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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1216

Filed: 20 June 2017

Mecklenburg County, Nos. 14 CRS 229898-99

STATE OF NORTH CAROLINA

v.

KIRK DEANGLO EVANS

Appeal by defendant from judgments entered 24 March 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant.

DIETZ, Judge.

Defendant Kirk Evans appeals his convictions for second degree kidnapping and second degree rape. The State charged Evans after matching his DNA to an unsolved rape from 1994.

On appeal, Evans challenges the jury's instruction on second degree rape and the admission of evidence that he raped another woman under similar circumstances

three years after the rape alleged in this case. As explained below, we reject Evans's arguments.

Although there was evidence that Evans used a gun to force the victim into his car to be raped, other evidence suggested Evans used verbal threats to carry out the rape as well. Thus, the trial court properly instructed the jury on both first and second degree rape.

The trial court also properly admitted evidence that Evans committed a similar rape three years after this offense. The State used the evidence of this other rape to show intent and common plan or scheme, among other permissible reasons, and this other rape was sufficiently similar and close in time. Accordingly, we find no error in the trial court's judgments.

Facts and Procedural History

More than two decades ago, in 1994, Sarah,¹ the victim, was walking home from a friend's house late at night. A man in a white car pulled up beside Sarah and asked her if she wanted a ride. Sarah declined, but the man pulled out a gun, pointed it at her, and told her to get in his car. Sarah felt that she could not safely escape so she got in the car. The man started driving, and Sarah asked him to drop her off when he passed her street. The man "said no, I'm going to kidnap you." Sarah started crying

¹ We use a pseudonym to protect the victim's identity.

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and tried to reach for the doorknob, but the man ordered her not to touch it and not to look at him.

The man drove Sarah to a secluded dirt road and told her that he wanted to make love to her, that he was not going to hurt her, and that he would take her home afterward. He told Sarah to pull off her panties and stockings and fondled her vagina in the front seat before telling her to get in the backseat. In the backseat, the man got on top of Sarah, had vaginal intercourse with her without using a condom, and ejaculated inside her. The man told Sarah to put her clothes back on, and he drove her back to the road where he had picked her up. He went through her jacket to see if she had any money and took \$5 worth of food stamps. Sarah cried throughout the entire encounter. The man then hugged Sarah and asked her to forgive him. Sarah walked to a nearby payphone and called the police to report what had happened.

A police officer responded to the call. The officer picked Sarah up, had her show him the location of the rape, and then transported her to a nearby hospital. The officer then took a statement from Sarah. Sarah's statement matched what she had earlier reported to the 911 operator. A doctor then examined Sarah, noting that she was alert, calm, and able to describe in detail what had happened. The doctor took vaginal swabs for a rape kit. A nurse who assisted with the examination testified that Sarah explained that she had been raped and that the rapist had threatened her both verbally and with a gun. Law enforcement sent Sarah's clothing and the rape kit to

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the crime lab. After the hospital released Sarah, law enforcement visited her at her home, discussed the crime with her again, and obtained a three-page written statement, again consistent with her earlier statements. Despite a lengthy investigation, law enforcement did not make any arrests at the time.

Twenty years passed, and Sarah never heard from law enforcement again. Then, in 2014, a detective contacted Sarah. He explained that DNA from Sarah's rape kit matched Defendant Kirk Evans. Sarah told the detective that she did not know Evans and never had consensual sex with him. When asked about the rape twenty years earlier, Sarah could no longer recall the details.

The State charged Evans with first degree rape, first degree kidnapping, and robbery with a dangerous weapon. At trial, the State relied on Sarah's statements to police and testimony from the doctor and the nurse who performed Sarah's hospital exam.

Over Evans's objection, the State also presented evidence that Evans raped another woman in 1997, approximately three years after Sarah's rape. The victim from that case, Susan,² testified that, on 3 July 1997 at around 11 p.m., she was walking to a friend's apartment when Evans approached her in his car and asked if she needed a ride. She got in his car, but Evans did not turn into the apartments that Susan said she was going to visit. Susan asked him to stop, but he said no and drove

² We again use a pseudonym to protect the victim's identity.

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her to a secluded dirt road. Evans then threatened to hurt Susan if she did not have sex with him. Susan began crying, and Evans told her to take her clothes off and get in the backseat. Evans then fondled her vagina before having vaginal intercourse with her without a condom and ejaculating inside her. Afterward, Evans told Susan to put her clothes on and get back in the front seat. Evans then reached down beside his car seat for something. Susan feared that he was reaching for a weapon and was going to hurt her, so she opened the car door and ran away. The trial court ruled that this evidence was admissible under Rule 404(b) to show a similar opportunity, intent, preparation, plan, and modus operandi.

Evans testified in his defense at trial. He told the jury that he had consensual sex with Sarah, but did not rape her. According to Evans, he was driving when he encountered Sarah and pulled over to ask her if she had a stem for smoking crack. She said that she did and got into his car to smoke crack with him. He told her that he would buy her more crack if she had sex with him. He testified that she agreed and that they had intercourse. He testified that he then told her he did not have money to buy more crack, that she got angry, and that he dropped her off.

During the charge conference, the State requested that the trial court instruct the jury on the lesser-included offense of second degree rape. Evans objected to the instruction on second degree rape, arguing that the evidence would only support verdicts of first degree rape or not guilty because there was no evidence that Evans

used or threatened force in any manner other than by the use of a gun. The trial court instructed the jury on second degree rape over Evans's objection.

The jury acquitted Evans on the robbery charge and convicted him of second degree kidnapping and second degree rape. The court sentenced him to consecutive prison terms of twelve years for rape and nine years for kidnapping. Evans timely appealed.

Analysis

Evans raises two arguments on appeal. First, he contends that the trial court erred in instructing the jury on the lesser-included offense of second degree rape. Second, he contends that the trial court erred in admitting evidence that he raped another woman in similar circumstances three years after his alleged rape of Sarah. We address these arguments in turn.

I. Instruction on lesser-included offense of second degree rape

Evans first argues that the trial court erred in instructing the jury on the lesser-included offense of second degree rape. He argues that there was no evidence to support a second degree rape instruction because the only evidence that Evans used force was his display of a gun, which is an act that can only support conviction for first degree rape. As explained below, we reject this argument.

We review de novo whether the evidence at trial was sufficient to support a jury instruction. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

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“Second degree rape involves vaginal intercourse with the victim both by force and against the victim’s will.” *State v. Alston*, 310 N.C. 399, 407, 312 S.E.2d 470, 475 (1984). The force element “may be established by either actual physical force or constructive force.” *State v. Penland*, 343 N.C. 634, 648, 472 S.E.2d 734, 742 (1996). “Constructive force may be demonstrated by evidence of threats or other actions by the defendant which compel the victim’s submission to sexual acts, and such threats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat.” *Id.* A defendant who commits all of the elements of second degree rape but who uses or displays a deadly weapon during the commission of the crime is guilty of first degree rape. *See State v. Adams*, 187 N.C. App. 676, 682, 654 S.E.2d 711, 715 (2007).

Here, the trial court instructed the jury on both first and second degree rape and instructed the jury that the difference between the charges of first and second degree rape is that, for second degree rape, “it is not necessary for the State to prove beyond a reasonable doubt that the defendant displayed a dangerous or deadly weapon.” The charge of second degree rape required the jury to find that Evans used “force, or threat of force . . . sufficient to overcome any resistance from the victim.”

The trial court’s decision to instruct on both offenses was supported by the evidence. To be sure, Sarah’s initial statements to police indicated that Evans brandished a gun. But Sarah also stated that Evans refused to let her out of the car

and warned her not to touch the door handle or to look at him during the commission of the rape and sexual assault. Moreover, the notes of the nurse who examined Sarah at the hospital indicate that Sarah said that the assailant had verbally threatened her. Finally, another witness testified that she was raped by Evans under similar circumstances, in a similar location, three years after Sarah was raped, and that Evans used verbal threats to carry out the rape but did not use or display a gun.³ Taken together, this evidence is sufficient for a reasonable jury to infer that Evans raped Sarah using force in the form of threats *other than* the display of a deadly weapon. Accordingly, we hold that the trial court did not err in instructing the jury on the lesser-included offense of second degree rape.

II. Admission of evidence of prior sexual offense

Evans next challenges the admission of evidence of a rape and sex offense that Evans committed against another victim approximately three years after the offenses in this case. Evans contends that this evidence had no probative value other than to prove his bad character and that, even if admissible for some other purpose, the evidence was too remote in time and not sufficiently similar to the offenses alleged in this case. As explained below, the trial court did not err by admitting this evidence.

In reviewing a trial court's decision to admit evidence of other crimes under Rule 404(b), "[w]e review de novo the legal conclusion that the evidence is, or is not,

³ Evans challenges the admission of this evidence but, as explained in Part II of this opinion, we hold that the trial court properly admitted it.

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, 159 (2012).

Rule 404(b) permits evidence of other crimes to be used for purposes other than "to prove the character of a person in order to show that he acted in conformity therewith." N.C. R. Evid. 404(b). For example, the State may use evidence of other crimes to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.*

Rule 404(b) is a "general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is 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, 389 S.E.2d 48, 54 (1990) (emphasis omitted). "To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is 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).

Here, the trial court ruled that this evidence was admissible under Rule 404(b) to show opportunity, intent, preparation, plan, and modus operandi—all of which are enumerated categories of permissible other crimes evidence under Rule 404(b). These categories tend to overlap, and thus we are less concerned with placing the evidence

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into a particular category and more concerned with ensuring that the evidence was not used solely to prove Evans's character "in order to show that he acted in conformity therewith." *See* N.C. R. Evid. 404(b).

We agree with the trial court that this evidence was introduced for permissible purposes under Rule 404(b). For example, this evidence showed Evans's intent and his plan or scheme to lure vulnerable women into his car so he could drive to a secluded area and rape them. This, in turn, undercut Evans's defense that he had consensual intercourse with Sarah and that his initial encounter with her was merely to obtain an instrument for smoking crack cocaine. *See State v. Adams*, 220 N.C. App. 319, 328, 727 S.E.2d 577, 583 (2012).

We likewise agree with the trial court's determination that the evidence was sufficiently similar. As the trial court observed, the two alleged rapes shared the same underlying facts involving women getting into Evans's car and Evans driving to a secluded location to rape them. The demographics of the victims were the same; the time of day was the same; even the specific details of the sexual acts and how Evans treated the victims were the same. Thus, the crimes were sufficiently similar under Rule 404(b) because there were "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890–91 (1991).

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Finally, the trial court properly found that the two rapes were sufficiently close in time. Our Supreme Court “has been liberal in allowing evidence of similar offenses in trials on sexual crime charges.” *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996). The Court previously has found that 10 to 12 years and even 26 years between sexual crimes was not too remote in time where the facts of the crimes were similar. *Beckelheimer*, 366 N.C. at 129, 133, 726 S.E.2d at 158, 160; *Frazier*, 344 N.C. at 616, 476 S.E.2d at 300. The three-year gap in this case, in light of the substantial similarity between the crimes, was sufficiently close in time to permit admission of the challenged evidence.

In sum, the trial court properly admitted evidence that Evans raped another woman under similar circumstances three years after the rape of the victim in this case. That evidence was admitted for a proper purpose under Rule 404(b), was sufficiently similar to the alleged crime, and was not too remote in time.

Conclusion

For the reasons stated above, we find no error in the trial court’s judgments.

NO ERROR.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).