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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-153

Filed: 2 January 2018

Mecklenburg County, Nos. 14 CRS 236145, 14 CRS 236147-152

STATE OF NORTH CAROLINA

v.

DEREK ANTONIO SMITH, JR.

Appeal by Defendant from judgments entered 17 June 2016 by Judge Jesse B. Caldwell, III in Superior Court, Mecklenburg County. Heard in the Court of Appeals 18 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Laura E. Crumpler, for the State.

Dylan J.C. Buffum, Attorney at Law, PLLC, by Dylan J.C. Buffum, for Defendant.

McGEE, Chief Judge.

Derek Antonio Smith, Jr. ("Defendant") appeals from judgments imposed after a jury found him guilty of felonious fleeing to elude arrest, first-degree kidnapping, common law robbery, first-degree sexual offense by fellatio, first-degree sexual

offense by digital penetration, and first-degree rape. Defendant argues that the trial court committed plain error by failing to instruct the jury on attempted first-degree rape and by permitting testimony regarding Defendant's prior bad acts under N.C. Gen. Stat. § 8C-1, Rule 404(b). We disagree.

I. Background

The woman who was attacked ("C.W.") testified at trial that she returned to her apartment (at times, "the apartment") on the evening of 10 September 2014 to find an unknown man inside. The man, later identified at trial by C.W. as Defendant, had entered the apartment through an unlocked exterior door. He later attacked C.W., tackled her to the ground, and held a knife to her throat. Defendant led C.W. to her bedroom, forced her to undress and get on her bed. The types, degrees, and willingness of the sexual contact that followed were contested at trial. Over the next several hours, Defendant refused to let C.W. leave her apartment, and threatened to kill her if she called for help.

C.W. testified that after Defendant forced her to undress, he undressed himself and forced C.W. to spread her legs. Defendant penetrated C.W.'s vagina with his penis five to six times, but became "frustrated" at being unable to penetrate fully. Defendant allowed C.W. to use the restroom and then forced her to return to the bedroom. Defendant motioned for C.W. to perform oral sex on him, which she did for over an hour. C.W. became frustrated and exhausted. When Defendant was no

longer able to maintain an erection, C.W. used that fact as a means to stop, stating that she "was not going to suck a limp d--k." C.W. further testified:

> Q. After you told him that you were not going to suck a limp d--k, what was his reaction to that?
>
> A. He didn't really have one.
>
> Q. Did you also tell him to masturbate himself?
>
> A. I did.
>
> Q. What did he react -- how did he react to that?
>
> A. I think -- the conversation went something like, I told him, you know, you need to do this to yourself and he said, "I don't do that."
>
> Q. He said, he didn't do that?
>
> A. Yeah. He said, "I don't do that." And I said, "Oh, you just break into women's apartments and make them do it for you?"
>
> Q. And what did he say?
>
> A. He said, "Yes, sometimes."

C.W. eventually convinced Defendant to leave her apartment by offering him her laptop, cell phone, and credit cards. When Defendant left the apartment, C.W. called 911 for help. C.W. told the dispatcher that Defendant had left her apartment and had stolen her car, a 2006 white Chevy Cobalt. C.W. then recounted the events of the night, including telling the dispatcher that Defendant "didn't penetrate . . . [b]ut he came close." When asked about that statement at trial, C.W. testified: "I did

say I believed [Defendant] had not penetrated," but that "at the time I didn't know all that had occurred." However, later in an interview with law enforcement, C.W. stated: "Yeah, he put [his penis] and he placed it [in her vagina] with his hand and then did . . . what he . . . yeah" and that Defendant penetrated "three, maybe four" times. Based on C.W.'s description and using a tracking application on C.W.'s stolen cell phone, officers were eventually able to locate her car at a nearby gas station. When they approached the car, Defendant fled. After a brief chase, Defendant was apprehended and placed under arrest. C.W. was brought to the scene, where she identified Defendant as her assailant.

C.W. testified she immediately went to the hospital to receive medical treatment and was examined by a Sexual Assault Nurse Examiner ("SANE" or "the nurse"). C.W. told the nurse that Defendant had "attempted to insert his penis into my vagina, but I was so tense that he couldn't get it in all of the way. He finally got frustrated and pulled out." At trial, the nurse testified that she identified multiple lacerations to C.W.'s vaginal area and that the results of her examination were consistent with C.W.'s testimony at trial.

The State also called a DNA analyst ("the analyst") with the Charlotte-Mecklenburg Police Crime Lab who tested samples taken from C.W.'s cheek, vagina, and fingernails, and from Defendant's penis and cheek. The analyst determined that the "probability of inclusion or the expected frequency of individuals who could

contribute to a portion of the mixture is approximately 1 in 63.2 million." The analyst also found DNA matching Defendant's DNA on vaginal swabs taken from C.W., and calculated that "[t]he probability of selecting an unrelated person at random who could be the source of the major DNA profile [was] approximately 1 in 817 trillion."

II. Discussion

Defendant argues that the trial court erred by: (1) failing to instruct the jury on the charge of attempted first-degree rape because the issue of penile penetration was contested at trial, and (2) allowing C.W.'s testimony under Rule 404(b) regarding Defendant's statement that he "sometimes" enters women's apartments to commit sexual assault.

A. Standard of Review

Defendant, representing himself *pro se*, failed to properly preserve either of these assignments of error for appeal by objecting or otherwise bringing the error to the attention of the trial court as required by N.C. R. App. P. 10(a)(1). When a criminal defendant fails to properly preserve an issue for appeal, the trial court's decision is reviewed for plain error. N.C. R. App. P. 10(a)(4). On appeal, Defendant concedes that plain error is the appropriate standard of review. "Plain error analysis applies to evidentiary matters and jury instructions." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634, *cert. denied*, 558 U.S. 999, 175 L. Ed. 2d 362 (2009). In order to succeed under the plain error standard, an appellant must show that the decision of the trial court "constitute[d] error at all[;] [and] [t]hen, [b]efore deciding that an

error by the trial court amounts to plain error, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (internal quotation marks omitted)), *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986).

B. Lesser-Included Offense Jury Instructions

Defendant first argues the trial court erred by failing to instruct the jury on the charge of attempted first-degree rape. A lesser-included offense is submitted to the jury only when there is sufficient evidence to support it, and evidence to give rise to a reasonable inference of guilt. *State v. Wright*, ____ N.C. App. ____, 798 S.E.2d 785, 789 (2017); *State v. Lucas*, 234 N.C. App. 247, 256, 758 S.E.2d 672, 679 (2014). "Instructions pertaining to attempted first-degree rape as a lesser-included offense of first-degree rape are warranted when the evidence pertaining to the crucial element of penetration conflicts or when, from the evidence presented, the jury may draw conflicting inferences." *State v. Matsoake*, ____ N.C. App. ____, ____, 777 S.E.2d 810, 815 (2015), *disc. review denied*, 368 N.C. 685, 781 S.E.2d 485 (2016). When determining whether a trial court's failure to give a jury instruction rises to the level of plain error, the inquiry is not whether it was possible that the jury may have returned a different verdict, but whether it was probable. *State v. Carter*, 366 N.C. 496, 500, 739 S.E.2d 548, 552 (2013).

Defendant contends C.W.'s testimony shows that the evidence pertaining to the issue of penetration was in conflict and that it was probable the jury would have found him guilty of attempted first-degree rape if the trial court had instructed the jury on attempted first-degree rape. Defendant points to two pieces of evidence to show that the evidence pertaining to the issue of penetration was in conflict: (1) C.W.'s statement to the 911 dispatcher that "[Defendant] didn't penetrate . . . but he came close," (2) C.W.'s testimony, that varied as to the number of times penetration occurred. Defendant contends these statements show that C.W. was untruthful about whether penetration occurred.

Our Supreme Court has previously held that a trial court erred by failing to instruct the jury on attempted first-degree rape when the victim gave inconsistent statements on the issue of penetration. *State v. Johnson*, 317 N.C. 417, 347 S.E.2d 7 (1986), *superseded by statute on other grounds as stated by State v. Moore*, 335 N.C. 567, 440 S.E.2d 797, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994). In *Johnson*, the woman who was attacked gave a written statement to the police the morning of the attack, in which she claimed the defendant "tried to push it in but couldn't." *Johnson*, 317 N.C. at 436, 347 S.E.2d at 18. In addition to this testimony, the examining physician testified that the woman told him she was uncertain whether there had been penetration. *Id.*

In the present case, we disagree with Defendant's argument, as inconsistencies regarding the number of times that penetration occurred do not create an inference that penetration did not occur. This Court has previously held that "penetration, *however slight*, of the female sex organ by the male sex organ" is sufficient to warrant submission for first-degree rape. *Matsoake*, ____ N.C. App. at ____, 777 S.E.2d at 815 (emphasis added) (citing *State v. Combs*, 226 N.C. App. 87, 90, 739 S.E.2d 584, 586 (2013)). The evidence in the present case on the issue of penetration is more exact than in *Johnson,* where the woman told both the police and her doctor that no penetration had occurred and her statement to the doctor was made well after the alleged assault occurred. Here, the only statement by C.W. equivocating on the issue of penetration was to the 911 dispatcher and was clarified during her subsequent discussion with the SANE nurse immediately after the incident. In determining whether there is truly conflicting evidence, statements should be viewed in their entirety. *State v. McNicholas*, 322 N.C. 548, 558, 369 S.E.2d 569, 575 (1988); *State v. Rhinehart*, 322 N.C. 53, 60, 366 S.E.2d 429, 433 (1988) ("[victim's] emotional statements in the minutes following the incident that defendant had 'tried to suck' his penis . . . do not support defendant's position that there was sufficient evidence of the existence of a mere attempt to warrant an attempt instruction"). Viewing the statements made by C.W. in their entirety, there was no conflict in the evidence regarding the issue of penetration.

In the present case, Defendant failed to show that the jury would have disregarded C.W.'s subsequent statements to investigators, her testimony at trial, the opinion of the SANE nurse, and DNA evidence on vaginal swabs collected from C.W. Defendant has not shown that the jury probably would have returned a different verdict, even if the attempt instruction had been included; therefore, the Defendant was not prejudiced by the failure to give the instruction under the plain error standard. *State v. Carter*, 366 N.C. 496, 500-01, 739 S.E.2d 548, 551-52 (2013) (citing *State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012)).

C. Rule 404(b) Evidence

1. Admissibility

Defendant next argues "the trial court committed plain error when it permitted the State to elicit testimony that [Defendant] confessed to being a serial rapist and failed to issue a corrective instruction." Defendant argues that C.W.'s testimony that Defendant "sometimes" entered into women's apartments to commit sexual assault was impermissible evidence of prior bad acts introduced in order to show Defendant's propensity to commit sexual assault. Evidence of prior bad acts is not admissible to prove that a person acted in accordance with that prior bad act. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). However, otherwise inadmissible evidence may be admissible for other purposes, including to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. *Id.* Our Supreme Court has recognized that:

> Cases decided under N.C.R. Evid. 404(b) state 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. Houseright, 220 N.C. App. 495, 497-98, 725 S.E.2d 445, 447 (2012) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original)). *See also State v. Beckelheimer*, 366 N.C. 127, 130-31, 726 S.E.2d 156, 159 (2012).

There is a three-step process to determine whether evidence was properly admitted under N.C.R. Evid. 404(b) and 403:

> First, is the evidence relevant for some purpose other than to show that defendant has the propensity to commit the type of offense for which he is being tried? Second, is that purpose relevant to an issue material to the pending case? Third, is the probative value of the evidence substantially outweighed by danger of unfair prejudice pursuant to N.C.R. Evid. 403?

Houseright, 220 N.C. App. at 499, 725 S.E.2d at 448 (internal citations omitted).

Our Supreme Court has clarified the standard of review applicable to evidentiary rulings under Rules 403 and 404(b):

> [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.

Beckelheimer, 366 N.C. at 130, 726 S.E.2d at 159.

For the first step we must determine whether evidence of Defendant's previous break-ins and sexual assaults is relevant. Relevant evidence is 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.R. Evid. 401 (2011). "North Carolina's appellate courts have been 'markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b).'" *Houseright*, 220 N.C. App. at 498, 725 S.E.2d at 447 (quoting *State v. Thaggard*, 168 N.C. App. 263, 270, 608 S.E.2d 774, 780 (2005)). In *Houseright*, this Court was asked to determine whether the defendant's previous sexual conduct toward a young witness was relevant for some purpose other than to show propensity to commit the offenses of first-degree sexual offense of a child. We held that "[the witness]'s testimony as to her sexual encounter with defendant tends to make the existence of a plan or intent to engage in sexual activity with young girls more probable" and "was admissible for the purpose of showing defendant's plan or intent to engage in sexual activity with young girls." *Houseright*, 220 N.C. App. at 500, 725 S.E.2d at 449. Here, evidence that Defendant "sometimes" entered women's apartments in order to commit sex offenses goes toward Defendant's motive or intent in entering C.W.'s apartment.

The second step of our analysis requires us to determine whether the purpose of the evidence was relevant to an issue material to the case. In the present case, Defendant's motive or intent in entering C.W.'s apartment was material to the charges of kidnapping and felonious breaking and entering. In North Carolina, to prove kidnapping, the State must show:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> . . .
>
> (6) Subjecting or maintaining such other person for sexual servitude in violation of G.S. 14-43.13.

N.C. Gen. Stat. § 14-39 (2015). While felonious breaking and entering requires:

> (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.
>
> (a1) Any person who breaks or enters any building with intent to terrorize or injure an occupant of the building is guilty of a Class H felony.

N.C. Gen. Stat. § 14-54 (2015). Both crimes require proof of Defendant's intent or motive in carrying out the act; therefore, the second element of the *Houseright* test

was satisfied.

The final step is to determine whether the probative value is substantially outweighed by the danger of unfair prejudice. "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 369 S.E.2d at 56. "'Unfair prejudice' within its context [of Rule 403] means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." N.C. Gen. Stat. § 8C–1, Rule 403 Commentary (2013). The prejudicial value of C.W.'s testimony was slight and we conclude that the probative value was not outweighed by its prejudicial effect.

Defendant also argues there is insufficient extrinsic evidence that the prior bad act occurred. It is true that Rule 404(b) "evidence is relevant only if the jury can conclude by a preponderance of the evidence that the extrinsic act occurred and that the defendant was the actor." *Haskins*, 104 N.C. App. at 679, 411 S.E.2d at 380. The trial court must find the evidence of the prior bad act to be substantial, which is "such evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Williams*, 307 N.C. 452, 454, 298 S.E.2d 372, 374 (1983). Our courts have previously admitted a defendant's statements regarding prior bad acts without additional extrinsic evidence. *See State v. Gibson*, 333 N.C. 29, 42, 424 S.E.2d 95, 102-03 (1992), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993) (admitting recording of defendant's admission to prior murders under Rule

404(b)); *State v. Gordon*, 316 N.C. 497, 504-05, 342 S.E.2d 509, 513 (1986) (allowing testimony of defendant's cellmate that defendant admitted to engaging in sexual intercourse with defendant's daughter). Because the statement being offered was an admission by Defendant, no further extrinsic evidence was required in order to prove that the prior bad act occurred.

2. Lack of a Limiting Instruction

Defendant's final contention is that the trial court should have given the jury a limiting instruction regarding the Rule 404(b) evidence offered by C.W. The trial court is not required to provide a limiting instruction unless requested by the party objecting to the use of the evidence as substantive evidence. *Ford*, 136 N.C. App. at 640, 525 S.E.2d at 222 (citing *State v. Goodson*, 273 N.C. 128, 159 S.E.2d 310 (1968)). While it may have been beneficial to the jury, the trial court did not err by failing to give a limiting instruction without Defendant's request.

III. Conclusion

The trial court did not err in not instructing the jury on attempted first-degree rape, as Defendant failed to show it would be probable that a reasonable jury could find that penetration did not occur. Defendant did not object to the admission of the challenged Rule 404(b) evidence and, under the plain error standard, the trial court did not err in admitting the evidence or in not providing a limiting instruction.

NO PLAIN ERROR.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).