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NO. COA01-1324

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 98 CRS 41806; 01 CRS 4223

GREG DEWAN SMITH

Appeal by defendant from judgments entered 22 February 2001 and 27 February 2001 by Judge Howard R. Greeson, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 15 August 2002.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Alexander McC. Peters, for the State.

J. Clark Fischer for defendant-appellant.

MARTIN, Judge.

Greg Dewan Smith ("defendant") appeals from judgments entered upon his conviction by a jury of first-degree murder, attempted armed robbery with a dangerous weapon, and discharging a firearm into occupied property. We find no error.

The State's evidence tended to show that around midnight on 17 September 1998, William and Betty Leann Burnette, along with four friends, were driving around Winston-Salem in search of some marijuana to purchase. After several unsuccessful attempts to find marijuana, the Burnettes drove their car to the intersection of 21st Street and Cleveland Avenue. Timothy Aaron, who was riding in the

Burnette car, testified that he yelled out of the car window to some people standing outside, asking if anyone had marijuana to sell. Upon receiving an affirmative response, Aaron got out of the car and approached the group. Meanwhile, William Burnette turned the car around and parked it on 20th Street. Aaron was told that he would be able to locate marijuana up the street. Aaron testified that as he was walking back towards the car, defendant approached him and stated he had some marijuana to sell.

Defendant then approached the Burnettes' car and leaned into the driver's side window where William Burnette was seated. Betty Leann Burnette testified that William and defendant had a brief exchange about the marijuana, and that William removed some money from his pocket and began counting it to look for change. Defendant attempted to grab Burnette's money and the two briefly "wrestl[ed]" for the money. Defendant pulled a handgun from his pocket and fired at least two shots, hitting William Burnette. Burnette later died as a result of the gunshot wounds.

Defendant offered evidence tending to show that Theon Joe, who was present with defendant on the night in question and who testified for the State, was the person who shot William Burnette.

In his brief, defendant brings forward only one assignment of error, thereby abandoning the remaining seven assignments of error of record. See N.C. R. App. P. 28(b)(6). His sole argument is that the trial court erred in allowing the State to offer evidence, pursuant to G.S. § 8C-1, Rule 404(b), that defendant committed a

previous armed robbery in 1997.

Wendell Floyd was permitted to testify that on the evening of 29 January 1997 he was waiting at a bus stop at the Great American Food Store. Floyd stated that defendant and another man approached him and asked if he "want[ed] to buy any weed." Floyd responded that he did not need any drugs because he was "already high." Floyd testified defendant then pulled out a gun and forced him behind a dumpster at gunpoint. Once behind the dumpster, defendant's accomplice removed money from Floyd's pocket.

In addition, Sergeant C.A. Duryea of the Winston-Salem Police Department testified that on the evening Floyd was robbed, he was in the area of the Great American Food Store, located about one-half mile from the intersection where Burnette was shot, in his capacity as a member of the drug enforcement unit. Sergeant Duryea testified that Floyd flagged him down and told him that he had just been robbed by two men. Floyd relayed to Sergeant Duryea that the two men approached him offering to sell him drugs, pulled a gun on him, and then directed him at gunpoint behind a dumpster where they robbed him of his money. Floyd then pointed to the two men, who were walking down the street approximately one block away. Sergeant Duryea and two other officers approached the suspects, one of whom was defendant. Floyd identified the two men as the robbers and defendant as the one who had used the gun. Sergeant Duryea testified that he frisked defendant and found a revolver and some cash in his front pants pocket. He further testified that defendant was arrested and pled guilty to common law robbery and

carrying a concealed weapon as a result of the incident.

Prior to the admission of the evidence, the trial court heard arguments on its admissibility outside the presence of the jury. The trial court determined the evidence was sufficiently similar to the crimes at issue to be admissible for the purpose of establishing motive, intent, and *modus operandi*. The trial court further found the probative value of the evidence outweighed its potential prejudice. The trial court gave a limiting instruction that the evidence of the 29 January 1997 robbery of Floyd was admissible only insofar as it might establish defendant's motive, intent, or similar *modus operandi* with respect to the crimes at issue. The trial court repeated this limiting instruction in its final charge to the jury. Defendant argues the testimony regarding the prior robbery of Floyd was not sufficiently similar to the crimes at issue to be admissible under Rule 404(b), and even if it were, the trial court should have excluded the testimony under G.S. § 8C-1, Rule 403 (2001) as irrelevant. We disagree.

Rule 404(b) 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). Our Supreme Court has observed that Rule 404(b) is a rule of "*inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if 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). Thus, though the evidence may establish other crimes, wrongs, or acts by defendant and his propensity to commit them, the evidence is admissible under Rule 404(b) so long as it is also relevant for some purpose other than showing defendant's propensity to the commit the crime for which he is being tried. *Id.* at 279, 389 S.E.2d at 54.

"When prior incidents are offered for a permissible 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' of Rule 403." *State v. Ferguson*, 145 N.C. App. 302, 305-06, 549 S.E.2d 889, 892 (citation omitted), *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001) . A prior act is sufficiently similar to warrant admissibility under Rule 404(b) if there exist similar facts which would indicate the same person committed both crimes. *State v. Sokolowski*, 351 N.C. 137, 522 S.E.2d 65 (1999). It is not necessary that the similarities between the two situations "'rise to the level of the unique and bizarre' in order for the evidence to be admitted under Rule 404(b)." *State v. Thomas*, 350 N.C. 315, 356, 514 S.E.2d 486, 511 (citation omitted), *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999).

In the present case, the evidence reveals sufficient similarities between the 29 January 1997 robbery of Floyd and the

robbery of Burnette to allow a reasonable inference that the same person perpetrated both crimes. Both incidents, which occurred in the same vicinity, involved defendant approaching the victim under the auspices of having marijuana to sell for the purpose of robbing the victim of money. In both cases, defendant used a small handgun which he kept in his pants pocket to perpetrate the robbery. Further, as with the Floyd robbery, the testimony with respect to this case tended to show defendant had an accomplice. State witness Theon Joe testified that he and defendant attempted to rob a man in the same vicinity earlier in the evening. Defendant held a handgun on a man while Joe attempted unsuccessfully to obtain money from the victim's pockets. A short time later, both defendant and Joe observed the Burnette car pull up to the intersection of 21st Street and Cleveland Avenue, following which defendant and Joe conversed with Aaron about the marijuana. We hold these similarities are sufficient to support the trial court's admission of evidence of the prior robbery under Rule 404(b).

We further hold the trial court did not abuse its discretion in determining that the probative value of the evidence outweighed the prejudice to defendant under Rule 403. In any event, defendant cannot meet his burden of establishing that any error in the admission of the testimony was prejudicial in light of the overwhelming evidence against him. See N.C. Gen. Stat. § 15A-1443(a) (2002) (defendant establishes prejudicial error only where "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" at

trial). The State presented the testimony of several witnesses to the event, all of which clearly established that defendant shot William Burnette. Betty Leann Burnette identified defendant as the man whom she saw shoot William Burnette. Steve Hinson, who was seated in the backseat of the Burnettes' car, testified defendant was standing at the driver's side window of their car while William was counting his money in the driver's seat; that defendant ordered William to give him the money; that when William refused, the two struggled briefly for the money; and that defendant then pulled out a black revolver and shot William. Kedrick Wagner, who was seated in the backseat directly behind William Burnette, identified defendant as the man who was leaning inside the Burnettes' car when the shots were fired, and stated that no one else was standing near the vehicle at that time. Brandon Lilly, who was seated in the front passenger seat of the Burnettes' car when the shooting took place, corroborated Hinson's and Wagner's testimony. Aaron, who was still standing outside the vehicle when the shooting occurred, testified that he heard defendant order William Burnette to give him the money, and that he then witnessed defendant shoot Burnette twice, hesitate, and shoot once more before running away.

In addition, the State presented the testimony of Marco Owens, who was standing at the intersection at issue when the Burnettes' vehicle drove up. Owens testified that he witnessed defendant approach the Burnettes' car and that moments later he heard gunshots. Owens further testified that he had seen defendant earlier that evening near the same intersection carrying a black

handgun and overheard him talking about robbing someone. Theon Joe testified that he and defendant had attempted to rob a man in the same vicinity earlier in the evening, that defendant was carrying a gun on the evening in question, and that he and defendant saw the Burnette car stop at the intersection of 21st Street and Cleveland Avenue. Joe testified that he saw defendant, who was still carrying a gun in his pants, approach the Burnettes' car, that he heard defendant arguing with people in the car, and that soon thereafter, two shots were fired.

In light of the foregoing evidence, we do not believe there is a reasonable possibility of a different result had the evidence of the 1997 robbery been excluded; therefore, even if the admission of Floyd's testimony was error, it does not entitle defendant to a new trial. N.C. Gen. Stat. § 15A-1443(a).

No error.

Judges TYSON and THOMAS concur.

Report per Rule 30(e).