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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-819

No. COA22-278

Filed 6 December 2022

Watauga County, No. 19 CRS 50549

STATE OF NORTH CAROLINA

v.

STEVEN LYNN GREER

Appeal by defendant from judgment entered 28 September 2021 by Judge R. Gregory Horne in Watauga County Superior Court. Heard in the Court of Appeals 20 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Justin Isaac Eason, for the State.

Mark Montgomery for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Steven Lynn Greer appeals from a judgment entered upon a jury's verdict finding him guilty of first-degree sex offense with a child. On appeal, Defendant argues that the trial court improperly admitted evidence of his prior "bad acts" with other children. After careful review, we conclude that Defendant received a fair trial, free from error.

Background

¶ 2 Defendant and "Sally's"[1] father, Jamie Culler, were "best friend[s.]" Indeed, the two "act[ed] like brothers with each other"—so much so that Sally thought of Defendant as family and referred to him as "Uncle Steve." Sometimes when Mr. Culler went to work, Defendant would babysit Sally. On at least one occasion, Defendant and Sally camped out in her yard together; Defendant also taught Sally how to ride a bicycle.

¶ 3 For much of her childhood, Sally and her father lived together in what Sally later described as "a hoarder's mess": "There was trash and dirt everywhere, dirty clothes, clean clothes thrown all together on the floor. Dishes never really got done. Clothes never really got washed." When the toilet in their home did not work, Mr. Culler and Sally "would go in the corner" of their house. On cold nights, Sally and her father would share a bed, with their backs against each other for warmth. Sally feared her father because "[h]e was very aggressive, and he would physically, mentally abuse [her] very often." Consequently, she "didn't really trust him."

¶ 4 When Sally was about 5 years old, she crashed while riding her bicycle and sustained a "gash on the inside of [her] thigh." Defendant offered to help her clean her wound, and the two went into the bathroom to inspect the injury. Sally testified

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[1] For ease of reading and to protect the victim's identity, we adopt the pseudonym used by the parties on appeal.

that while in the bathroom, Defendant "[e]nded up spreading my legs so he could see the cut easier, and what happened then was he ended up pulling my underwear aside and started checking out my vaginal area" with his fingers.

¶ 5 Defendant repeated this behavior "[f]our or five" times while Sally was in kindergarten or first grade. He also initiated "tickle fights" with Sally while holding her tightly in his lap, and made her touch his penis. At some point, Defendant began taking Mr. Culler's place in the bed with Sally while she was sleeping. On at least one occasion, Defendant took off his pants while in bed with Sally; "[h]is chest was touching [her] back, and his private region was touching [her] behind." Defendant then inserted his penis into Sally's anus. Sally was 7 or 8 years old at the time. The abuse continued until Sally and Mr. Culler moved in with Sally's grandmother, when Sally was approximately 9 or 10 years old. A few years later, Sally's first cousins adopted her, and Sally eventually disclosed Defendant's abuse to them.

¶ 6 On 24 June 2019, a Watauga County grand jury indicted Defendant for first-degree sex offense with a child. The indictment alleged that the offense occurred between 1 January 2009 and 20 September 2011.

¶ 7 The matter came on for trial on 21 September 2021 in Watauga County Superior Court. During the State's case-in-chief, Ms. D and Mr. E[2]—ages 38 and 24

[2] We adopt initials for ease of reading and to protect the victims' identities.

at the time—testified for the State. Ms. D and Mr. E testified that when they were children, Defendant sexually abused them. The trial court admitted their testimony pursuant to Rules 403 and 404(b) of the North Carolina Rules of Evidence. However, the trial court gave the jury a limiting instruction before Ms. D testified and again before Mr. E testified. The court directed the jurors to consider the evidence only for the purpose of showing (1) the identity of the offender; (2) Defendant's intent to commit the crime charged; (3) "a plan, scheme, system, or design involving the crime charged in this case"; or (4) "a common modus operandi or method of procedure."

¶ 8 On 28 September 2021, the jury returned its verdict finding Defendant guilty of first-degree sex offense with a child. The trial court entered judgment upon the jury's verdict and sentenced Defendant to a term of 360 to 441 months in the custody of the North Carolina Division of Adult Correction. Defendant gave notice of appeal in open court.

Discussion

¶ 9 On appeal, Defendant argues that "the trial court erred in admitting evidence of prior 'bad acts' for which [he] was not on trial." The admission of such evidence, Defendant argues, "rendered the trial fundamentally unfair," mandating a new trial. We disagree.

I. Standard of Review

¶ 10 The standards of review from a trial court's Rule 404(b) and Rule 403 rulings are distinct from one another. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Appellate courts "review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)" and "then review the trial court's Rule 403 determination for abuse of discretion." *Id.*

II. State's Proffer of Rule 404(b) Testimony

¶ 11 On 13 September 2021, Defendant filed a motion in limine, requesting that the trial court exclude evidence relating to his prior convictions of taking indecent liberties with a child, attempted first-degree sex offense with a child, and sex offense in a parental role. In a pretrial hearing, the trial court decided to "rule on motion objections as they arise and give limiting instructions with regard to that." At trial, the State proffered, pursuant to Rule 404(b), the testimony of Ms. D and Mr. E concerning Defendant's prior criminal behavior.

A. Voir Dire Testimony

¶ 12 During voir dire, Ms. D testified that Defendant sexually abused her when she was a child. She first met Defendant when he started dating her mother. Defendant and Ms. D's mother were in a relationship for "around four or five years"; he moved in with Ms. D's family when she was approximately 4 years old. Ms. D initially thought that Defendant was "okay[,]" and she grew to trust him after he repeatedly drove her to visit her friends in other counties. Regarding the first instance of sexual

abuse that she remembered, Ms. D testified that while the two walked alone together, Defendant sat her down on a large boulder and touched her upper thigh; he then "took [her] hand and put [her] hand on his penis."

¶ 13 When Ms. D was approximately 8 years old, Defendant "made up some reason" for Ms. D to be in her bedroom alone with him. Defendant then placed a lollipop stick inside Ms. D's vagina, threatening to use his fingers instead if she refused the stick. Ms. D explained that Defendant frequently "would find excuses to separate me from my family, like say -- he would say we're going to go see my friends, or he would try to come in my room at night." Once alone with her, Defendant would touch her vagina and make Ms. D touch his penis. Ms. D further testified that Defendant "occasionally would lick my vagina and have me put his penis in my mouth. If I tried to sleep or pretend like I was sleeping through this, he would just ejaculate onto my face." The sexual abuse ended when one of Ms. D's sisters witnessed Defendant's behavior and informed their mother, who reported it to the police. Ms. D explained that she did not tell anyone about the sexual abuse because Defendant threatened to kill her mother and her sisters if she did. Defendant never again abused Ms. D, as he was "taken out of [her] home."

¶ 14 Mr. E also testified during voir dire that Defendant sexually abused him. Defendant was married to Mr. E's stepmother, and for approximately "one or two years" when he was in fifth or sixth grade Mr. E would stay at their house every

Tuesday and Wednesday night. At first, Mr. E "really liked [Defendant] a lot" and "trusted him fully." Eventually, however, Defendant began standing in the doorway of Mr. E's bedroom and watching Mr. E while Defendant thought he was sleeping, which "really scared" Mr. E. Defendant then began touching Mr. E "[n]ear [his] penis or on [his] penis" with his hand "[l]ike every time" Mr. E visited. Mr. E testified regarding the final instance of abuse: "[T]he final time, I woke up because I felt something on my mouth. I squinted my eyes, and his penis was in my mouth. He then ejaculated into my mouth, which hurt my stomach really bad, and I went and sat on the toilet." After that incident, Mr. E stopped visiting his stepmother and Defendant. Although Mr. E was "scared" of Defendant and "didn't want him to get in trouble[,]" he eventually told his school counselor about the abuse.

B. Trial Court's Findings

¶ 15 The trial court "considered the admissibility of this 404(b) evidence for purposes of modus operandi, intent, identity, and common scheme, or plan." After hearing the proffered testimony and arguments of counsel, the trial court permitted Ms. D and Mr. E to testify before the jury, in that there were significant "similarities in the method or procedure between the three alleged incidents." The court first determined that "the present alleged victim and the prior victims were of similar age, all being prepubescent children." The court found that Sally was 6 to 8 years old during the date of the offense alleged in the indictment, that Ms. D was 8 to 10 years

old during the time of her abuse, and that Mr. E was 10 to 11 years old when he was abused.

¶ 16 The court next found that there was "similarity in the location of the occurrences[,]" as the instances of sexual abuse "all occurred in the homes where the children were residing or staying and where . . . Defendant was present and welcome[.]" The trial court determined that "all or at least a substantial part of the acts occurred in and around the homes and the bedrooms and specifically the bedrooms where the children were sleeping[,]" with the acts occurring "at a time and place where no other adults were present with the children."

¶ 17 The trial court also noted that Defendant's relationship with his victims progressed in a similar way each time: "In each case, . . . Defendant's method of procedure was to first work to establish a relationship of fondness and trust with the young children[.]" "With the relationship established in each case," the trial court found, "Defendant then began to engage with each victim by first fond[l]ing their genitals and then escalating the sexual assaults both in frequency and severity as to the acts." The court further noted that in each case, the sexual abuse "only ended when the children were removed from . . . Defendant's presence[.]"

¶ 18 As to the acts themselves, the trial court found that, "although there [we]re differences in the sex acts, . . . there [we]re also similarities":

> With regard to [Sally], . . . Defendant began touching her

> vagina, having [Sally] touch or pet his penis, and it culminated in anal penetration prior to her being removed from the situation moving in with her grandmother.
>
> As to Ms. [D], the acts started by touching and fond[l]ing of her vagina, had her touch his penis, then escalated to vaginal and oral penetration before she was removed from contact with [Defendant] by way of him being arrested for the acts committed against her.
>
> As to Mr. [E], it started by touching and fond[l]ing of the victim's penis and culminated in oral penetration.

The court concluded that the similarities of the acts in each instance "show[ed] a method of operation or procedure by . . . Defendant towards each of the victims."

¶ 19 Concerning the three cases' temporal proximity, the trial court found that Defendant's abuse of Sally and Mr. E occurred around the same time, and thus remoteness in time was not an issue. As to Ms. D, the court first determined that "the incidents occurred in 1991 and continued until approximately July of 1992." The court then found that because Defendant "was convicted of the charges as against Ms. [D] . . . and was, thereafter, in prison from that point until June the 25th of 1999[,]" Defendant's "access to the victims or potential victims was interrupted from July of 1992 until his release . . . on June the 25th of 1999." Accordingly, the court concluded that "the period of time between [Defendant's] release from custody of June the 25th, 1999, and beginning the assaults against [Sally] was approximately 9 1/2 years[,]" and was not too remote.

¶ 20 In light of these findings, the trial court concluded "under 404(b) that there is

sufficient similarity and that the remoteness in time is not too severe."

¶ 21 The trial court then reviewed the evidence pursuant to Rule 403's balancing test. The court first determined that "this evidence is highly probative." Additionally, although it "acknowledge[d] the danger of unfair prejudice, confusion of the issues, or misleading of the jury[,]" the court nevertheless "conclude[d] that the evidence is relevant -- highly relevant, and that its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

¶ 22 Ultimately, the trial court concluded that "the evidence is admissible under [Rule] 404(b) and Rule 403[,]" and allowed Ms. D and Mr. E to testify before the jury regarding their sexual abuse by Defendant. Before the jury heard Ms. D's testimony during trial, the court gave the following limiting instruction:

> [M]embers of the jury, any evidence that you hear from this witness tending to show some prior assault or sexual assault, this evidence is received solely for the purpose of showing the following: The identity of the person who committed the crime charged in the case if it was committed; that . . . [D]efendant had the intent necessary -- had the intent, which is a necessary element of the crime charged in this case; that there existed in the mind of . . . Defendant a plan, scheme, system, or design involving the crime charged in this case, or to show a common modus operandi or method of procedure. If you believe that this -- if you believe this evidence, you may consider it but only for the limited purposes for which it is received as I have just listed. You may not consider it for any other purpose.

The court later repeated this instruction before Mr. E testified to the jury.

III. Analysis

¶ 23 Evidence is admissible so long as it is relevant. N.C. Gen. Stat. § 8C-1, Rule 402 (2021). Evidence is "relevant" if it has "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." *Id.* § 8C-1, Rule 401. "Even where relevant, however, Rule 404 limits the introduction of character evidence, including evidence of a defendant's past crimes, wrongs, or acts." *State v. Godfrey*, 263 N.C. App. 264, 269, 822 S.E.2d 894, 898 (2018); *see* N.C. Gen. Stat. § 8C-1, Rule 404(b) ("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.").

¶ 24 Nonetheless, Rule 404(b) is "a clear general rule of *inclusion*[,]" and the evidence will be admitted unless "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). As such, evidence of other crimes, wrongs, or acts may "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).

¶ 25 As our Supreme Court has explained, "Rule 404(b) has particular salience in trials for sexual offenses[,]" *State v. Pabon*, 380 N.C. 241, 2022-NCSC-16, ¶ 62, and

our appellate courts are "markedly liberal in admitting evidence of similar sex offenses by a defendant[,]" *id.* ¶ 30 (citation omitted).

¶ 26 Although evidence may be relevant for a proper purpose under Rule 404(b), Rule 403 provides that such evidence may nevertheless "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C. Gen. Stat. § 8C-1, Rule 403. Thus, the admissibility of Rule 404(b) evidence is "constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). "When prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991).

¶ 27 "[P]rior acts are considered sufficiently similar under Rule 404(b) if there are some unusual facts present in both crimes that would indicate that the same person committed them." *Pabon*, ¶ 63 (citation and internal quotation marks omitted). But the similarity between the acts need not "rise to the level of the unique and bizarre" to be admissible. *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988).

¶ 28 "[R]emoteness for purposes of 404(b) must be considered in light of the specific facts of each case, and the purpose underlying the evidence also affects the analysis."

Pabon, ¶ 63 (citation and internal quotation marks omitted). "[A] greater lapse in time between the prior and present acts generally indicate[s] a weaker case for admissibility under Rule 404(b) . . . ." *Id.* Yet "[r]emoteness 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." *Beckelheimer*, 366 N.C. at 132–33, 726 S.E.2d at 160 (citation and italics omitted) (concluding that evidence of child sex abuse from 10 to 12 years prior to the abuse for which the defendant was on trial was admissible to demonstrate the defendant's modus operandi). In such instances, "remoteness in time goes to the weight of the evidence rather than its admissibility." *Id.* at 133, 726 S.E.2d at 160.

¶ 29 Here, Defendant argues that the trial court erred in admitting the State's proffered Rule 404(b) testimony. Defendant asserts that the acts described by Ms. D and Mr. E were "too dissimilar to the charged act" to be admissible. He further contends that their testimony was inadmissible because the acts to which they testified were too remote in time, "allegedly occurring at least two years and as much as twenty-three years prior to the alleged act for which [Defendant] was on trial." We disagree.

¶ 30 The trial court appropriately admitted the testimony of Ms. D and Mr. E for the purpose of demonstrating Defendant's "modus operandi, intent, identity, and

common scheme or plan." As the court thoroughly detailed in its oral findings following voir dire, Defendant's sexual abuse of Sally, Ms. D, and Mr. E shared key similarities: Each victim was prepubescent when abused; Defendant met each victim after developing a relationship of trust with the victim's parent or parental figure, and then with the victims; Defendant physically isolated the victims from others before committing his abuse; the acts of abuse progressed in severity and frequency, starting with Defendant touching the victims' genitals and having them touch his penis and culminating with penile penetration of each victim; almost all of the abusive acts occurred in the victims' bedrooms; and the "sexual abuse only ended when the children were removed from . . . Defendant's presence" and he no longer had access to them.

¶ 31 Furthermore, the acts of sexual abuse detailed in the proffered testimony were not so remote in time as to mandate their exclusion. In Sally's case, Defendant was on trial in 2021 for acts that he was alleged to have committed 10 to 12 years earlier, when Sally was approximately 6 to 8 years old; thus, the relevant period of abuse was 2009 to 2011. Although the trial court determined that Ms. D's relevant period of abuse was from 1991 to 1992, the court properly tolled the period of Defendant's incarceration from 1992 to 1999 when calculating the temporal proximity. *See State v. Pierce*, 238 N.C. App. 537, 546–47, 767 S.E.2d 860, 867 (2014) ("[T]emporal proximity is not eroded when the remoteness in time can be reasonably explained . . .

by lack of access to a victim or by the defendant's incarceration." (citation and internal quotation marks omitted)). Therefore, the period of time between Ms. D's abuse and Sally's abuse was approximately 10 to 12 years (from 1999 to 2009 or 2011)—not 23 years, as Defendant contends—and Ms. D's testimony was not too remote to lack relevancy.

¶ 32 Mr. E testified that Defendant sexually abused him when he was around 10 or 11 years old, resulting in a relevant period of abuse of 2007 or 2008. Given that Mr. E's relevant period of abuse differed by only one to two years from the period during which Sally alleged that Defendant abused her, Mr. E's testimony was highly relevant to Sally's case. Moreover, the trial court admitted the proffered testimony of these witnesses to demonstrate, in part, Defendant's modus operandi—a purpose for which "remoteness in time goes to the weight of the evidence rather than its admissibility." *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160. The jury was clearly capable of determining the proper weight to give this evidence.

¶ 33 In sum, given the similarity of the "unusual facts present in [the] crimes" indicating "that the same person committed them[,]" *Pabon*, ¶ 63 (citation omitted), the trial court properly admitted Ms. D's and Mr. E's testimony for the purpose of demonstrating Defendant's modus operandi. Furthermore, these acts were not so remote in time from the period during which the acts of which Defendant was accused occurred as to render them irrelevant, as "[r]emoteness in time is less important"

when the evidence is admitted for the purpose of showing modus operandi. *Beckelheimer*, 366 N.C. at 132–33, 726 S.E.2d at 160 (citation omitted). Accordingly, we conclude that the trial court did not err in admitting the proffered testimony concerning Defendant's sexual abuse of others pursuant to Rule 404(b).

¶ 34 Defendant next argues that "[e]ven if this evidence was relevant under Rule 404, it should nevertheless have been excluded under Rule 403[,]" as it improperly portrayed Defendant "as a sexual predator[.]" This argument is unavailing.

¶ 35 As explained above, the testimony regarding Defendant's sexual abuse of Ms. D, Mr. E, and Sally contained key similarities. "[I]n light of the strong similarities between the alleged acts, the probative value of admitting the evidence far exceeds any unfair prejudice to Defendant." *State v. Curry*, 153 N.C. App. 260, 265, 569 S.E.2d 691, 695 (2002). Moreover, the trial court gave limiting instructions as to the purpose for which the testimony was admitted into evidence. "Given the similarities between the accounts of the victim and the 404(b) witness[es] and the trial judge's careful handling of the process," the trial court did not abuse its discretion in determining that "the danger of unfair prejudice did not substantially outweigh the probative value of the evidence." *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161. The court properly admitted the testimony of Ms. D and Mr. E as to Defendant's prior "bad acts."

Conclusion

¶ 36 For the foregoing reasons, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Chief Judge STROUD and Judge MURPHY concur.

Report per Rule 30(e).