An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2022-NCCOA-252

No. COA20-824

Filed 5 April 2022

Durham County, No. 17 CRS 59048-49, 3499

STATE OF NORTH CAROLINA

v.

MICHAEL LEON POWELL

Appeal by Defendant from Judgments entered 24 July 2019 by Judge James E. Hardin, Jr. in Durham County Superior Court. Heard in the Court of Appeals 3 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General, Erin E. Gibbs, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Michael Leon Powell (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty on three counts of Rape of a Child by an Adult, two counts of Sex Offense with a Child by an Adult, and three counts of Indecent Liberties with a Child. The Record before us tends to reflect the following:

¶ 2 On 11 December 2014, a Durham County Grand Jury returned Indictments against Defendant on 3 counts of Rape of a Child Under the Age of 13 by an Adult, 3 counts of Sex Offense with a Child under the age of 13 by an Adult, and 3 counts of Indecent Liberties with a Child.[1] Each indictment identified the alleged child victim by the initials L.P.

¶ 3 The case came on for trial in July 2019. L.P. was the State's first witness. L.P. testified she and her mother moved to Durham, North Carolina in 2014 when her mother married Defendant. At first, L.P. had a good relationship with Defendant and viewed him as a father figure, even referring to him as her "dad." However, at some point following the move to Durham, Defendant's attitude towards L.P. began to change. L.P. explained Defendant began to start arguments with L.P. about her attitude and punish her for "talking back." This "pretty often" included a "whipping."

¶ 4 L.P. further testified her relationship with Defendant became uncomfortable after an incident when L.P. and Defendant were "play-fighting" and Defendant touched L.P.'s chest in a way that "felt weird." Although the unwanted touch made L.P. feel uncomfortable, she was too scared to tell her mom about it because "[she] was scared. And [her mom] was really happy, and [she] didn't want to ruin that for her."

---

[1] Subsequently, at trial, the State voluntarily dismissed one count of Sex Offense with a Child.

¶ 5 After this incident, Defendant's behavior escalated. Defendant continued to start arguments with L.P. and she would get in trouble with Defendant. However, Defendant began forcing L.P. to "choose" her punishment—a beating or having sex with him. For the "punishment," Defendant made L.P. take off her clothes and lie on a towel while he raped her. L.P. tried to push Defendant off her, but he jumped up and threatened to beat her with a belt. As time went on, the "punishments" became more frequent, and Defendant forced L.P. to have sexual intercourse with him a couple times each week as "punishment." A few times L.P. tried to "choose" the beating instead of the rape for her "punishment," but even after Defendant hit her with the belt, he would still rape her. Sometimes, as part of the rape, Defendant would use the handle of a lint roller or force L.P. to do so. Eventually, Defendant's rapes of L.P. began to include forced anal intercourse.

¶ 6 The rapes—happening on the order of twice a week—occurred while Defendant and L.P. were home alone when L.P.'s mother was at work. Defendant also attempted to dictate who L.P. could hang out with, what she could wear, and to restrict her access to the outdoors. Eventually, L.P. told her friends about the physical and sexual abuse, and, on 13 June 2017 a Child Protective Services (CPS) worker came to her house. L.P. spoke with the CPS worker privately and explained what had been going on in the home. L.P. also spoke with Investigator Hunt from the Durham Police Department about the abuse.

¶ 7 L.P.'s mother testified she and her children moved to Durham in March 2014 and she married Defendant in May of that year. L.P.'s mother corroborated the deterioration of the relationship between Defendant and her daughter. She described herself as generally being happily married to Defendant but acknowledged the two would argue primarily over Defendant's treatment of L.P. and specifically the fact L.P. was always being put "on punishment." L.P.'s mother asserted she never observed any behavior that warranted punishment of L.P. When she would ask L.P. if she wanted to play outside with her friends, L.P. would respond she could not because she was "on punishment" from Defendant and would become fearful when her mother told her that she was no longer on punishment and could play outside. L.P.'s mother also testified to working long hours during the relevant time during which Defendant would be home alone with L.P. The first time L.P.'s mother learned of the sexual abuse was on 13 June 2017 when the CPS worker came to the home. Additionally, the State called a number of other witnesses to corroborate L.P.'s report of abuse and to discuss the investigation into Defendant.

¶ 8 One of these witnesses was Investigator Winston Hunt of the Durham Police Department. Investigator Hunt testified he was assigned to the case and as part of his investigation interviewed Defendant. During an interview of Defendant, Defendant volunteered he had previously been accused of committing the same type of offenses. This revelation prompted Investigator Hunt to check a database for

Defendant's name. This search revealed a prior police report made in 2011 accusing Defendant of alleged sexual offenses against a then-minor, J.G., in 2011, but that the investigation had been inactivated.

¶ 9 Finally, the State called J.G. to testify, offering her testimony under N.C.R. Evid. 404(b) for the asserted purposes of showing Defendant's motive, intent, plan or scheme, and/or modus operandi. Defendant made an oral motion to exclude the testimony, and the trial court heard J.G.'s testimony on *voir dire*. The forecast of evidence showed that between 2003 and 2005 Defendant sexually abused J.G., while Defendant was in a relationship with her mother and lived in their home. Initially, J.G. and Defendant had a normal relationship, and Defendant acted as a surrogate father to J.G. However, the relationship began to break down a year later when Defendant began to closely monitor J.G.'s interactions and convince her mom to put her on punishment. During this time, Defendant began to "play-wrestle" with J.G. and inappropriately touch her breasts during the "play." Eventually, this inappropriate touching lead to vaginal intercourse, which took place in the home while J.G.'s mother was at work.

¶ 10 Based on the forecast of evidence the trial court found:

> 8. That to establish the defendant's intent to engage in sexual intercourse with the victim, his modus operandi for this activity, his motive for this activity, and his plan and scheme by which the defendant accomplished his desires toward the victim, [L.P.], the State elicited evidence of prior sexual assaults against [J.G.] and

> aspects of her relationship with the defendant that had substantial similarities to the subject matter before the Court.
>
> 9. With respect to this, the State has offered evidence of relationship similarities along with multiple incidents of sexually assaultive behavior committed by the defendant against [J.G.] that were substantially similar to assaultive behavior he committed against [L.P.]. That the most significant of these incidents of sexually assaultive behavior and relationship similarities are as follows: that the defendant was in an emotional, romantic relationship with the mother of each victim; that the defendant acted as a surrogate father figure with each child and developed a position of trust and confidence with each of them prior to and during the inappropriate activity, that each of the victims were in the same age range as the other when the sexually assaultive activity with them began; that each of the mothers of the victims was fully employed, and the defendant was not employed full-time so as to be alone at the residence with the victims (or in the residence when no adult was present but only a small child); that the defendant was in a live-in relationship with or married to each of the victims' mothers; that the defendant directly imposed or caused to be imposed through the victims mothers "punishment" so that he could be alone and isolate the victims; that the defendant used aggression and threats in monitoring them at their shared residences and activities of the victims to impose control over each of them; that this also caused some level of isolation from each of the victims with their family and friends so that each would be alone with the defendant in the shared residence; that the sexual assaults of the victims by the defendant began as "play wrestling" between the defendant and each of them and that this escalated from merely touching their breasts to vaginal intercourse; that each of the victims had, based upon the sexual assaults perpetrated against them by the defendant on various occasions, became scared to tell an adult about what was going on and confided to select peers when the initial disclosure was made.

After making these Findings, the trial court concluded the evidence was admissible

under Rule 404(b) to show Defendant's modus operandi, motive, intent, and plan and scheme. J.G. was then permitted to testify to the jury.

¶ 11 Following the close of the evidence, the jury returned a verdict finding Defendant guilty on three counts of Statutory Rape of a Child by an Adult, two counts of Statutory Sexual Offense of a Child by an Adult, and three counts of Indecent Liberties with a Child. During the sentencing phase, the jury also returned a verdict finding the aggravating circumstance that Defendant took advantage of a position of trust or confidence, which includes a domestic relationship, to commit the offenses.

¶ 12 The convictions were consolidated into two Judgments and Defendant was sentenced to two consecutive sentences of 345 to 474 months each. Defendant gave Notice of Appeal in open court.

Issue

¶ 13 The dispositive issue on appeal is whether the trial court erred by admitting the testimony of J.G. under Rule 404(b) of the North Carolina Rules of Evidence.

Analysis

¶ 14 Defendant contends the trial court erred in admitting evidence of the prior rape of J.G. for the purposes of modus operandi, intent, and common scheme and plan pursuant to N.C. R. Evid. 404(b) arguing: (1) the identity of the perpetrator was not at issue and the element of intent was not relevant to the crimes charged; (2) the prior sexual assault was not sufficiently similar; and (3) the ten-year gap between the two

sexual assaults rendered the former assault too remote to be admissible.[2]

¶ 15 "We review do novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). North Carolina Rule of Evidence 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that [the person] acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). However, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake . . . ." *Id.* Rule 404(b) is a "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). Nevertheless, the evidence of the prior criminal activity must be (1) relevant to the crime charged and

---

[2] Defendant also contends two generalized evidentiary Findings made by the trial court in its written Order are unsupported by the evidence. First, Defendant contends the trial court erred in finding the *voir dire* testimony reflected Defendant sexually assaulted J.G. between 2004 and 2007. Defendant contends the evidence reflected the assaults occurred between 2004 and 2005 only. Second Defendant contends the trial court erred in finding that the two victims of his sexual assaults were in the same age range at the time Defendant sexually assaulted them. We conclude that even if these Findings are unsupported in part or are otherwise inaccurate or imprecise, any error would not be dispositive and not alter the conclusion here. Accordingly, we reach no conclusion on whether or not these Findings are unsupported.

(2) sufficiently similar and temporally proximate to the crime charged. *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007).

A. Relevance

¶ 16 Defendant contends the evidence of the prior crime was not admissible for the purpose of modus operandi because the issue of the identity of the perpetrator was not relevant in this case, nor was the evidence admissible to prove the element of intent for the crimes charged. While Defendant correctly asserts the evidence was not admissible to show identity of the perpetrator, "the fact that evidence cannot be brought within a [listed] category does not necessarily mean that it is not admissible." *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (citation and quotation omitted). "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." *Id.* Furthermore, "North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges." *State v. Frazier*, 121 N.C. App. 1, 9, 464 S.E.2d 490, 494 (1995) (citation and quotation omitted).

¶ 17 Defendant's arguments ignore that, in this case, Defendant was charged with Indecent Liberties with a Child under N.C. Gen. Stat. § 14-202.1. "In order to obtain a conviction under this statute, the State must prove: (1) the defendant was at least 16 years of age; (2) he was five years older than his victim; (3) he willfully took or

attempted to take an indecent liberty with the victim; (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred; and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire." *State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987) (citation omitted). Indeed, for the purposes of this charge, the State had to prove the Defendant took the indecent liberty willfully and for the purpose of arousing or gratifying sexual desire. Thus, even if the evidence might not be relevant to prove the identity of the perpetrator in this case, the evidence showing modus operandi, intent, motive, and common scheme/plan, is admissible to show Defendant acted willfully and purposefully in taking indecent liberties with L.P. *See Bagley*, 321 N.C. at 207-208, 362 S.E.2d at 248 (holding testimony admissible that tended to prove a common modus operandi, motive, intent, preparation, and plan in the context of a sexual assault case, even when the identity of the perpetrator is not at issue). Therefore, the trial court did not err by admitting the testimony of the prior sexual assault under Rule 404(b) because it was—at a minimum—relevant to the intent element for the crime of indecent liberties with a child.

B. Similarity

¶ 18 Defendant also contends the prior sexual assaults of J.G. were not sufficiently similar to the assaults on L.P. to be admissible under Rule 404(b). Under Rule 404(b), "[p]rior acts are sufficiently similar if there are some unusual facts present in both

crimes that would indicate the same person committed them." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159. However, "we do not require that the similarities rise to the level of the unique and bizarre." *Id.* For example, in *State v. Beckelheimer*, the North Carolina Supreme Court held admissible testimony of a prior sexual assault under Rule 404(b) for the purpose of modus operandi. *Id.* at 133, 726 S.E.2d at 160. In that case, the similarities between the two incidents included: both victims were young male cousins of defendant who visited defendant at his mother's house where he lived; that defendant invited both victims into his bedroom to play video games; and both victims described a similar series of escalating incidents which began with defendant touching the victims on the outside of their clothes while pretending to be asleep and culminated with oral sex. *Id.* at 131, 726 S.E.2d at 159.

¶ 19 Here, the trial court made extensive Findings regarding the similarities between the two assaults, including: Defendant was in a close, live-in relationship with the mothers of the two victims; Defendant ensured access to the victims through punishments and restrictions on their time outside or with friends; Defendant had time alone with the victims while other household members were at work; and Defendant initiated contact with the victims through "play-fighting" and touching their breasts which eventually transmuted into forced sexual intercourse. Therefore, while these similarities may not rise to the level of unique or bizarre, the similarities are sufficient to support the State's theory of modus operandi in this case. Thus, the

trial court did not err by admitting the 404(b) evidence because the two sexual assaults were sufficiently similar to allow for admission.

C. Remoteness

¶ 20 Finally, Defendant contends the ten-year gap between the two sexual assaults negates the plausibility of an ongoing and continuous plan. However, if "there is a period of time during which there is no evidence of sexual abuse, the lapse does not require exclusion of the evidence if the defendant did not have access to the victims during the lapse." *Frazier*, 121 N.C. App. at 11, S.E.2d at 495 (citation omitted). Further, when "similar acts have been performed continuously over a period of years, the passage of time serve[s] to prove, rather than disprove, the existence of a plan." *Id.* For example, in *State v. Jacob* this Court held admissible evidence of a prior sexual assault, even though there was a thirteen-year gap between the assaults, because the defendant's common plan or scheme was to sexually molest his young daughters, and during the time frame between the assaults, the defendant did not have access to the victims. 113 N.C. App. 605, 611, 439 S.E.2d 812, 815-16 (1994).

¶ 21 Here, although there was a ten-year gap between the reported sexual assaults, there is no evidence or showing that during that time frame Defendant had a live-in relationship with a woman who had a young daughter in the home. However, when Defendant began a relationship with L.P.'s mother, the evidence reflected he began building the same type of relationship with the woman's daughter. Indeed, in this

case just as in *Jacob*, the similarity of the acts despite the time period works to support the State's theory of a common scheme or plan because as soon as Defendant re-gained access to a victim, he engaged in the same pattern of behavior.

¶ 22 Therefore, the evidence supports the trial court's Findings, which in turn support its Conclusions regarding the admissibility of the prior sexual assault for the purpose of showing a common scheme or plan under Rule 404(b). After completing its analysis regarding admissibility under Rule 404(b) the trial court undertook the balancing test under Rule 403 and found that the probative value of the evidence substantially outweighed the danger of unfair prejudice. Thus, the evidence of the prior sexual assaults against J.G. were properly admitted. Consequently, the trial court did not err in overruling Defendant's objection on this basis.

Conclusion

¶ 23 Accordingly, for the reasons set forth above, we conclude there was no error at the trial and affirm the Judgments.

NO ERROR.

Judges COLLINS and CARPENTER concur.

Report per Rule 30(e).