IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-879

Filed: 16 May 2017

Cumberland County, Nos. 12 CRS 054162, 12 CRS 050249

STATE OF NORTH CAROLINA

v.

ROBERT TERRY ELLISON, Defendant.

Appeal by defendant from judgments entered 23 November 2015 by Judge James F. Ammons Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Constance E. Widenhouse and Wyatt B. Orsbon, for defendant-appellant.

ELMORE, Judge.

Robert Terry Ellison (defendant) was convicted of first-degree murder for the death of his mother. Defendant argues on appeal that the trial court committed plain error by admitting evidence that defendant had choked his ex-wife during an

argument. We hold that (1) the evidence was admissible under Rule 404(b) to prove identity through a *modus operandi*; (2) the trial court did not abuse its discretion in concluding that the probative value of the evidence outweighed its prejudicial effect under Rule 403; and (3) assuming *arguendo* that the evidence was not admissible as proof of motive and intent, the error does not rise to the level of plain error so as to warrant a new trial.

I. Background

On 11 December 2011, police discovered the body of Edwardyne Ann Williams in an isolated wooded area less than one mile from her home. She had been strangled to death. A white Isuzu Rodeo registered to Williams had been abandoned nearby and her purse was found hanging from a tree. The keys to the vehicle were missing.

Two weeks prior, Williams had moved merchandise from her failed thrift store back into her home with the help of her brother, Robert Kreel. Kreel became concerned when he was unable to reach Williams by phone over the next two days. He drove back to Williams's home and noticed that her Rodeo was not in the driveway. Defendant, who had recently moved back in with Williams, met Kreel at the front door. Defendant said that Williams left town after they had a fight.

Kreel testified that defendant declined an invitation to search for Williams and "never showed any concern." After Williams went missing, Kreel noticed that defendant started going through "insurance papers, house papers, anything to do

with the mortgage." He made statements to Kreel like, "I'm going to fix this place up now." And when Kreel told defendant that his mother's vehicle had been found, defendant showed "no real reaction."

The State's evidence tended to show that defendant had demonstrated lifelong hostility toward his mother. Williams's daughter, Ann Ellison, testified that defendant was "periodically in and out of the home" while they were growing up because he refused to abide by his mother's household rules. When he was at home, defendant would often lock himself in his room to drink, smoke, and do drugs. Defendant apparently "blamed [Williams] a lot for the problems he was having in his life." He would "belittle her, mentally abuse her, call her names," and "shove her around." Ellison testified that Williams did not feel safe around defendant whenever he came back home.

Defendant's ex-wife, Tara Canady, testified that defendant had choked her and Williams on prior occasions. Tara and defendant started dating sometime between 1998 and 1999, when they were teenagers. On one occasion, they were drinking and smoking marijuana in defendant's bedroom. Williams became upset because she did not allow smoking in her house. When she entered the room, defendant grabbed her by the throat for five or ten seconds before pushing her out and slamming the door. Defendant then continued to smoke, saying he "would do whatever he wants to do."

In 2000, defendant moved in with Tara and her mother after being kicked out of his own home. At the time, Tara and defendant were married and she was pregnant with their daughter. Tara testified that there were times when defendant would grab her by the throat. She recalled a particular argument in her bedroom during which defendant put his hands around her neck and choked her. Tara thought she passed out but could not say for certain. She did "remember waking up in a daze."

Tara's mother, Karen Canady, corroborated her testimony. She recalled many incidents when she observed scars and bruises on her daughter. When she came home from work unannounced to find defendant choking Tara in the bedroom, she "knew right then and there where all those marks were coming from." Karen had to force defendant out of the house at gunpoint.

Karen Canady also testified that defendant had previously threatened Williams. After his discharge from the Navy, defendant faced "legal trouble" in Pennsylvania and asked Williams to testify on his behalf. She told the court that she did not want defendant placed on probation under her care because he was "a very big danger" and she was "very afraid of him." Defendant was incarcerated as a result. He told Williams it was her fault and he would kill her when he got out.

Sometime in 2006, defendant returned to Cumberland County and eventually moved back in with his mother. The problems between them persisted. Williams's eldest daughter, Tabatha Jones, testified that during an argument defendant bent

Williams's finger backwards and nearly broke it. At Kreel's suggestion, Williams had defendant removed by the sheriff and committed to a mental-health hospital. Kreel told defendant that "[Williams] didn't want him back in the house." When defendant was released, Kreel bought him a one-way bus ticket to Arizona.

On 8 November 2011, defendant returned to Cumberland County once again. That evening, Kreel invited defendant and Williams over for dinner. Defendant had been working for a carnival in Georgia and, according to Kreel, defendant was eager to express "how physically fit he was." After a few drinks, Kreel became annoyed with defendant's vulgar language and "could see that he hadn't really changed." The atmosphere was tense. At one point, defendant told Williams, "I could break you with one arm" and asked, "You guys going to have me committed again?"

Before Thanksgiving that same year, Williams approached Dr. Stephen Marson with concerns about defendant. Williams was enrolled in Dr. Marson's sociology class at UNC-Pembroke. He developed a rapport with Williams and eventually agreed to serve as her academic advisor. Dr. Marson testified that when he met with Williams, she was "fearful, frightened, [and] nervous." She asked him: "[H]ow do you feel about me allowing a homeless man to live in my [home]?" She clarified that the "homeless man" was her son before explaining: "I'm afraid that, if I allow him in the house, he'll hurt me; but, I'm afraid also that, if I don't allow him in the house, he'll hurt me."

At the conclusion of trial, the jury found defendant guilty of first-degree murder on the theory of premeditation and deliberation. He was sentenced to life in prison without the possibility of parole. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant challenges the trial court's ruling to admit evidence of his prior assault on Tara Canady. Along with evidence of defendant's assaults against Williams, the trial court ruled that evidence of his assault against Tara was admissible pursuant to North Carolina's Rule of Evidence 404(b). The court undertook a balancing test as to each incident before finding that the cumulative effect of the evidence was not unduly prejudicial and did not outweigh its probative value. In its jury instructions, the trial court explained the purposes for which the all of the 404(b) evidence was received:

> Now, ladies and gentlemen, *evidence has been received tending to show that the defendant may have assaulted his girlfriend by choking her in the 2000 to 2001 time period*. Evidence has also been received which tends to show that the defendant may have assaulted his mother by choking her in the 2000 to 2001 time period. Evidence has also been received to show that the defendant may have assaulted his mother by attempting to break her finger in the 2005–2006 time frame, and evidence has been introduced which tends to show that the defendant threatened his mother in 2011 by telling her he could break her with one arm. This evidence was received solely for the purpose of showing the *identity* of the person who committed the crime charged here, if it was indeed committed; that the defendant had a

> *motive* for the commission of the crime charged here; that the defendant had the *intent*, which is a necessary element of the crime charged here.
>
> If you believe any of this evidence, you may consider it, but only for the limited purpose for which it was received. You may not consider it for any other purpose. You may not convict the defendant in this case because of something he may have done in the past.

(Emphasis added.) Defendant argues that the trial court committed plain error by admitting evidence of his prior assault on Tara because it was not relevant to prove identity, motive, or intent. Rather, defendant contends, the evidence was improper character evidence that was offered to show defendant's propensity to commit the crime charged.

"Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citing N.C. R. App. P. 10(a)(4); *State v. Black*, 308 N.C. 736, 739–41, 303 S.E.2d 804, 805–07 (1983)). Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018 (1982)).

> For error to constitute plain error, 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (alterations, citations, and quotation marks omitted).

"The admissibility of evidence is governed by a threshold inquiry into its relevance." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (citation omitted). Evidence is relevant if it has "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 (2015). Even if relevant, the evidence may nevertheless "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2015).

Pursuant to Rule 404(b), "[e]vidence 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." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). Such evidence "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." *Id.*

Whether evidence is "within the coverage of Rule 404(b)" is a legal conclusion reviewed *de novo* on appeal. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Whether relevant evidence satisfies the Rule 403 balancing test is a discretionary ruling reviewed for abuse of discretion on appeal. *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. An abuse of discretion occurs "where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Defendant argues that evidence of his assault against Tara was not admissible to identify defendant as the perpetrator. " 'Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged.' " *State v. Jeter*, 326 N.C. 457, 458, 389 S.E.2d

805, 806 (1990) (quoting *State v. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 367 (1954)). Evidence of a prior crime or other act "may be offered on the issue of defendant's identity as the perpetrator when the *modus operandi* of that crime [or act] and the crime for which defendant is being tried are similar enough to make it likely that the same person committed both crimes." *State v. Carter*, 338 N.C. 569, 588, 451 S.E.2d 157, 167 (1994) (citing *State v. Moore*, 309 N.C. 102, 305 S.E.2d 542 (1983)). "It is not necessary that the similarities between the two situations 'rise to the level of the unique and bizarre,' " but "the similarities must tend to support a reasonable inference that the same person committed both the earlier and later acts." *State v. Sokolowski*, 351 N.C. 137, 150, 522 S.E.2d 65, 73 (1999) (quoting *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900 (1988)) (citing *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991)); *see, e.g.*, *State v. Burr*, 341 N.C. 263, 288–91, 461 S.E.2d 602, 615–17 (1995) (holding that evidence of the defendant's prior assaults against the victim's mother, in which defendant grabbed her, choked her, and bent her arms behind her back, was admissible to prove identity where "the unusual acts which would have caused the victim's injuries were particularly similar to those acts defendant committed against [the victim's mother]").

In this case, evidence of defendant's prior assault on Tara was admissible under Rule 404(b) as proof of identity. The State's evidence did not definitely identify

defendant as the perpetrator. Because the autopsy revealed that Williams was strangled to death, evidence that defendant previously choked Tara supports a reasonable inference that both acts were committed by the same person. The probative value of the evidence is certainly greater when considered with Tara's testimony that defendant had also choked Williams during an argument about smoking in the house. Although the lack of temporal proximity between the prior assaults and Williams's murder weighs against admissibility, the lapse does not demand exclusion of the evidence. *See State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986) ("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.").

Assuming *arguendo* that evidence of defendant's assault on Tara was not admissible to prove motive and intent, the admission does not rise to the level of plain error. First, the prevailing purpose of the evidence was to show identity, for which it was properly admitted and considered by the jury. As our Supreme Court has explained: " 'Where at least one of the [other] purposes for which the prior act evidence was admitted was [proper,]' there is no prejudicial error." *State v. Morgan*, 359 N.C. 131, 158–59, 604 S.E.2d 886, 903 (2004) (alteration in original) (quoting *State v. Haskins*, 104 N.C. App. 675, 683, 411 S.E.2d 376, 382 (1991), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992)) (citing *State v. Bagley*, 321 N.C. 201,

206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036 (1988)). Second, defendant does not challenge the trial court's ruling to admit evidence of his prior assaults against Williams which, in this case, was arguably the more probative 404(b) evidence. Third, the trial court instructed the jurors that even if they believed the evidence, they could consider it "only for the limited purpose for which it was received" and not "for any other purpose." Finally, although the evidence against defendant was largely circumstantial, the State's case against him was strong. *See State v. Adcock*, 310 N.C. 1, 36, 310 S.E.2d 587, 607 (1984) ("The law makes no distinction between the weight to be given to either direct or circumstantial evidence." (citation omitted)). Based on the foregoing, defendant has failed to show that, absent the evidence, there is a reasonably probability that the jury would have reached a different result.

III. Conclusion

We conclude that evidence of defendant's prior assault against Tara was admissible under Rule 404(b) as proof of identity, and the trial court did not abuse its discretion in its Rule 403 determination. Even assuming that the evidence was not admissible as proof of motive and intent, the admission does not amount to plain error.

NO PLAIN ERROR.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).