IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-115

No. COA20-523

Filed 15 February 2022

Iredell County, Nos. 14CRS55313-76

STATE OF NORTH CAROLINA

v.

JOSHUA MAURICE YOUNG, Defendant.

Appeal by defendant from judgments entered 25 September 2019 by Judge Joseph N. Crosswhite in Superior Court, Iredell County. Heard in the Court of Appeals 24 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa M. Postell, for the State.

Carella Legal Services, PLLC, by John F. Carella, for defendant.

STROUD, Chief Judge.

¶ 1 Joshua Maurcie Young ("Defendant") appeals from judgments of fifteen counts of first-degree sexual offense and forty-nine counts of indecent liberties. First, Defendant argues that the trial court lacked jurisdiction to charge him with sexual offense with a child under North Carolina General Statute § 14-27.4A because that statute was not enacted until after the offense date listed on the indictments. Second,

Defendant contends that the trial court erred in admitting testimony in violation of Rules of Evidence 404(b) and 403. We hold that the trial court was not divested of jurisdiction because Defendant's indictment contained all the essential elements of the lesser-included offense of first-degree sexual offense pursuant to North Carolina General Statute § 14-27.4(a), a statute which was in place on the alleged offense dates. We also hold that the trial court did not violate Rules of Evidence 404(b) and 403 in admitting the challenged testimony.

I. Background

¶ 2 The State's evidence tended to show that Defendant worked as a teacher at the Church of the Today Ministries' daycare. R.G.'s mother testified that beginning in 1993, when R.G. was three and a half years old, until 1995, R.G. attended Church of the Today Ministries' daycare five days a week. R.G. testified every day, the children would sit in a half circle around Defendant as he read them books. During story time, Defendant would tell the other children "to sit still, sit down, be quiet" and would tell R.G. "to get up and go into the bathroom." R.G. testified she thought she was being sent to the restroom for timeout because she "was very talkative"; however, then Defendant "would follow [her] in there." R.G. testified that Defendant

> would close the door behind, and unzip his pants, pull out his penis, and sort of prep me on what was going to happen and tell me not to say anything to anybody or I could get into trouble. And he made me promise I wouldn't tell anybody, and he said he wasn't going to hurt me. Then he

> would make me perform oral sex on him for about five minutes. Then I would return back to the classroom and sit down as normal.

¶ 3 R.G. told her mother about the abuse when she was six years old. R.G.'s mother testified that on that day, an episode of Jerry Springer was on television and the guests on the show "were doing some type of stripper thing on a pole . . . and it looked like the girl was actually going down on the guy." R.G. said to her mother, "Mom, you know Mr. Josh? . . . he has me do that" and explained that "Mr. Josh makes me go in the bathroom, and he puts his dick in my mouth." When R.G.'s mother asked for more details, R.G. told her mother that "she would sit in class and Mr. Josh would come and pick her out of the class and say come in the bathroom." R.G. explained that Defendant would "just tell me to come in the bathroom, and he would sit me on the toilet, and he would tell me to put this in my mouth." R.G. testified, "I wasn't aware that what was happening was wrong, at the time. I just felt as though if I said something that I would get in trouble."

¶ 4 J.G. was born in 1992 and attended the Church of the Today Ministries' daycare from ages three to five. J.G. testified that every day, Defendant would wake her up during naptime, take her into the bathroom, and pull her pants down. According to J.G., Defendant would proceed to "pull his penis out and touch my vaginal area with his and tell me to say, 'stop, Mr. Josh.'" Defendant would also have J.G. rub his penis with her hand. J.G. testified that Defendant never threatened her.

J.G. testified that at the time, they were "all family friends," but explained that "once getting older, I started realizing that it was wrong." In 2014, J.G. went through a period where she was "angry," "lashing out at people," and was drinking heavily. J.G. confided in a friend about the childhood abuse and the friend reached out to J.G.'s mother. On 10 June 2014, J.G. told her mother, father, and brother about the abuse and then reported "directly to the police station." J.G. provided the police with a signed statement.

¶ 5 Outside the presence of the jury, the trial court addressed the State's proffer of potential Rule 404(b) evidence. The State moved to introduce the testimony of S.T., the child of a woman who Defendant had been married to for a period of time. The State clarified that it was "not offering for propensity to commit the crime, which is the improper purpose." After a voir dire examination, the trial court allowed S.T.'s testimony. Over Defendant's objection, S.T. testified that her mom married Defendant in 1997 or 1998. On one occasion when S.T. was eight years old and was visiting Defendant's sister's house, S.T. testified that Defendant "told me to come to the bathroom. He pulled his pants down and made me open my mouth, and he put his penis in my mouth." After removing his pants, Defendant put his penis in S.T.'s mouth and S.T. "kind of like bit down." At that point, Defendant "made [S.T.] get out of the bathroom." At the close of the State's evidence, Defendant moved to dismiss the charges. The trial court denied the motion.

¶ 6 Defendant called Gerri Summers, a former co-worker of Defendant at the Church of the Today Ministries' daycare. Ms. Summers testified that the daycare's policy was that two adults had to be present in the room with the children at all times, and that she did not recall ever seeing Defendant take R.G. or J.G. into the bathroom alone.

¶ 7 Defendant was charged with fifteen counts of sexual offense with a child by an adult pursuant to North Carolina General Statute § 14-27.4A and forty-nine counts of indecent liberties pursuant to North Carolina General Statute § 14-202.1. The case came on for trial on 23 September 2019. The jury returned guilty verdicts on all sixty-four counts. The judgments reflecting the fifteen guilty counts read first-degree sexual offense, not sexual offense of a child. The trial court consolidated six counts of first-degree sexual offense and sentenced Defendant to 240-297 months imprisonment. For each of the other nine counts of first-degree sexual offense, Defendant was sentenced to nine consecutive sentences of 240-297 months of imprisonment. The trial court consolidated thirty counts of indecent liberties and sentenced Defendant to 16-20 months of imprisonment. For the additional nineteen counts of indecent liberties, Defendant was sentenced to nineteen consecutive sentences of 16-20 months of imprisonment. Defendant appeals.

II. Jurisdiction

¶ 8 Defendant contends the trial court lacked jurisdiction to try and convict him of

sexual offense of a child under North Carolina General Statute § 14-27.4A because that statute was not enacted until 2008, thirteen years after the alleged date of the offenses.

¶ 9 Defendant was indicted for sexual offense with a child under North Carolina General Statute § 14-27.4A – Sexual offense with a child; adult offender. N.C. Gen. Stat. § 14-27.4A (2019). The jury instructions and the verdict sheet named and reflected the elements of North Carolina General Statute § 14-27.4A. However, the judgments were entered pursuant to North Carolina General Statute § 14-27.4—First-degree sexual offense.[1] N.C. Gen. Stat. § 14-27.4 (2019). North Carolina General Statute § 14-27.4A was enacted in 2008 and includes the following elements: (1) the defendant is at least 18 years of age and (2) the defendant engaged in a sexual act with a victim who is under the age of 13 years. N.C. Gen. Stat. § 14-27.4A(a) (2009).[2] North Carolina General Statute § 14-27.4(a) was enacted in 1994 and includes the following elements: (1) the defendant is at least 12 years old and is at least four years older than the victim and (2) the defendant engaged in a sexual act

[1] The judgments read first-degree sexual offense; however, the corresponding statute number was North Carolina General Statute § 14-27.4A.

[2] N.C. Gen. Stat. § 14-27.4A has been recodified as § 14-27.28(a). *See* Sess. L. 2015-181, § 10(a), (effective 1 December 2015, and applicable to offenses committed on or after that date).

with a victim who is under the age of 13. N.C. Gen. Stat. § 14-27.4(a)(1) (1995).[3] "The difference between the two statutes concerns the defendant's age: section 14–27.4(a)(1) requires the State to prove that the defendant was at least twelve years old and at least four years older than the victim, whereas section 14–27.4A(a) requires the State to prove that the defendant was at least eighteen years old." *State v. Harris*, 243 N.C. App. 728, 734, 778 S.E.2d 875, 879 (2015) (citation omitted). Notably, North Carolina General Statute § 14-27.4(a)(1) is a lesser included offense of North Carolina General Statute § 14-27A. N.C. Gen. Stat. § 14-27A(d); *see also State v. Hicks*, 239 N.C. App. 396, 398, 768 S.E.2d 373, 374 (2015) (noting that "the indicted charge, N.C. Gen. Stat. § 14–27.4(a)(1), is a lesser included offense of N.C. Gen. Stat. § 14–27.4A").

¶ 10 It is well established that "an indictment must allege every element of an offense in order to confer subject matter jurisdiction on the court." *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007). Moreover, "when a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense [only] when the greater offense which is charged in the bill of indictment contains all of the essential elements of the lesser." *State v. Wilson*, 128 N.C. App. 688, 692, 497 S.E.2d 416, 419–20 (1998) (citations, quotation marks, and brackets

[3] N.C. Gen. Stat. § 14-27.4 has been recodified as § 14-27.26. *See* Sess. L. 2015-181, § 8(a) (effective 1 December 2015, and applicable to offenses committed on or after that date).

omitted). Defendant asserts the trial court did not have jurisdiction because at the time of the offenses, North Carolina General Statute § 14-27.4A had not been enacted. However, at the time Defendant allegedly committed the offenses,[4] North Carolina General Statute § 14-27.4(a)(1)—a lesser included offense of N.C. Gen. Stat. § 14-27.4A—was a statutory crime. *See* N.C. Gen. Stat. § 14-27A(d). Additionally, the indictment charging Defendant with North Carolina General Statute § 14-27.4A contained all the essential elements of North Carolina General Statute 14-27.4(a)(1). *See Wilson,* 128 N.C. App. at 692, 497 S.E.2d at 419–20. Therefore, the indictment in this case conferred subject matter jurisdiction on the trial court. *See Kelso*, 187 N.C. App. at 722, 654 S.E.2d at 31.

III. Prior Bad Act Evidence

¶ 11 Defendant contends the trial court erred in admitting S.T.'s testimony because it was inadmissible under Rules of Evidence 404(b) and 403.

> [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, as it did here, 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.

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[4] The offense date listed on all the judgments for first-degree sexual offense is 29 November 1994.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

¶ 12 At trial, after S.T.'s voir dire testimony, the State moved to introduce the evidence under Rule 404(b). Defendant responded:

> Your, Honor, there are differences. The relationship was different. It's not another daycare case. There are some similarities on what was done, at least superficially it was quite similar. But I would argue to the Court that the admission of this should not be allowed and should be disallowed under Rule 403 due to unfair prejudice to my client. The State has plenty of evidence of intentional conduct, at this point. And I would argue that it's necessary for the State to introduce this evidence.

The trial court stated from the bench:

> In this matter, the Court having heard testimony from [S.T.] by way of voir dire outside the presence of the jury, will find similarities in much of the testimony, specifically the incident that occurred in the bathroom involving oral sex. The Court will specifically find similarities with regard to the timeframe that it occurred in the mid to late 90s. The witnesses -- the victims at the time were of similar age. The facts are similar. Specifically her testimony of how it occurred, how he took her to the bathroom. Therefore, in considering that evidence, the Court will find that the probative value of that limited testimony will outweigh any prejudicial value. The Court's discretion will allow this testimony in its limited purpose, under 404(b) for the purpose of proof of motive, opportunity, intent, plan, knowledge, or absence of mistake.

During S.T.'s testimony, the trial court gave the jury a limiting instruction that "this testimony is being offered for the limited purpose only of establishing proof of motive,

opportunity, intent, plan, knowledge, or absence of mistake. This testimony is not being accepted for any other purpose and should not be considered by you for any other purpose." Then, during the jury charge, the trial court instructed:

> Evidence has been received tending to show that the defendant committed a sexual act with [S.T.]. This evidence was received solely for the purpose of showing that the defendant had the intent, which is a necessary element of a crime charged in this case, the absence of mistake and the absence of accident. If you believe this evidence you may consider it, but only for the limited purpose for which it was received. You may not consider it for any other purpose.

A. Rule 404(b)

¶ 13 Defendant argues that the trial court violated Rule 404(b) "by concluding that the testimony was admissible to prove intent or absence of mistake" and "by finding that the incidents were similar[.]"

¶ 14 Rule 404(b) provides in relevant part that

> [e]vidence 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) (2019). Rule 404(b) is "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). Evidence of another offense "is admissible so long as it is relevant to any fact or issue other than the character of the accused." *Id.* at 278, 389 S.E.2d at 54 (emphasis omitted) (citations and quotation marks omitted). The Supreme Court has explained:

> Though it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity. Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them. We do not require that the similarities rise to the level of the unique and bizarre.

Beckelheimer, 366 N.C. at 131, 726 S.E.2d at 159 (citations and quotation marks omitted).

¶ 15 Defendant first argues that the trial court erred in overruling Defendant's objection on the basis that "[t]he only crime charged that included an intent requirement was taking indecent liberties with J.G." Defendant contends that "the admission of the testimony was based on its alleged similarity to the sexual offense charges, which had no intent requirement and 'absence of mistake' had no bearing on the allegations and charges in this case." However, Defendant did not make this argument before the trial court. The crux of Defendant's objection to the admission of S.T.'s testimony focused on the prejudicial nature of the testimony under Rule 403.

The only 404(b) argument advanced by Defendant was that "there are differences. The relationship was different. The locations were different. It's not another daycare case. There are some similarities on what was done, at least superficially it was quite similar." It is well established that "[a] defendant cannot swap horses between courts in order to get a better mount." *State v. Howard*, 228 N.C. App. 103, 107, 742 S.E.2d 858, 860 (2013) (citation and quotation marks omitted). Consequently, Defendant cannot raise an argument on appeal that he did not make before the trial court. Because Defendant did not properly preserve this argument, we decline to reach the merits. *See State v. Shelly*, 181 N.C. App. 196, 207, 638 S.E.2d 516, 524 ("When a party changes theories between the trial court and an appellate court, the assignment of error is not properly preserved and is considered waived.").

¶ 16 Second, Defendant argues that the trial court's finding that the incidents were similar was made in error because "[t]he only similarities were the age of the alleged victim and the generic nature of the location as a bathroom." However, the similarities in the evidence exceed those noted by Defendant. In all instances, Defendant held a position of authority over the victims, either as a teacher or a stepfather. Defendant's dominant position provided him easy access to his child victims. The chosen location—the bathroom—was more than a generic location, as it provided a closed-door, isolated spot which the children associated with privacy. The alleged assaults were also similar in nature. Defendant removed only the clothes

necessary for him to expose his penis, and he used his penis to perpetrate each alleged assault. Thus, the evidence supports the trial court's finding that "the facts are similar. . . . [s]pecifically her testimony of how it occurred, how he took her to the bathroom." *See Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159.

¶ 17 We agree, after a *de novo* review, with the trial court's conclusion that the evidence is within the coverage of Rule 404(b). *See id.* In addition to finding sufficient similarities, the trial court found that the timeframe of all three incidents—in the mid to late 90s—was similar. Defendant argues that "[i]t is unclear how close in time the two set of allegations [made by S.T. and J.G.] occurred." However, the evidence presented at trial supports the trial court's finding that the incidents involving J.G., R.G., and S.T. all occurred in the mid to late 1990s. As the trial court made findings of fact regarding the similarity and temporal proximity of the incidents, we hold the trial court did not err in admitting S.T.'s testimony pursuant to Rule 404(b). *See id.*

B. Rule 403

¶ 18 Defendant also argues that "[t]he admission of S.T.'s testimony prejudiced [Defendant's] right to a fair trial." Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2019).

¶ 19 Here, the trial court heard the parties' extensive arguments before ruling on the admissibility of S.T.'s testimony. Additionally, the trial court gave a limiting instruction to the jury during S.T.'s testimony and, again, in its final jury charge. Thus, "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to [D]efendant and was careful to give a proper limiting instruction to the jury." *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998). Defendant has not demonstrated that the trial court abused its discretion in concluding that the probative value of S.T.'s testimony outweighed any prejudice under Rule 403.

IV. Conclusion

¶ 20 We hold that the trial court had jurisdiction to charge Defendant with sexual offense with a child under North Carolina General Statute § 14-27.4A because the indictment listed all the essential elements of the lesser included offense of North Carolina General Statute § 14-27.4(a)(1). We also hold the trial court did not violate Rules of Evidence 404(b) and 403 in allowing S.T.'s testimony.

NO ERROR.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).