NO. COA01-1416

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Forsyth County
No. 00 CRS 58316

ROBERT LEE HINTON, JR.

Appeal by defendant from judgment entered 25 June 2001 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 1 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General Susan R. Lundberg, for the State.

William M. Speaks, Jr., for defendant-appellant.

BRYANT, Judge.

On 22 January 2001, defendant was indicted on a charge of first degree burglary. The case was tried at the 25 June 2001 Criminal Session of Forsyth County Superior Court.

The State presented evidence at trial which tended to show the following: On 11 November 2000, Marion McKeever was in her home in Winston-Salem, North Carolina. Sometime around 1:30 a.m., McKeever heard glass falling in her home and told her husband that somebody was breaking in. McKeever went to investigate, and found the defendant standing beside a lamp in her living room holding a knife

and pointing it at her. McKeever picked up a broom, began swinging it at defendant, and yelled for her husband to get his gun. When her husband responded that he was coming, defendant ran from the home. McKeever then called 911.

Officers Horatious Bowen, Kelvin Murphy and James Wooten of the Winston-Salem Police Department responded to the 911 call and went to the McKeever's home. Mrs. McKeever gave police a description of the intruder, a report of the break-in and told them which way the intruder ran. Shortly after their arrival, the officers received a report that a foot pursuit was in progress and a possible suspect was headed in their direction. Officer Wooten stepped outside the house, spotted defendant running by the house, yelled for him to stop and joined the pursuit. Officer Bowen was able to catch defendant and subdue him. A search of defendant's person revealed a pocket knife. Defendant was then placed in the backseat of a patrol car, and Officer Murphy escorted Mrs. McKeever outside to take a look at him. Officer Wooten testified that Mrs. McKeever "positively identified" defendant as the person who entered her home "without hesitation."

At trial, the State offered the testimony of Irma Jackson to prove defendant's motive and intent. Jackson testified that on 10 October 2000, defendant broke into her utility shed and stole various items. Defendant objected to Jackson's testimony, and the trial court instructed the jury that the evidence was admissible solely to prove defendant's motive and intent. Defendant testified and admitted that he broke into the McKeever's home, that he did so

because he was delusional after smoking crack cocaine, believed that he saw "figures" chasing him, and that he sought "refuge."

Defendant was convicted of first degree burglary and sentenced to 114 to 146 months imprisonment. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred by admitting evidence of other crimes committed by him. Specifically, Ms. Jackson testified that defendant broke into her utility shed and stole certain items from it. Defendant asserts that the evidence was too dissimilar to the facts of this case to be admitted pursuant to Rule 404(b). *See State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989) (holding that when the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value), *cert. granted, judgment vacated by Artis v. North Carolina*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1980). Defendant argues that the shed was unoccupied, unattached, and that the break-in occurred in daylight, whereas the offense charged here involved breaking into an occupied dwelling at night. Accordingly, defendant contends that it was prejudicial error for the evidence to be admitted.

After careful review of the record, briefs and contentions of the parties, we find no error. This Court has stated that:

> While evidence of defendant's prior misconduct may not be admitted to show that he has the propensity to commit an offense of the nature of the crime charged, such evidence may be admitted to show defendant's "motive, opportunity, intent, preparation, plan, knowledge, [or] identity."

State v. Lytch, 142 N.C. App. 576, 583, 544 S.E.2d 570, 574

(citations omitted), *disc. rev. denied*, 354 N.C. 224, 554 S.E.2d 653 (2001) (alteration in original), *aff'd by* 355 N.C. 270, 559 S.E.2d 547 (2002); *See* N.C.G.S. § 8C-1, Rule 404(b). "'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. Beckham*, 145 N.C. App. 119, 121, 550 S.E.2d 231, 234 (2001) (quoting *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991)). In the present case, the State offered testimony from Ms. Jackson that defendant had broken into her utility shed and taken various items. The break-in occurred in the same neighborhood approximately one month prior to the break-in at issue here. Furthermore, we note that the trial court instructed the jury to consider this evidence for intent or motive and not to prove the offense for which defendant was being tried. Accordingly, considering the closeness in time and geography, as well as the fact that both involved break-ins, we conclude that the previous incident was sufficiently similar to be admissible pursuant to Rule 404(b).

Even assuming *arguendo* that the evidence should not have been admitted pursuant to Rule 404(b), we conclude that defendant was not unduly prejudiced by its admission. This Court has stated that:

> "The party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission." Evidentiary errors are

> harmless unless a defendant proves that absent the error a different result would have been reached at trial.

State v. Ferguson, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001) (citations omitted). Here, there was overwhelming evidence of defendant's guilt. Mrs. McKeever testified and defendant admitted to: (1) breaking into the McKeever's home by breaking a window in the door of the house and reaching in and unlocking the door; (2) the break-in occurred in the middle of the night, around 1:30 a.m., and (3) defendant had a knife in his hand which he pointed at Mrs. McKeever. Shortly after the break-in, defendant was apprehended nearby and was positively identified by Mrs. McKeever. A search of defendant incident to his arrest revealed a small pocket knife in his pocket. Thus, even if Ms. Jackson's testimony regarding defendant's prior break-in of her shed had not been admitted, it is unlikely that a different result would have occurred at trial. Accordingly, we find no error.

No error.

Judges MARTIN and HUNTER concur.

Report per Rule 30(e).