testimony revealed only that the culprit in the previous robberies "wore dark, nondescript clothing that obscured his face; carried a weapon; demanded money; and fled

accordingly. N.C. R. App. P. Rule 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

upon receiving it." *Id.* at 155, 567 S.E.2d at 123. On appeal from the defendant's conviction for the robbery, our Supreme Court found that this 404(b) testimony merely described facts "generic to the act of robbery," noted that the earlier robberies were factually dissimilar from the one being tried, and held that this 404(b) testimony was therefore admitted in error. *Id.* at 155-57, 567 S.E.2d at 123-24.

However, our Court has allowed 404(b) testimony that describes "common locations, victims, [and] type of crime," between previous and present instances of unlawful conduct. *State v. Gordon*, __ N.C. App. __, __, 745 S.E.2d 361, 364, *disc. review denied*, __ N.C. __, 749 S.E.2d 859 (2013). For instance, in *Gordon*, which involved a robbery in a Wal-Mart parking lot, previous instances of the *Gordon* defendant committing similar robberies was held admissible under Rule 404(b) where

[e]ach of these incidents occurred in or in the vicinity of a Wal-Mart parking lot; that each of the victims in this matter were female and alone; that each of the incidents involved a common law robbery, the purse snatching, a grab and dash type of crime; that these incidents occurred within six weeks of one another, one in Statesville, one in Mooresville, which are approximately [twenty] miles apart; and in each incident, the alleged perpetrator of the crime . . . was a black male.

Id. Similarly, in the present case, the 404(b) testimony indicated that (1) Defendant exposed himself to adult women, who were either alone or in pairs, (2) he did so in or in the vicinity of businesses near the courthouse in downtown Fayetteville, and (3) each instance involved Defendant exposing his genitals with his hand on or under his penis. Just as in *Gordon*, this 404(b) testimony revealed numerous unique details of "common locations, victims, [and] type of crime" that rose above facts "generic to the act" of public exposure. Defendant's argument is without merit.

Defendant also contends that the incidents described in the 404(b) testimony are fundamentally dissimilar to Defendant's public exposure on 25 July 2012 because the 404(b) testimony came from adult women, whereas the purported "victim" in the present case is a fourteen-month-old male child. In support of this position, Defendant relies on *State v. Dunston*, 161 N.C. App. 468, 588 S.E.2d 540 (2003). In *Dunston*, the defendant was accused of having anal sex with a twelve-year-old child. *Id.* at 469, 588 S.E.2d at 542. However, the trial court erred by allowing 404(b) testimony from the defendant's wife that the couple regularly had anal sex. *Id.* at 473-74, 588 S.E.2d at 544-45. This Court held that "the fact defendant engaged in and liked consensual anal sex with an adult, whom he married, is not

by itself sufficiently similar to engaging in anal sex with an underage victim . . . to be admissible under Rule 404(b).” *Id.* In the present case, Defendant maintains that, because the 404(b) testimony came from adult women, “[n]othing about [the 404(b) testimony] would shed light on why [Defendant] would expose himself to a [male] child.” (emphasis added).

We disagree not only with Defendant’s conclusion, but we also disagree with his assumption that whether Defendant exposed himself “to” a child is relevant to our analysis. N.C.G.S. § 14-190.9(a1) requires only that Defendant expose himself “in the presence of” someone under sixteen. North Carolina’s appellate Courts consistently have interpreted the phrase “in the presence of” in N.C.G.S. § 14-190.9 by its plain meaning. In order to convict a defendant of indecent exposure in public, the exposure need only be in the *presence* of another person; it need not be seen by, let alone directed at, another person. See *State v. Fly*, 348 N.C. 556, 561, 501 S.E.2d 656, 659 (1998) (“[The statute] does not require that private parts be exposed to [a person] before the crime is committed, but rather that they be exposed ‘in the presence of’ [another person].”); *State v. Fusco*, 136 N.C. App. 268, 270, 523 S.E.2d 741, 742 (1999) (“Indecent exposure involves exposing one’s self ‘in the

presence of' [another] person The victim need not actually see what is being exposed." (citation omitted)).²

In the present case, Defendant acknowledges in his own brief that he exposed himself to Ms. Hardin outside of a business near the courthouse in downtown Fayetteville, that he had his hand on his penis when he did so, and that he "shook" his penis at her. That this particular public exposure also happened to take place in the presence of a child is not dispositive of the other similarities between this event and those described in the 404(b) testimony. Therefore, *Dunston* is distinguishable from the present case, and we are unpersuaded by Defendant's argument.

Defendant attempts to further distinguish the 404(b) testimony from his exposure to Ms. Hardin by noting that Ms.

² Although the present case involves Defendant's conviction of felony indecent exposure under N.C.G.S. § 14-190.9(a1), *Fly* and *Fusco* interpreted an older version of North Carolina's misdemeanor indecent exposure statute, N.C.G.S. § 14-190.9(a). Before 2005, in order to convict for misdemeanor indecent exposure under N.C.G.S. § 14-190.9(a), the State had to prove not only that a defendant's exposure occurred in public and in the presence of another person, but it also had to prove that this exposure occurred in the presence of a member "of the opposite sex." See 2005 N.C. Sess. Laws ch. 226, § 1. As such, the analyses in *Fly* and *Fusco* are still applicable in the present case, at least to the extent they inform this Court how to interpret the phrase "in the presence of" as it applies to Defendant exposing himself "in the presence of" a member of a particular class of people, presently a child under the age of sixteen.

Hardin expressly described Defendant's conduct as "masturbating," while the 404(b) witnesses did not. However, 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; there need only be "some unusual facts present in both" the past and present instances of conduct to make them sufficiently similar. See *Carpenter*, 361 N.C. at 388, 646 S.E.2d at 110. As already discussed, there are numerous unique similarities between Defendant's conduct described in the 404(b) testimony and in Ms. Hardin's account, which we find satisfies the similarity prong of Rule 404(b). Defendant's distinction, to the extent that there is one, is not dispositive of these similarities. Therefore, Defendant's argument is without merit.

Defendant further contends that the 404(b) testimony nonetheless was unduly prejudicial and should have been excluded under Rule 403 of the North Carolina Rules of Evidence. Under Rule 403, evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" to a defendant. N.C. Gen. Stat. § 8C-1, Rule 403 (2013). Whether to exclude evidence under Rule 403 is a matter of discretion of the trial court and that decision will be reversed "only upon a showing that [the trial court's] ruling was manifestly

unsupported by reason and could not have been the result of a reasoned decision." *State v. Lakey*, 183 N.C. App. 652, 654, 645 S.E.2d 159, 160-61 (2007) (citation and quotation marks omitted). Moreover, we generally will not overturn a trial court's decision to admit evidence under Rule 403 where "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to [the] defendant and was careful to give a proper limiting instruction to the jury." See *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160 (citation and quotation marks omitted).

In the present case, the trial court held *voir dire* examinations of the State's 404(b) witnesses, and it even excluded a possible third 404(b) witness because she could not state in open court that Defendant was the same man who had exposed himself to her in the past. The trial court found that the 404(b) testimony was admissible to show "some evidence of intent, plan, or absence of mistake in this case" because Defendant "has shown a pattern of exposing himself to [adult] females in the courthouse area" in downtown Fayetteville. Moreover, the trial court expressly instructed the jury that it could only consider the 404(b) evidence for these limited purposes. As such, our review of the record reveals that the trial court was aware of the potential danger of unfair

prejudice to Defendant by allowing the 404(b) testimony and that it gave a proper limiting instruction to the jury in response. At the very least, in light of our above analysis, and in spite of Defendant's contention that the introduction of the 404(b) testimony "allowed the State to change the focus of the case from the credibility of Ms. Hardin's account of the incident to the character of [Defendant]," we find that the trial court's decision to not exclude the 404(b) testimony under Rule 403 was not manifestly unsupported by reason.

No error.

Judges STEPHENS and DIETZ concur.