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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-604

Filed 06 June 2023

Wake County, No. 19 CRS 222967

STATE OF NORTH CAROLINA

v.

ADAM J. SIPES, Defendant.

Appeal by defendant from judgment entered 18 November 2021 by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 26 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Chris D. Agosto Carreiro, for the State.

Caryn Devins Strickland, for the Defendant.

DILLON, Judge.

Defendant Adam J. Sipes was found guilty of sexual battery and second-degree kidnapping in connection with his unlawful touching of a female jogger in a park.

I. Background

The State's evidence at trial tended to show:

In the late afternoon on New Year's Day, 2019, A.S.¹ went for a run along a bike path in a public park. After she finished her run and was walking to cool down, she noticed Defendant following her. She stepped off a sidewalk and began texting in hopes that Defendant would walk by her.

Defendant came up behind her. When she turned, Defendant was staring at her from about a foot away. A.S. testified about the encounter: "He was looking at me, but it felt like he did not see me or register me as a human person." Using both of his hands, Defendant "came at [her]" very quickly and pushed her to the ground. He got on top of her and covered her mouth with his hands. A.S. froze out of shock because she did not know what Defendant was going to do next and testified "my body and brain fully felt like I was going to die." She also stated that "this was the most terrified [she had] ever been in [her] whole life."

After staring at her, Defendant rubbed her body and chest, groped her, and began sticking his fingers into her vagina over her clothing. A.S. tried to break free of Defendant's grasp but could not escape. Defendant eventually stopped the assault and walked away.

During a police investigation, A.S. identified Defendant from photographs, and Defendant was arrested. At trial, Defendant was charged with and found guilty of sexual battery and second-degree kidnapping. Defendant appeals.

¹ In accordance with Indigent Defense Services, the victim is referred to as A.S.

II. Analysis

Defendant makes three arguments on appeal, which we address in turn.

A. Motion to Dismiss Kidnapping Charge

Defendant first argues the trial court erred by denying his motion to dismiss the kidnapping charge. We disagree for the reasoning below.

In evaluating the correctness of a motion to dismiss for insufficiency of the evidence, a reviewing court “need only determine whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator,” with “substantial evidence” consisting of “that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.” *State v. Elder*, 383 N.C. 578, 586, 881 S.E.2d 227, 234 (2022) (internal citations omitted). “Whether the State presented substantial evidence of each element of the offense is a question of law,” so, accordingly, “we review the denial of a motion to dismiss de novo.” *Id.*

A person guilty of kidnapping unlawfully confines, restrains, or removes another from one place to another without their consent “if such confinement, restraint or removal is *for the purpose of*: . . . [d]oing *serious bodily harm to or terrorizing the person so confined, restrained or removed*.” N.C. Gen. Stat § 14-39(a)(3) (2019) (emphasis added).

In this case, the only element Defendant disputes is whether there was sufficient evidence that Defendant had the specific intent to terrorize A.S.

Terrorizing is “more than just putting another in fear. It means *putting that person in some high degree of fear, a state of intense fright or apprehension.*” *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986) (emphasis added). “[T]he test is not whether the victim was in fact terrorized, but whether the evidence supports a finding that the *defendant’s purpose was to terrorize her.*” *Id.* “Nonetheless, the victim’s subjective feelings of fear, while not determinative of the defendant’s intent to terrorize, are relevant.” *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000). Additionally, “the defendant’s intent or purpose to terrorize [the victim] may be inferred by the fact-finder from the circumstances surrounding the events constituting the alleged crime.” *Id.* at 605, 540 S.E.2d at 821. Here, based on the evidence as described above, we conclude the trial court did not err by denying Defendant’s motion to dismiss.

B. Prior Sexual Battery Conviction

Defendant next argues the trial court erred by denying Defendant’s motion to exclude prior bad acts under Rule 404(b), because the State failed to demonstrate similarity between those acts and the charged offense. Defendant also argues that under Rule 403, any probative value of the evidence was far outweighed by its prejudicial effect. We disagree.

We review this admission of evidence in two distinct phases. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). First, we review “whether the evidence supports the findings [of fact] and whether the findings

support the conclusions [of law]. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).” *Id.* Second, we “review the trial court’s Rule 403 determination [concerning the evidence’s prejudicial nature] for abuse of discretion.” *Id.*

1. Rule 404(b)

Rule 404(b) of our Rules of Evidence provides:

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. 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) (2021). Historically, our Supreme Court has been “markedly liberal in admitting evidence of similar sex offenses by a defendant.” *State v. Pabon*, 380 N.C. 241, 259, 867 S.E.2d 632, 644 (2022). The Supreme Court has treated Rule 404(b) as “a clear general rule of *inclusion*.” *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) (emphasis in original). Indeed, it recently spoke of the “useful guidance of the twin north stars: similarity and temporal proximity” in determining whether evidence of a defendant’s prior bad acts should be admitted under Rule 404(b). *Pabon*, 380 N.C. at 259, 867 S.E.2d at 644.

a. Similarity

To determine whether evidence of Defendant’s prior sexual battery conviction was appropriate, we first evaluate the similarities between his previous conviction

and the current case. “Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them.” *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012) (internal quotations omitted) (emphasis added). However, “[w]e do not require that the similarities rise to the level of the unique and bizarre.” *Id.* (internal quotations omitted). Further, “near identical circumstances are not required.” *Id.* at 132, 726 S.E.2d at 160.

In the case at bar, evidence of Defendant’s prior sexual battery conviction was similar to his assault of A.S. in multiple ways, including: (1) Defendant saw both victims in a public setting and attacked them once in isolation, (2) he attacked both victims during daylight hours, (3) each victim was practically a stranger to Defendant, (4) both were females of the same race and similar ages, (5) Defendant covered the victims’ mouths in both attacks, and (6) Defendant fled the scene when both victims resisted him.

b. Temporal Proximity

Next, we look to temporal proximity, where we consider whether the time lapse between the current case and the previous conviction for a 2009 assault renders the crimes too remote in time for the prior conviction to be admissible. “Remoteness for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered.” *State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998).

Remoteness in time is less important when the [prior] 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. It is reasonable to think that a criminal who has adopted a particular *modus operandi* will continue to use it notwithstanding a long lapse of time between crimes.

State v. Riddick, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986).

Our courts have previously upheld the admission of prior sex crime evidence despite lengthy gaps between the two crimes when the purpose for admitting the previous crime was to show a defendant's *modus operandi*. For example, this Court previously upheld the admission of evidence of a defendant's rape conviction despite a 23-year time lapse between the crimes. *State v. Sneed*, 108 N.C. App. 506, 510, 424 S.E.2d 449, 452 (1993). Our Supreme Court has also upheld the admission of evidence from a previous crime despite an eight-year time lapse. *State v. Carter*, 338 N.C. 569, 588-89, 451 S.E.2d 157, 167-68 (1994).

In the instant case, Defendant's prior sexual battery conviction demonstrates his *modus operandi*, or his method of conducting a certain crime. Because evidence of Defendant's prior sex crime is being used for this purpose, remoteness is more permissible than it would be if used for other purposes, such as for demonstrating a common plan. There was a 10-year time lapse between these assaults. However, Defendant was imprisoned for four of those ten years. Thus, at the time Defendant attacked A.S., he had been released from prison for six years. A six-year time lapse

is two years shorter than the time lapse upheld in *Carter*. Even if the years when Defendant was incarcerated are not subtracted from the total 10-year time lapse, the 10-year time lapse is less than half the length of the 23-year time lapse upheld in *Sneeden*.

Accordingly, there is not a significant time lapse between these instances. Although Defendant committed the prior act ten years before, he was imprisoned for four of the ten years.

2. Rule 403

The final step of our analysis is to determine whether the trial court committed a Rule 403 error. Rule 403 requires relevant evidence to 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 (2021).

Here, Defendant argues that evidence of his prior sexual battery conviction was unfairly prejudicial. The record shows that the trial court initially heard evidence about the prior conviction outside of the jury’s presence, conducted a careful consideration of the possibility of prejudice, and provided the jury with a limiting instruction. Thus, we conclude that the trial court did not abuse its discretion when it determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

C. Extension of Probation

Lastly, Defendant argues the trial court erred by imposing 60 months of

supervised probation without making specific factual findings to explain why a probationary period longer than 6-18 months was necessary. We disagree.

Under § 15A-1343.2(d) of our General Statutes, the trial court may sentence a defendant to longer probationary periods only if the trial court makes “specific findings that longer or shorter periods of probation are necessary.” N.C. Gen. Stat. § 15A-1343.2(d) (2021). When the trial court fails to make those specific findings, we must “remand for the reduction of Defendant’s probation to a length of time authorized by [the applicable sentencing statute] or entry of specific findings as to why a longer period of probation was necessary.” *State v. Porter*, 282 N.C. App. 351, 353, 870 S.E.2d 148, 150 (2022).

Unlike the trial court in *Porter*, the trial court here made a finding that a longer period of supervised probation for 60 months was necessary. Accordingly, the trial court did not err by imposing a longer probationary period.

NO ERROR.

Judges WOOD and FLOOD concur.

Report per Rule 30(e).