

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-565

Filed: 19 May 2020

Alamance County, Nos. 16 CRS 55304, 55371

STATE OF NORTH CAROLINA

v.

MARK ANTHONY CHAMBERLAIN

Appeal by defendant from judgments entered 28 September 2018 by Judge William R. Pittman in Alamance County Superior Court. Heard in the Court of Appeals 21 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Orlando L. Rodriguez, for the State.

Marilyn G. Ozer for defendant.

DIETZ, Judge.

Mark Anthony Chamberlain forced a woman into his car, drove her to a remote location, and sexually assaulted and raped her. At trial, a jury found Chamberlain guilty of first-degree kidnapping, first-degree forcible rape, and first-degree forcible sexual offense.

STATE V. CHAMBERLAIN

Opinion of the Court

On appeal, Chamberlain argues that there was insufficient evidence that he threatened to use a dangerous or deadly weapon, an essential element of the sex offenses charges; that the trial court erred by allowing evidence that Chamberlain committed two previous, similar sexual assaults against other victims; and that the trial court erred by failing to intervene on its own initiative to address allegedly improper remarks during the State's closing argument.

We are not persuaded by these arguments. As explained below, the State presented substantial evidence that the victim reasonably believed Chamberlain threatened her with a deadly weapon; the trial court properly admitted the evidence of Chamberlain's past sexual assaults to establish his *modus operandi*; and the remarks during closing argument, even assuming they were objectionable, were not so grossly improper as to require the trial court to intervene *sua sponte* to ensure a fair trial. Accordingly, we find no error in the trial court's judgments.

Facts and Procedural History

Around 12:34 a.m. on 17 October 2016, Defendant Mark Anthony Chamberlain was driving around Alamance County when he noticed A.S.¹ walking alone. After passing by A.S. four times and noticing that no other cars were on the road, Chamberlain rolled down his window, told A.S. that he had a gun, and ordered her to get into his car. Once in the car, A.S. saw that Chamberlain did not have a gun, but

¹ We use initials to protect the victim's identity.

STATE V. CHAMBERLAIN

Opinion of the Court

saw a knife at his side. She tried to press the emergency dial button on her cellphone, but Chamberlain overpowered her and took her phone away. Chamberlain told A.S. if she tried to get out of the car, he would slit her throat, but if she cooperated, he would drop her off at her house.

Chamberlain drove A.S. to a dirt road in a wooded area. The location was secluded and there were no homes or businesses nearby. Chamberlain made A.S. exit the car where he sexually assaulted and raped her. Following the assault, Chamberlain drove back to a public road, gave A.S. twenty-three dollars, and ordered her to hand over her underwear. He then gave her back her cell phone, told her to exit the car, and threatened to kill her if she told anyone about the incident.

Now alone, A.S. ran down the street and banged on the door of a nearby home. The homeowner testified that he opened the door and found a frantic A.S. yelling about how someone had raped her. He allowed A.S. into his home, tried to calm her down, and gave her a phone to call the police. A.S. gave the police a description of the assault, the make and model of the vehicle, and a partial license plate number. She also told police that, while inside the car, she saw a black knife in the perpetrator's lap that looked like "one of those hunting knife things." A.S. was distraught and shaking as she spoke to the 911 dispatcher.

Later that night, law enforcement officers noticed Chamberlain driving a car matching the description provided by A.S. Chamberlain told the officers that he had

STATE V. CHAMBERLAIN

Opinion of the Court

picked up a girl and paid her for sex before dropping her at a friend's house. Later, Chamberlain took the officers to the crime scene, which matched A.S.'s description of the location of the sexual assault. Officers later found A.S.'s underwear on a street close to where they initially stopped Chamberlain.

The State charged Chamberlain with first-degree forcible rape, first-degree kidnapping, and first-degree forcible sexual offense. At trial, the State introduced a black plastic knife recovered from the driver's side of the car. The State also introduced testimony from two witnesses whom Chamberlain had raped in the past. These witnesses testified that Chamberlain targeted them when they were alone, threatened them with a knife, and sexually assaulted them in a remote location.

The jury found Chamberlain guilty of all charges. The trial court sentenced him to life in prison without parole. Chamberlain timely appealed.

Analysis

I. Motion to dismiss

Chamberlain first argues that the State failed to prove that he used a deadly weapon to commit first-degree forcible rape or first-degree forcible sexual offense because the black plastic knife introduced into evidence at trial was not a deadly weapon as a matter of law.

This Court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). A defendant's motion to

STATE V. CHAMBERLAIN

Opinion of the Court

dismiss is properly denied if “there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). When reviewing for substantial evidence, we “consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192–93, 451 S.E.2d 211, 223 (1994).

First-degree forcible rape and first-degree forcible sexual assault require the State to prove that the defendant used, threatened to use, or displayed “a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon.” N.C. Gen. Stat. §§ 14-27.21(a)(1), 14-27.26(a)(1). The “deadly character of a weapon depends more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself.” *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citations omitted).

Thus, even an ordinary, non-lethal item could satisfy the deadly weapon element if the jury finds that “the victim reasonably believed the item used to be the dangerous or deadly weapon of the type alleged in the indictment.” *State v.*

McKinnon, 306 N.C. 288, 297, 293 S.E.2d 118, 124 (1982). “When the deadly character of an instrumentality is dependent upon the particular circumstances of a case, the question is one of fact to be determined by a jury.” *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

Here, the State presented evidence that Chamberlain forced A.S. into his car by threatening to shoot her with a gun. After A.S. got in the car she did not see a gun, but saw that Chamberlain possessed what she believed was a hunting knife of some kind. Chamberlain’s threatening comments to A.S. confirmed her fear that he possessed a deadly knife. Specifically, Chamberlain told A.S. that if she tried to leave, he would slit her throat and kill her but, if she cooperated, he would return her home.

To be sure, as Chamberlain argues, the only knife law enforcement recovered was a small, black plastic knife of the type often provided to patrons at casual dining restaurants. In many contexts, this type of plastic knife would not be considered a dangerous or deadly weapon. But in *this* context, considering A.S.’s inability to carefully inspect the weapon and Chamberlain’s threat to kill her with it, the State presented substantial evidence that A.S. “reasonably believed the item used to be the dangerous or deadly weapon of the type alleged in the indictment.” *McKinnon*, 306 N.C. at 297, 293 S.E.2d at 124. Accordingly, the trial court properly denied Chamberlain’s motion to dismiss.

II. 404(b) evidence

Chamberlain next argues that the trial court erred by allowing the State to present evidence from two separate witnesses whom Chamberlain previously had sexually assaulted or raped. Chamberlain acknowledges that, although he filed a motion *in limine* to exclude this evidence and the trial court conducted a *voir dire* hearing on the issue, Chamberlain failed to renew his objection when the evidence actually was admitted at trial. Thus, he argues both ordinary error and plain error. Because, as explained below, the trial court did not err, Chamberlain's argument fails regardless of the standard applicable to our review.

This Court reviews a trial court's admission of evidence under 404(b) of the Rules of Evidence by examining the legal conclusions *de novo* and the trial court's underlying 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) provides that 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." *State v. Al-Bayyinah*, 356 N.C. 150, 153, 567 S.E.2d 120, 122 (2002). Our Supreme Court has held that Rule 404(b) is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a

defendant.” *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990) (emphasis in original). Rule 404(b) is “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.” *Id.* at 279, 389 S.E.2d at 54.

The Rule 404(b) analysis also includes an examination, under Rule 403, of whether the evidence’s probative value is “substantially outweighed by the danger of unfair prejudice.” *Id.* at 281, 389 S.E.2d at 56.

Finally, although Rule 404(b) is a general rule of inclusion, it “is still constrained by the requirements of similarity and temporal proximity.” *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159. “Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them.” *Id.* “Remoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as to permit a reasonable inference that the same person committed both crimes.” *Id.* at 132–33, 726 S.E.2d at 160.

Here, the trial court properly determined that the witness testimony was admissible to show Chamberlain’s *modus operandi*. All three victims were women who were alone and had never met Chamberlain prior to the assault. In all three incidents, Chamberlain threatened to harm the women with a knife. He then ordered them to go with him to a remote location where he sexually assaulted them in a

distinctive manner, including his position behind the victims as he raped or attempted to rape them.

The trial court acknowledged that there was a great deal of time separating these incidents; the first one occurred in 1987. But the court properly observed both our Supreme Court's holding that temporal proximity is less important "when the other crime is admitted [in evidence] because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried," *id.*, and that Chamberlain was incarcerated for a period between these crimes, which again made the remoteness of time less relevant than the fact that he used this distinctive *modus operandi* in all three sexual assaults. The court also was well within its sound discretion in balancing the probative value of the challenged evidence with its potential prejudicial effect and determining that it was admissible under Rule 403. Accordingly, the trial court did not err, and certainly did not commit plain error, by admitting this evidence.

III. Closing argument

Finally, Chamberlain argues that the trial court should have intervened on its own initiative to address improper remarks by the State during closing argument.

STATE V. CHAMBERLAIN

Opinion of the Court

Chamberlain concedes that he did not object to the allegedly improper statements at any point in the trial court.

If a defendant's counsel timely objects at trial, this Court's standard of review for improper closing arguments "is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). But when there was no objection at the time, our standard of review is whether the prosecutor's arguments "were so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Murrell*, 362 N.C. 375, 391, 665 S.E.2d 61, 73 (2008). A trial court is required to intervene on its own initiative only if "the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998).

Here, during closing argument, the prosecutor told the jury that A.S. had a history of substance abuse, and one of the reasons why A.S. may have "reasonably believed" the plastic knife to be a hunting knife was because she was under the influence of narcotics. Chamberlain contends that the prosecutor "recognized that the State's evidence of a dangerous weapon was weak" and purposefully misstated the law to strengthen the State's case.

We find no error under the applicable standard of review. Even assuming this portion of the State's closing argument was objectionable, it did not infect the trial with fundamental unfairness. Chamberlain's trial counsel ably presented

STATE V. CHAMBERLAIN

Opinion of the Court

Chamberlain's arguments for why he should be found not guilty of the offenses alleging threatened use of a deadly weapon. Moreover, the trial court correctly instructed the jury on the law regarding this issue.

As this Court has recognized, when the trial court intervenes on its own initiative during closing argument, it does so despite recognizing "an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Martinez*, 251 N.C. App. 284, 290, 795 S.E.2d 386, 391 (2016). Because this sort of *sua sponte* intervention by the court could inadvertently highlight arguments by the prosecutor that the defense, for strategic reasons, would prefer not to be highlighted in the jury's mind, we will not find error unless the challenged comments render the trial fundamentally unfair. As explained above, that did not occur here, and thus we find no error.

Conclusion

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

NO ERROR.

Judges TYSON and INMAN concur.

Report per Rule 30(e).