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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-511

Filed 19 February 2025

Gaston County, Nos. 20CRS054904, 20CRS054905, 20CRS055980, 20CRS055981

STATE OF NORTH CAROLINA

v.

KENNETH ROGER BELL, Defendant.

Appeal by defendant from judgments entered 17 November 2023 by Judge W. Todd Pomeroy in Gaston County Superior Court. Heard in the Court of Appeals 16 January 2025.

*Attorney General Jeff Jackson, by Assistant Attorney General Sarah Nicole Tackett, for the State-appellee.*

*Phoebe W. Dee, for defendant-appellant.*

GORE, Judge.

Defendant Kenneth Roger Bell appeals the judgments entered against him. Specifically, defendant argues the trial court erred by allowing certain testimony pursuant to Rule 404(b) of the North Carolina Rules of Evidence. Upon review, we discern no plain error.

Defendant became the adoptive father of C.D. after marrying C.D.'s mother and adopting her at the age of four or five years old. Defendant is the step-grandfather of B.H. and A.H. Defendant was charged and indicted for indecent liberties with a child, statutory sex offense with a child 15 years or younger, first-degree statutory rape of a child under 13 years of age, and a second count of first-degree statutory rape of a child under 13 years of age.

A.H. disclosed to her mother that defendant touched her sexually multiple times starting when she was in elementary school, around seven or eight years of age, at her home and when he was alone with her at his house. A.H. disclosed he ultimately had sexual intercourse with her when she was staying with him while the rest of her family was on a cruise. This continued until she was approximately twelve years old when she started telling her mother she did not want to visit defendant. A.H. recorded a written statement to the police and was interviewed by a child advocacy center through a video recording. The written statement, video recorded interview, and some of her journal entries regarding the sexual abuse were introduced into evidence.

B.H. disclosed defendant sexually abused her after receiving a call the day A.H. disclosed the sexual abuse. B.H. disclosed that she was seven or eight years old when defendant began touching her sexually. Defendant would sexually abuse her after school and on the way to church. Defendant's sexual contact with B.H. progressed to

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sexual intercourse. Defendant continued to sexually abuse B.H. until she was around twelve years old when her parents divorced.

Upon disclosure from A.H. and B.H. of the sexual abuse by defendant, C.D. was contacted and also confessed to sexual abuse by defendant from the age of four or five years old until C.D. was around twelve years old (when her mother divorced defendant). No charges were brought for the sexual abuse against C.D., however, the State sought C.D.'s testimony pursuant to Rule 404(b) to show intent, knowledge, a common plan or scheme, opportunity, the absence of mistake or accident, and/or defendant's identity. Additionally, C.D.'s written statement to the police and her recorded interview regarding similar testimony were admitted into evidence without defendant's objection.

After defendant's arrest, defendant made multiple jail calls to Cindy Bell, his ex-wife, and admitted to some of the sexual abuse of A.H. and B.H. These calls were admitted into evidence without objection by defendant. Additionally, the State had defendant's custodial interview with law enforcement admitted into evidence. Defendant testified at trial and denied all the evidence brought against him. Defendant denied the incriminating statements he made during his custodial interview and stated instead that A.H. "put his hand on her belly and it may have touched her vagina."

The jury deliberated approximately three hours prior to returning a guilty verdict for each indictment. Defendant was sentenced to 240 to 348 months'

imprisonment for the offense of first-degree statutory rape of a child under 13 years of age and consecutively sentenced to 240 to 348 months' imprisonment for the consolidated remaining offenses. Defendant timely appealed the judgments.

Defendant appeals of right pursuant to N.C.G.S. §§ 7A-27(b) and 15A-1444(a). Defendant argues the trial court erred, or alternatively plainly erred, by allowing C.D. to testify under the Rule 404(b) exception because the testimony was too remote in time and lacked "substantial similarity" to the other acts of sexual abuse. The State argues defendant waived review of his objection to C.D.'s testimony by failing to object to the similar evidence admitted subsequently through C.D.'s written statement and recorded interview with police. We agree.

Defendant objected to the testimony of C.D. during voir dire and at the beginning of her testimony before the jury. The trial court overruled the objection and admitted it under Rule 404(b) analysis. The State also introduced into evidence C.D.'s written statement to the police and her recorded interview with the police. Defendant did not object to the admission of this additional evidence. "Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Anthony*, 354 N.C. 372, 409 (2001); *State v. Ramey*, 318 N.C. 457, 461–62 (1986) (determining defendant waived his objection about testimony of defendant's prior bad acts when defendant failed to lodge an objection to similar evidence that

was later admitted through other testimony and the victim's written statement). Accordingly, we consider defendant's sole issue under plain error review.

Under plain error review, "a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518 (2012) (internal quotation marks and citations omitted). Courts are to apply plain error "cautiously and only in the exceptional case"; thus plain error only exists when it is an error that "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (cleaned up).

Rule 404(b) is an exception to the general rule that excludes evidence admitted for the sole purpose of proving the character of a person and that they acted in conformity with that certain character. N.C. R. Evid. 404(b). Under Rule 404(b) analysis, evidence is "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, . . . or accident." *Id.* Because 404(b) evidence has the potential to "predispose the mind of the juror to believe the prisoner is guilty, and thus effectually strip him of the presumption of innocence," trial courts must consider whether the evidence is "sufficiently similar and not so remote in time" prior to allowing its admission. *State v. Jones*, 322 N.C. 585, 589 (1988) (citations omitted). Additionally, the trial court must weigh the evidence under Rule 403 to determine whether the probative value

of the evidence is “substantially outweighed by the danger of unfair prejudice” prior to its admission. *State v. Mangum*, 242 N.C. App. 202, 207 (2015). Because of the waiver in this case, we limit our review to consider whether the admission of C.D.’s 404(b) evidence was plain error.

Defendant argues the admission of C.D.’s testimony was fundamental error. He argues the “bulk of the evidence at trial [was] 404(b) evidence,” that the jury considered the evidence for “approximately three hours over two days,” and that C.D.’s evidence “was likely a key component in the jury’s analysis of the credibility of the various witnesses and, therefore, the difference between guilty and not-guilty verdicts.” Yet on review, defendant only challenges the 404(b) evidence admitted through C.D.’s testimony. Therefore, we only consider that 404(b) testimony for plain error.

Defendant has not met his burden of demonstrating plain error because there is overwhelming evidence in the record to overcome any concern of fundamental error through admission of C.D.’s 404(b) testimony. B.H. and A.H. gave significant testimonies on the witness stand and through their recorded interviews detailing multiple instances of sexual abuse by defendant during their prepubescent years. Defendant’s ex-wife testified to defendant keeping A.H. and B.H. when she was working; this directly contradicted defendant’s testimony in which he denied being alone with A.H., other than when the rest of the family was on a cruise, and denied that he ever kept B.H. alone after school. As previously stated, C.D.’s testimony was

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also admitted through her written statement to the police and her recorded interview. There were jail calls by defendant in which he admitted to taking some indecent liberties with A.H. The jury also heard defendant's recorded interview with police in which he admitted to rubbing A.H.'s vagina. Defendant testified at trial. He denied his recorded statements to police during the custodial interview and provided implausible justifications to refute the incriminating statements.

The overwhelming evidence along with defendant's lack of credibility at trial, support our determination that the trial court did not commit fundamental error by allowing C.D.'s 404(b) testimony into evidence. For the foregoing reasons, we hold the trial court did not plainly err by allowing C.D.'s testimony.

NO PLAIN ERROR.

Judges HAMPSON and FREEMAN concur.

Report per Rule 30(e).