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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-508

Filed 02 May 2023

Davidson County, Nos. 13 CRS 1441-42; 13 CRS 51420; 13 CRS 51772-75

STATE OF NORTH CAROLINA

v.

ANTHONY WAYNE SANDO, Defendant.

Appeal by Defendant from judgments entered 10 December 2021 by Judge Lora C. Cabbage in Davidson County Superior Court. Heard in the Court of Appeals 8 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Julianne L. Bradshaw, for the State.

Mark Montgomery for Defendant.

Griffin, Judge.

Defendant Anthony Wayne Sando appeals from judgments entered upon a jury's verdict finding him guilty of indecent liberties with a minor and multiple counts of statutory sexual offenses. Defendant asserts that the trial court erred by not allowing a defense witness to testify about his lack of improper sexual encounters with Defendant. Defendant also contends that the trial court erred in excluding

evidence that a complainant was sexually abused by another individual. We hold that Defendant received a fair trial, free from error.

I. Factual and Procedural History

Siblings, “Michael” and “Walter”,¹ were elementary students when they became personal friends with Defendant after meeting his foster children at school. Michael and Walter’s mother considered Defendant to be a father figure to the boys. In February 2013, both Michael and Walter told their mother Defendant had sexually abused them for several years.

On 13 May 2013, Defendant was indicted on seven counts of indecent liberties with a minor, three counts of first degree statutory sexual offense, and two counts of first degree statutory sexual offense of a person who is 13, 14, or 15 years old. Multiple indictments alleged that Defendant had taken indecent liberties with Michael from approximately July 2008 to December 2012. Separate indictments allege Defendant committed first-degree statutory sexual offenses against Walter from approximately 2006 to 2008.

On 19 November 2021, Defendant was convicted on all counts. Defendant appealed in open court.

II. Analysis

¹ We use pseudonyms for ease of reading and to protect the identity of the juveniles. *See* N.C. R. App. P. 42(b).

Defendant first argues that the trial court erred by sustaining an objection regarding a defense witness's testimony concerning his relationship with Defendant. Defendant also argues that the court erred in excluding evidence that one of the minors had previously been abused by another individual. We disagree.

A. Relevancy of Testimony

Defendant contends that the trial court erred in “not allowing a defense witness [to] testify that [Defendant] never made ‘improper advances’ to him.” Specifically, Defendant wished to have a witness testify about Defendant's lack of “improper advances” toward the witness. The trial court sustained an objection to this testimony as improper character evidence. Defendant argues, “[a]s a preliminary matter,” the proper characterization of the issue is a question of relevance, rather than character evidence.

Evidentiary Rule 401 provides that “[r]elevant evidence’ means evidence having 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.” N.C. Gen. Stat. § 8C-1, Rule 401 (2021); *State v. Tysinger*, 275 N.C. App. 344, 352, 853 S.E.2d 189, 194 (2020). Regarding character evidence, Rule 404(a) provides that, “[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.” N.C. Gen. Stat. § 8C-1, Rule 404 (2021). However, “[a]n exception exists for ‘[e]vidence of a *pertinent* trait of character offered by an accused,

or by the prosecution to rebut the same.” *State v. Wagoner*, 131 N.C. App. 285, 292, 506 S.E.2d 738, 743 (1998) (emphasis added) (quoting N.C. Gen. Stat. § 8C-1, Rule 404(a)(1)).

In the present case, the trial court sustained an objection to the witness’s experience with a lack of improper advances from Defendant or actions towards the witness that included improper connotations. Defendant seeks to admit this allegedly pertinent testimony to demonstrate his good character and lack of improper sexual advances. This is therefore an issue of character evidence rather than simple relevancy as Defendant contends.

1. Character Evidence

Defendant argues in the alternative that he is entitled to rely on evidence of his good character. “[A]n accused may no longer offer evidence of undifferentiated, overall ‘good character,’ but may now only introduce evidence of ‘pertinent’ traits of his character.” *State v. Bogle*, 324 N.C. 190, 198, 376 S.E.2d 745, 749 (1989) (citation omitted). The Supreme Court in *Bogle* added that, “[i]n determining whether a more general trait of character such as law-abidingness is admissible in a criminal case, we have concluded that the term ‘pertinent’ is generally synonymous with ‘relevant in the context of the crime charged.’” *Id.*

However, “[f]or character evidence to be admissible at trial under Rule 404(a)(1), an accused must ‘tailor the evidence to a particular trait that is relevant to

an issue in the case.” *State v. Walston*, 367 N.C. 721, 722, 766 S.E.2d 312, 313–14 (2014) (quoting *State v. Squire*, 321 N.C. 541, 546, 364 S.E.2d 354, 357 (1988)).

In *State v. Walston*, the North Carolina Supreme Court considered whether the trial court properly prohibited testimony concerning the defendant’s respect towards children. *Id.* at 727, 766 S.E.2d at 317. The Court reasoned that “[b]eing respectful towards children does not bear a special relationship to the charges of child sexual abuse, nor is the proposed trait sufficiently tailored to those charges.” *Id.* (citations omitted).

This Court addressed a similar issue in *State v. Clapp*. In *Clapp*, the defendant contended that the trial court erred by refusing testimony from a member of the coaching staff to testify about the defendant’s character of working well with children and appearing to not have “an unnatural lust or desire to have sexual relations with children.” *State v. Clapp*, 235 N.C. App. 351, 362, 761 S.E.2d 710, 718 (2014). The Court held the proposed testimony “constituted nothing more than an attestation to [the] [d]efendant’s normalcy.” *Id.* at 363, 761 S.E.2d at 719. Further, the Court stated the testimony did not “tend to show the existence or non-existence of a pertinent trait of character” and the trial court did not err in excluding this testimony. *Id.*

Similarly, here, the witness’s relationship with Defendant had no bearing on Defendant’s alleged misconduct with Michael and Walter. Furthermore, the witness’s lack of sexual abuse at the hands of Defendant did not preclude Defendant

from sexually abusing Michael and Walter. As in *Clapp*, the witness's opinion of Defendant's normalcy and lack of improper sexual advances were not pertinent to the issues at trial. Accordingly, the trial court properly excluded the witness's testimony as to improper character evidence.

Even if the testimony was improperly excluded, the error would not have been prejudicial. “The test for prejudicial error is whether there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial.” *State v. Barnett*, 223 N.C. App. 450, 457, 734 S.E.2d 130, 135 (2012) (quoting *State v. Goodwin*, 186 N.C. App. 638, 644, 652 S.E.2d 36, 40 (2007) (internal quotation marks and citations omitted)).

The defense witness was given ample opportunity to testify to his relationship with Defendant apart from the lack of “improper advances.” The witness testified that Defendant, who was his godfather, always treated him with respect, and that he never heard Michael or Walter “say or make any indication of improper conduct” between them and Defendant. Defendant also utilized other witnesses and experts throughout the trial to testify about Defendant's alleged abuse of Michael and Walter. We find no evidence that the jury would have reached a different verdict if the defense witness's testimony concerning a lack of “improper advances” was not excluded.

B. Prior Sexual Abuse by Another

Defendant also argues that the “trial court erred in excluding evidence that a complainant was sexually abused by another.”

The trial court held that Defendant could not present evidence that a family member previously sexually abused Walter. In his argument, Defendant relies on Rule 412 under the North Carolina Rules of Evidence, commonly known as the Rape Shield Statute, and cites Rule 412(b)(2):

Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

...

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant[.]

N.C. Gen. Stat. § 8C-1, Rule 412(b)(2) (2021). However, Defendant fails to consider the definition of “sexual activity” under Rule 412(a):

(a) As used in this rule, the term “sexual behavior” means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

N.C. Gen. Stat. § 8C-1, Rule 412(a).

Our Supreme Court has previously stated that “this statute stands for the realization that prior sexual conduct by a witness, absent some factor which ties it to the specific act which is the subject of the trial, is irrelevant due to its low probative value and high prejudicial effect.” *State v. Younger*, 306 N.C. 692, 698, 295 S.E.2d 453, 456 (1982). Furthermore, the Court in *State v. West* stated that, “[o]ur Supreme Court has held that North Carolina’s Rape Shield law is ‘nothing more then [sic] a codification of this jurisdiction’s rule of relevance as that rule specifically applies to

the past sexual behavior of rape victims.” *State v. West*, 255 N.C. App. 162, 166, 804 S.E.2d 225, 227 (2017) (quoting *State v. Fortney*, 301 N.C. 31, 37, 269 S.E.2d 110, 113 (1980)).

This Court has held that prior sexual abuse by a family member is not relevant evidence and falls within the purview of Rule 412. *State v. Bass*, 121 N.C. App. 306, 309, 465 S.E.2d 334, 336 (1996). Here, like in *Bass*, we hold Defendant’s proposed evidence is irrelevant and barred under Rule 412.

Additionally, the North Carolina Supreme Court has held that Rule 412 is not the “sole gauge for determining whether evidence is admissible in rape cases.” *State v. Younger*, 306 N.C. 692, 698, 295 S.E.2d 453, 456 (1982). A victim’s statements about prior sexual activity are sometimes admissible even if they do not meet an exception under Rule 412(b). *Bass*, 121 N.C. App. 306, 310, 465 S.E.2d 334, 336 (1996) (citing *State v. Guthrie*, 110 N.C. App. 91, 93, 428 S.E.2d 853, 854 (1993))). However, this exception is applicable when false statements are at issue and the evidence is presented for impeachment purposes. *Id.* In the present case, there is no evidence in the record that Walter’s testimony was false or that his credibility was being questioned.

Defendant also relies on this Court’s opinion in *State v. Rorie* to support his argument that “prior allegations of abuse by someone other than [] [Defendant are] admissible.” The present case is distinguishable from *Rorie*. In *Rorie*, the evidence was not about prior sexual abuse, but rather that the minor claimant had previously

viewed pornographic material. *State v. Rorie*, 242 N.C. App. 655, 662, 776 S.E.2d 338, 343 (2015). This Court held that this testimony was not evidence of prior sexual conduct and was therefore admissible. *Id.* at 663, 776 S.E.2d at 344. However, in the present case, Defendant wishes to admit evidence of prior abuse by a family member that occurred at least two years before Defendant's alleged abuse. The Court in *Rorie* acknowledged this distinction and stated that the viewing of pornographic material is not within the ambit of Rule 412. *Id.* This exception is not applicable in the present case, where prior sexual abuse falls within the purview of "sexual activity" and is accordingly barred under Rule 412.

Assuming *arguendo* that the testimony was incorrectly excluded, Defendant has failed to show that he was prejudiced by the exclusion of evidence. "It has long been the rule in this jurisdiction that not every erroneous ruling on the admissibility of evidence will result in a new trial being ordered. Where evidence has been improperly admitted would not, if excluded, have changed the result of the trial, a new trial will not be granted." *State v. Galloway*, 304 N.C. 485, 496, 284 S.E.2d 509, 516 (1981) (citation omitted). Here, significant testimony from Michael, Walter, their mother, therapists, and physicians implicated Defendant for the alleged acts. Defendant has failed to show that an alternative verdict would have been reached with the inclusion of the evidence in question.

III. CONCLUSION

STATE V. SANDO

Opinion of the Court

We conclude that the trial court properly excluded defense witness testimony as improper character evidence and did not err in excluding evidence of prior sexual abuse by another person.

NO ERROR.

Judges COLLINS and STADING concur.

Report per Rule 30(e).