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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-648

No. COA21-732

Filed 20 September 2022

Surry County, Nos. 19 CRS 51724; 20 CRS 299

STATE OF NORTH CAROLINA

v.

CURTIS LEE WHITAKER

Appeal by Defendant from judgments entered 18 May 2021 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 10 August 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John F. Oats, Jr., for the State.

Mark Montgomery Attorney at Law, by Mark Montgomery, for Defendant-Appellant.

WOOD, Judge.

¶ 1 The sole issue on appeal is whether the indictment for second-degree rape was properly joined with the indictment for assault with a deadly weapon inflicting serious injury. We hold that joinder of the indictments for trial was proper.

I. Facts

¶ 2 Mary[1] was involved in an abusive relationship with Curtis Lee Whitaker ("Defendant"). The two met while working at their local Walmart and bonded over a shared interest in music. Mary was nineteen years old at the time, and Defendant was twenty-one. Before long, they became boyfriend and girlfriend.

¶ 3 Mary alleged that, in April 2017, Defendant raped her. The incident occurred while the two were alone in Defendant's bedroom and watching a movie. Romantic kissing turned aggressive as Defendant forced himself atop Mary. Mary's struggle and pleas were met with a silencing choke. After Defendant had satisfied himself, he released Mary and laughed. Mary ended the relationship after this event but continued to work with Defendant at Walmart.

¶ 4 One week later, Defendant caused a scene at work, demanding that the two reconcile. According to Mary, she was afraid she would lose her job if she did not comply with Defendant's demands to get back together.

¶ 5 Over the next several months, Mary endured more instances of rape. She also alleged she was beaten and emotionally abused. According to Mary, she stayed in the relationship because she was afraid of Defendant, and she was the only one assisting his sick father. Defendant eventually proposed marriage, and Mary reluctantly agreed.

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[1] To protect the victim's identity, we use a pseudonym here.

¶ 6 In February 2018, ten months after the first incident of rape, Mary lost her engagement ring. Enraged, Defendant "was going to make sure that everyone knew that [she] belonged to him." He took a utility knife, commanded Mary to keep quiet, and slowly carved his full name into the flesh of Mary's back. As with the rape, this mutilation took place in Defendant's bedroom. Defendant was distraught after the event and called his mother to come assist Mary while Mary ran to the bathtub to pour hydrogen peroxide over her wound. Soon thereafter, Mary permanently ended the relationship.

¶ 7 Defendant was indicted for second-degree forcible rape on August 26, 2019, and assault with a deadly weapon inflicting serious injury on June 1, 2020. At trial, Defendant testified in his own defense. He denied raping Mary, claiming Mary gave express consent before engaging in intercourse. He further alleged that Mary was obsessed with vampirism and blood and that they would regularly bite each other as a means of foreplay. According to Defendant, this obsession with blood led Mary to request Defendant to carve his name into her back.

¶ 8 Before trial, the State moved to join the two offenses, and Defendant moved to sever them. The trial court granted the State's motion for joinder over Defendant's objection and denied Defendant's motion for severance. The jury found Defendant guilty of both second-degree forcible rape and assault with a deadly weapon inflicting serious injury. For the rape, the court sentenced Defendant to prison for a minimum

of 73 months and a maximum of 148 months. For the assault, the court sentenced Defendant to prison for a minimum of 25 months and a maximum of 42 months. Defendant gave notice of appeal in open court.

II. Standard of Review

¶ 9 We review de novo whether a transactional connection exists sufficient for joinder. *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981). If offenses may be joined, we review a trial court's decision to join for abuse of discretion. *Id.* Our review must look to the pre-trial grant or denial of joinder "as of the time of the trial court's decision and not with the benefit of hindsight." *Id.* at 127, 282 S.E.2d at 453. Thus, on review of an order to join offenses, subsequent factual discovery that would justify or defeat joinder is irrelevant. *State v. McCanless*, 234 N.C. App. 260, 264, 758 S.E.2d 474, 478 (2014).

III. Transactional Connection

¶ 10 Multiple offenses may be joined for trial so long as they "are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2021). This consolidation is appropriate when (1) "the offenses have a transactional connection" and (2) "the accused can receive a fair hearing on more than one charge at the same trial." *State v. Perry*, 142 N.C. App. 177, 180-81, 541 S.E.2d 746, 748 (2001) (quoting *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250

(2000)).

¶ 11 When determining if a transactional connection exists between the alleged offenses, we look to "(1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case." *Montford*, 137 N.C. App. at 498-99, 529 S.E.2d at 250. We may also consider "a common *modus operandi*" between the offenses. *State v. Chapman*, 342 N.C. 330, 343, 464 S.E.2d 661, 668 (1995). Offenses that merely possess "the same or similar character without any transactional connection" may not be joined. *State v. Bracey*, 303 N.C. 112, 117, 394, 277 S.E.2d 390, 394 (1981). A court should consider if "the circumstances of each offense were so distinctively similar that they serve almost as fingerprints." *State v. Williams*, 74 N.C. App. 695, 697, 329 S.E.2d 705, 707 (1985). Following, we consider the competing factors in the present case.

¶ 12 Showing a transactional connection, both the rape and assault occurred at Whitaker's residence. *See State v. Fultz*, 92 N.C. App. 80, 83, 373 S.E.2d 445, 447 (1988) (holding even a similar environment lends support to finding a connection). Both offenses involved the same defendant and victim. *See State v. Hammond*, 112 N.C. App. 454, 459, 435 S.E.2d 798, 801 (1993). Both offenses occurred while Whitaker and Mary were involved in a parasitic relationship where Whitaker was in a position to exercise domineering control. *See State v. Effler*, 309 N.C. 742, 752, 309

S.E.2d 203, 209 (1983) (During each offense, the defendant "was in a position of dominance and used his position to exert his influence.").

¶ 13 By contrast, showing the lack of a transactional connection, the offenses occurred at different times. In fact, the trial court was only given overlapping date ranges for the offenses. The rape was alleged to have taken place at some point between April 1, 2017, and June 18, 2018, while the assault was alleged to have taken place at some point between February 1, 2018, and February 28, 2018. This leaves a potential lapse in time of almost eleven months. *See State v. Wilson*, 57 N.C. App. 444, 449, 291 S.E.2d 830, 833 (1982) (holding a three-week lapse to be substantial). Further, the nature of the offenses was different: while one was a sex crime, the other was an assault.

¶ 14 Turning to previous case law, we look especially to *State v. Street*. In *Street*, this Court found a transactional connection despite a significant lapse in time when the offenses "were nonetheless so similar in circumstance and place." 45 N.C. App. 1, 6, 262 S.E.2d 365, 368 (1980). This Court also considered the similar "nature of the offenses [as] a factor." *Id.* The alleged acts were separated by five months, yet

> each of the offenses for which the defendant was charged allegedly occurred at the same place . . . . All of the victims were members of the same family. The evidence tended to show that these incidents and similar incidents continued for a long period of time, and that the defendant sexually abused his children virtually each time his wife left the defendant home alone with the children. In each instance

> the defendant used his parental control over the children to force them to comply with his sexual desires.

Id. at 5-6, 262 S.E.2d at 368.

¶ 15 Here, as in *Street*, a multitude of factors contributed to finding a transactional connection. Both the rape and assault took place in Defendant's home while he was alone with Mary. Both offenses featured the same assailant and victim. We also take note of the same abusive relationship which continued from the first offense to the next. This abusive relationship evidences a common *modus operandi*. Despite the lapse in time, these offenses were part of a series of acts or transactions connected together through a relationship fraught with abuse and domestic violence such that the trial court properly discovered a transactional connection.

IV. Prejudice

¶ 16 We next consider whether joinder prejudiced Whitaker such that he did not receive a fair trial.

> The test to be applied is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant. In so doing we must look to whether defendant was hindered or deprived of his ability to defend one or more of the charges.

State v. Corbett, 309 N.C. 382, 389, 307 S.E.2d 139, 144 (1983) (citing *State v. Greene*, 294 N.C. 418, 423, 241 S.E.2d 662, 665 (1978)).

¶ 17 Defendant first argues he was prejudiced because, absent the joinder, the jury

would not have heard evidence of either the rape or assault in a separate trial for each indictment. We disagree. Though not dispositive, joinder may be harmless if evidence of the offenses would otherwise be admissible under Rule 404(b). *State v. Owens*, 135 N.C. App. 456, 461, 520 S.E.2d 590, 593 (1999). Additional evidence that may not have originally been admissible may nevertheless be admissible if it is offered for "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) (2021). This Court has previously held that Rule 404(b) exceptions "may be established by a lower threshold of proof than that needed to establish the 'series of acts or transactions connected together or constituting parts of a single scheme or plan,' which must be shown for joinder of offenses." *Owens*, 135 N.C. App. at 460, 520 S.E.2d at 593. Here, Whitaker's cruelty transpired during the course of an abusive relationship. Evidence of the rape and assault would have been admissible in separate trials under several of Rule 404(b)'s allowances. *See State v. Moore*, 275 N.C. 198, 207, 166 S.E.2d 652, 658 (1969) ("In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of his feelings.") (quoting *State v. Rash*, 34 N.C. 382, 384 (1851)).

¶ 18 Defendant next argues he was prejudiced because joinder "opened the door to an avalanche of evidence of other bad acts" that the jury would not have heard

otherwise. These bad acts include witness testimony stating Defendant beat Mary, abused his father, threatened Mary's family, and exhibited multiple personalities. As with the assault and rape offenses, evidence of these acts, too, are admissible under 404(b) and would not have prejudiced Defendant.

V. Conclusion

¶ 19 The trial court properly joined the offenses of rape and assault. A transactional connection existed between the offenses, and Defendant was not prejudiced when evidence of either offense would be admissible in a trial for the other. We therefore affirm the judgment of the trial court.

AFFIRMED.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).