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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-269

Filed: 3 October 2017

Mecklenburg County, No. 14 CRS 237025, 14 CRS 237812

STATE OF NORTH CAROLINA

v.

JOSE VILLALOBOS, Defendant.

Appeal by Defendant from judgments entered 22 November 2016 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin O’Kane Scott, for the State.

Richard Croutharmel, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Jose Villalobos (“Defendant”) appeals following jury verdicts convicting him of two charges of taking indecent liberties with a child. The trial court sentenced Defendant to 16 to 20 months imprisonment for the first conviction. On the second conviction, the court sentenced Defendant to 16 to 29 months imprisonment but suspended the active sentence and placed Defendant on 36 months of supervised

probation. On appeal, Defendant contends the trial court erred by admitting testimony in violation of North Carolina Rules of Evidence 403 and 404(b). After careful review, we find no error.

I. Factual and Procedural History

On 17 November 2014, a Mecklenburg County Grand Jury indicted Defendant for two counts of taking indecent liberties with a child against two minor females, “Emily” and “Katie.”¹ On 16 November 2016, the Mecklenburg County Superior Court called Defendant’s case for trial. On the same day the State moved to join the two charges for trial. Defendant then moved to sever the cases, as they pertained to two distinct complainants. The trial court heard the parties on the motions, denied Defendant’s motion, and granted the State’s motion for joinder. Defendant also filed a motion *in limine* to prevent the State from introducing, during its case in chief, testimony related to other crimes, wrongs or acts allegedly committed by Defendant. The court waited to address this motion until the relevant witness was called to testify. The State’s evidence tended to show the following.

The State first called “Mark” to testify.² Mark testified Emily is his daughter and Defendant is a part of his extended family.³ At the time relevant to this case, Mark and Defendant lived approximately two to three miles away from each other.

¹ Pseudonyms are used to protect the minors’ identity. See N.C. R. App. Pro. 3.1(b) (2016).

² A pseudonym is used for the minor’s parent, to protect the minor’s identity.

³ Mark testified Defendant is married to Mark’s wife’s aunt.

Prior to 2013, Mark saw Defendant nearly once a week, usually at Defendant's house for family gatherings. But in August of 2013 a conflict arose concerning Emily. Defendant arrived at Mark's house to discuss the situation, claiming it was a misunderstanding and asking for forgiveness. Mark did not report the incident to the police at that time, "because we wanted to keep it as a family issue"; but he eventually reported it around a year later.

The State then called Emily. She testified Defendant is her great-uncle and she sometimes visited his house for birthday parties. He was nice and kind to her and would give her things such as doll sets for birthdays, Christmas and for no special occasion. She further testified one day when she was seven years old, she visited Defendant's house with her mom, grandmother, and little sister. Her mom and grandmother played a card game with other adults while Emily and Defendant's daughter, Gina, played a game in Gina's room.

Later, as Emily was leaving Gina's room, Defendant called to her from his bedroom and told her to "come here." Emily obeyed, and went to Defendant, who was alone in the room. She testified "[h]e hugged me and touched my bottom." She then left the room and went to a living room where her three year old cousin was watching television on the couch. Emily joined her cousin on the couch, sitting on the opposite end. Then, Defendant came into the room and sat down on the couch next to Emily, placing a pillow between him and the three year old child. He then put his hand on

Emily's leg. Emily testified, he first put his hand around her knee, then started going up her leg on the inner part, to "[a]lmost between [her] legs." She pushed his hand away, and he then put his hand directly between her legs. She testified Defendant touched "[t]he part I use to go to the bathroom." At that point, Emily got up and went to the dining room where her mother was playing a card game with other family members; she whispered in her mother's ear that Defendant had touched her bottom. Emily testified she whispered because she did not want to cause a scene. Her mother then left Defendant's house and took Emily home.

The State then called Patricia,⁴ Emily's mother. Patricia confirmed Emily's account of the incident. She testified when Emily whispered in her ear what Defendant had done, she was "very angry, very hurt." She "walked into the kitchen grabbing a knife to hurt him" but stopped when she saw one of Defendant's children, and thought it was not "fair for me to do something at that moment." She then left the house with her daughters.

Patricia further testified Defendant visited her house the next day to speak with her husband, Mark. She had not yet called the police, because she "didn't want [her] family to go through this. [She] didn't want [Emily] to go through the court system and have her here." However, she eventually contacted the police on 18

⁴ A pseudonym is used for the minor's parents, to protect the minor's identity.

September 2014, after she learned Defendant bothered another little girl, Katie, who was a friend of the family.⁵

Next, the State called Katie, the second complainant. Katie was approximately ten years old at the time of the incident.⁶ Katie's mother was friends with Defendant's wife, Chayo. Katie testified when she was younger, her family regularly visited Defendant and Chayo at their house to play cards and for holidays. She further testified, one time while her family was visiting Defendant's house "I went outside . . . and I got bug bites and [Defendant] came in and he told me to get up and that he would check for bug bites He put his hands on my legs and started patting and rubbing them." She stated "[h]e moved up and down my legs [u]p to my inner thigh." Katie then told Defendant she had to leave, and walked away. At that time she did not tell anyone what happened.

Katie then recounted, nearly a month later when her family was visiting Defendant's house again "[Defendant] sat down next to me because I was on a couch. And he pulled me to him and then he kissed me on the lips. And he put his hands down my pants." She further testified Defendant's hand touched her vagina on the outside of her underwear. She then attempted to get up and told Defendant she had

⁵ The State also called Detective Teresa Johnson, a detective with the Charlotte-Mecklenburg Police Department. Detective Johnson worked in the crimes against children's unit and investigated Emily's case. She interviewed Emily and her father, Mark. Emily's interview which was audio and video recorded was admitted into evidence and was published to the jury.

⁶ Katie testified she was fourteen at the time of the trial, and the incident occurred "[w]hen I was in sixth grade, maybe four years ago."

to use the bathroom, but he “pulled [her] to him again.” She insisted on leaving, got up again and left.

Katie’s family continued to visit Defendant’s house and Katie tried to avoid going, but she had not yet told her family what Defendant had done. She stated “I was scared that my family would be disappointed that I didn’t tell them sooner, over time, and that I would get in trouble or something might happen.” Katie testified one day she had a discussion with her mother, and her mother told her “she heard that [Defendant] did something weird to [Emily] and then she kept saying to protect my little sister” Her mother then asked Katie whether anything like that had happened to her, and Katie replied “that he kissed me and that he did touch me there.” Katie then testified she went to an interview at Pat’s Place Child Advocacy Center to talk about the things that had happened concerning Defendant.

The State then called Katie’s mother, Angela.⁷ Angela confirmed Katie’s testimony.⁸ She testified in September of 2014, she had a conversation with Katie regarding the incident with Defendant. Angela stated,

I had just started working that night . . . as a nanny. I’d go in at 8:00 and I wouldn’t get home until 6:00. And I was talking to [Katie] about taking care of her sister. I told her to please look after her. If she was to go anywhere, to go with her. She needed to take care of her. I didn’t want anything to happen to her, you know, anyone to kidnap her or do anything to her. And I asked her if she were to go

⁷ A pseudonym is used for the minor’s parent, to protect the minor’s identity.

⁸ Angela testified she knows Defendant through a friend of hers who is married to Defendant’s nephew.

somewhere, to go with her, to watch her because I couldn't and I was worrying a lot. And then [Katie] started crying.

Katie then said to her mother "well, who took care of me?" Angela testified "I started to imagine that something had happened to her. And I asked her, . . . what had happened." Katie told her mother about what happened with Defendant. Angela recounted the conversation,

[s]he said the first time was when he touched her legs and her feet and then she stood up and left with us. And then the second time was when he kissed her and they were sitting on the sofa. . . . it was like a recliner sofa and . . . he put himself on top of her and touched her parts. He kind of . . . pushed himself up and touched her and kissed her on the mouth.

Angela testified she then spoke to her husband about these incidents and together they called the police. She further testified, she knows Emily's family well and has discussed what happened with Emily's mother "three or four times."⁹

The State's final witness was "Lisa."¹⁰ Prior to her testimony the court addressed Defendant's motion *in limine* regarding Rules of Evidence 403 and 404(b). The State conducted a voir dire examination of Lisa. She testified when she was around ten years old she lived across the street from Defendant and often played with two of his daughters. Lisa testified when she was at Defendant's house, "[h]e would

⁹ The State also called Katie's father. He testified his family did not immediately call the police out of concern for Chayo and her daughters. They decided to speak with Chayo directly about the matter before telling the police. Katie's father called the police on the 15th and reported the incidents.

¹⁰ A pseudonym is used to protect the complainant's identity.

talk to me and try to get me away from [his daughters].” She explained “he would ask them to do something or sometimes they would just mysteriously disappear and then I was left alone in the room with him.”

Lisa further testified on three occasions, around 2006 and 2007 Defendant touched her inappropriately. She recounted the first time “[Defendant] told me that he was a massage therapist and that he wanted to give me a massage. And he’d have me lie down and then he would place his hands up and down my body.” During this encounter Lisa was fully clothed. She also stated “[h]e would go, . . . from the bottom of my legs, then up towards my inner thigh area, as close as he could get to my lower private area, without me realizing what he was doing. And then he would go up near my breast area and touch along the side [of my breast].”

Lisa further testified the second time Defendant touched her another girl, who Lisa thought to be his niece, was also present in the room. She testified this incident was much like the first. “He just started talking to us very calmly to help keep us calm And then he asked us both to lie down and we were just kind of scared so we did what he said. He did the same thing and touched both of us.” Again, she was fully clothed. Following this incident Lisa “did say something to the daughters and asked them if he had done that to anyone else or to them and [she remembered] them looking startled and scared to say anything to [her].”

Lisa testified,

[t]he third time [Defendant's daughters] went to go get a board game and he led me into his [bed]room. He probably told me something that made me go in there. I don't remember what that was. But he led me to his room, closed the door behind me, locked the door, and then kissed me. And that's when I turned around, unlocked the door, and just ran home.

She then told her mother what happened, even though after each of the three incidents Defendant told her not to tell her mother. Lisa eventually reported the incidents to the police.

After the completion of the voir dire examination, the trial court heard the parties on Defendant's motion *in limine* to exclude Lisa's testimony. The State argued it offered Lisa's testimony not to show Defendant's propensity, but for other proper purposes including to show Defendant's intent, identity, motive, the existence of a common scheme or plan, absence of mistake, and opportunity. Defense counsel contended the evidence was not admissible for any proper purpose, and the evidence was extremely prejudicial to Defendant. Defense counsel further argued the incidents involving Lisa were not sufficiently similar, nor were they in close temporal proximity to the incidents involving the other two girls.

The trial court observed this testimony "could be offered for a purpose other than to simply show that [Defendant] has a propensity to commit this particular type of activity." The court further found the acts were substantially similar and there was reasonable temporal proximity between the acts. Additionally, the court found

the evidence to be extremely probative. Thus, the court concluded the evidence of Defendant's prior acts were admissible under Rules 404(b) and 403.

When the jury returned, the State called Lisa as a witness to describe the prior acts Defendant committed. Before she testified the court instructed the jury that the evidence could be considered only for the limited purpose of showing Defendant's intent and whether Defendant had a plan or design involving the alleged crimes.

After Lisa's testimony to the jury the State then rested its case and Defendant did not put on any evidence. Defendant moved to dismiss the charges for lack of sufficient evidence, which the court denied.

The jury deliberated and returned a unanimous guilty verdict finding Defendant guilty on two counts of taking indecent liberty with a child. The trial court sentenced Defendant to 16 to 20 months imprisonment for the first conviction and 16 to 29 months imprisonment for the second conviction, but suspended the active sentence and placed Defendant on 36 months of supervised probation. Defendant gave oral notice of appeal to this Court.

II. Jurisdiction

Defendant's appeal from the superior court's final judgment lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Standard of Review

When analyzing a trial court’s rulings applying Rules 404(b) and 403, this Court “conduct[s] distinct inquiries with different standards of review.” *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

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.

Id. (italics added) “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of the Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

IV. Analysis

On appeal, Defendant contends the trial court erred and abused its discretion by allowing the jury to hear Lisa’s testimony. Defendant argues the testimony constitutes improper character evidence in violation of North Carolina Rules of Evidence 403 and 404(b). We disagree and find no error.

North Carolina Rule of Evidence 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). Our Supreme Court has stated, this is a rule of inclusion, “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), *cert. denied*, 421 S.E.2d 360 (1992). “The list of permissible purposes for which such evidence may be introduced as set forth in the statute *is not exclusive*.” *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). “In fact, as a careful reading of Rule 404(b) clearly shows, evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused.” *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986).

North Carolina courts have historically been liberal in admitting evidence of similar sex crimes. *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978). However, evidence admitted under Rule 404(b) “should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused.” *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (subsequent history omitted). Thus, “[i]n light of the perils inherent in

introducing prior crimes under Rule 404(b), several constraints have been placed on the admission of such evidence.” *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007).

First, in order for the evidence to be admissible it must be relevant to the crime for which Defendant is at trial. *Id.* Relevant evidence “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2015).

Additionally, the admissibility of such evidence is further limited by the requirements of similarity and temporal proximity. *Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123; *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993). “The determination of similarity and remoteness is made on a case-by-case basis, and the required degree of similarity is that which results in the jury’s ‘reasonable inference’ that the defendant committed both the prior and present acts.” *State v. Stevenson*, 169 N.C. App 797, 800, 611 S.E.2d 206, 209 (2005) (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991)). “Under Rule 404(b) a prior act or crime is ‘similar’ if there are ‘some unusual facts present in both crimes’” *Stager*, 329 N.C. at 304, 406 S.E.2d at 890 (citations omitted). However, “[t]he similarities need not be ‘unique and bizarre.’” *Stevenson*, 169 N.C. App. at 800, 611 S.E.2d at 209 (citations omitted). “[R]emoteness in time is less significant when the prior conduct

is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility.” *Stager*, 329 N.C. at 307, 406 S.E.2d at 893.

North Carolina courts have not established a bright line rule on what constitutes sufficient temporal proximity. Instead, our courts take the lapse of time into consideration when determining the probative value of the proffered evidence.

While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, . . . the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

State v. Shamsid-Deen, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989). In *State v. Patterson* this Court held evidence of prior bad acts occurring ten to fifteen years prior to the defendant’s trial were not too remote when the acts were sufficiently similar to demonstrate defendant’s common scheme or plan. 149 N.C. App. 354, 364, 561 S.E.2d 321, 327 (2002).

However, in *State v. Jones* the North Carolina Supreme Court held evidence of prior bad acts occurring seven years prior to the defendant’s trial were too remote. 322 N.C. 585, 586, 369 S.E.2d 822, 822 (1988) (subsequent history omitted). In that case the State presented evidence tending to show the defendant assaulted a female in much the same manner as the complainant in the case before the court. *Id.* The

Supreme Court stated “the period of seven years ‘substantially negate[s] the plausibility of the existence of an ongoing and continuous plan to engage persistently in such deviant activities.’” *Id.* at 590, 369 S.E.2d at 824 (quoting *State v. Shane*, 304 N.C. 643, 656, 285 S.E.2d 813, 821 (1982)). The court went on to say “the passage of time between the commission of the two acts slowly erodes the commonality between them. The probability of an ongoing plan or scheme then becomes tenuous.” *Id.* at 590, 369 S.E.2d at 824.

The final consideration in the test of admissibility of prior bad acts is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant, pursuant to Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2015).

The decision to admit or exclude evidence is a matter addressed to the sound discretion of the trial court which will not be disturbed absent an abuse of discretion and “only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.”

State v. Smith, 99 N.C. App. 67, 71, 392 S.E.2d 642, 645 (1990) (quoting *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985)), *cert. denied*, 328 N.C. 96, 402 S.E.2d 824 (1991).

Here, Defendant argues Lisa’s allegations were not sufficiently similar to Emily’s and Katie’s allegations and were too remote in time to be considered by the trial court. Defendant contends the only similarities that exist involve the location

of the acts and the age of the complainants. However, we find Lisa's allegations to be sufficiently similar to that of Emily and Katie, and not too remote in time.

First, each of the children had a familial relationship with Defendant. Emily identified Defendant as her great-uncle. Katie's mother was a friend of Defendant's wife. Lisa lived in Defendant's neighborhood and was friends with two of Defendant's daughters. Due to these relationships, each of the girls regularly visited Defendant's home. Also, each of the complainants were female girls, and close to the same age at the time of the incidents. Emily was eight years old, Lisa was nine, and Katie was ten. Each of the incidents occurred in Defendant's home and while other people were present in the house. Furthermore, the manner in which Defendant touched each girl was similar. Defendant assaulted each of them multiple times, and each time he touched them outside their clothing. Additionally, the acts were temporally connected. Lisa's testimony indicates her assault occurred at most seven years prior to the first two girls. Lisa was assaulted in 2006, Katie in 2011 or 2012, and Emily in 2013.¹¹ This temporal connection, coupled with the similarity in the events tends to demonstrate a continuous pattern of conduct by Defendant, rather than isolated incidents. Thus, we conclude there was sufficient similarity and reasonable temporal proximity between the acts.

Finally, in light of the evidence presented at trial by the two complainants as

¹¹ On cross examination Katie stated the events happened in "2011 or 2012, when I was in sixth grade."

well as six additional witnesses, any unfair prejudice caused by Lisa's testimony was minimal.

Defendant also argues Lisa's testimony was inadmissible because the State voluntarily declined to prosecute Defendant based on her allegations. Defendant's sole authority for his argument is *State v. Goodwin*. 186 N.C. App. 638, 652 S.E.2d 36 (2007). In that case, this Court held the trial court erred in allowing the State to cross-examine the defendant regarding two prior incidents which resulted in criminal charges, but which the State voluntarily dismissed. However, the fact that the charges were voluntarily dismissed was irrelevant to this Court's holding. In fact, we held the trial court erred because the evidence was only relevant for the purpose of showing the defendant's propensity to commit the crime. Therefore, Defendant's argument and reliance on *Goodwin* is without merit.

V. Conclusion

In sum, after careful review, we hold the trial court committed no error by admitting the challenged testimony under Rules 403 and 404(b) for the limited purpose of showing Defendant's intent and common plan or scheme.

NO ERROR.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).