Third District Court of Appeal

State of Florida

Opinion filed September 4, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-2320
Lower Tribunal No. 09-30889A

Kendrick Silver,
Appellant,

vs.

The State of Florida,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Marisa Tinkler Mendez, Judge.

Carlos J. Martinez, Public Defender, and Manuel Alvarez, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Gabrielle Raemy Charest-Turken, Assistant Attorney General, for appellee.

Before SALTER, LINDSEY, and MILLER, JJ.

MILLER, J.

Appellant, Kendrick Silver, challenges his convictions for first-degree murder and conspiracy to commit armed robbery, contending the lower tribunal erred in admitting Williams[1] rule evidence and hearsay by inescapable inference during his trial. For the reasons set forth below, we discern no error and affirm.[2]

FACTS

In 2006, Silver and his cohort, Oniel Pedley, embarked on a crime spree spanning an eight-month time period. The episode involved four armed robberies, two of which culminated in the deaths of hapless individuals. Eventually, forensic evidence and witness testimony betrayed the identity of the perpetrators.

On December 16, 2006, Solemus Accimeus, then sixty-two years of age, was working as an armed security guard at Esther's Restaurant located on Northwest 103rd Street ("Esther's 103rd Street") in Miami-Dade County, Florida. At the conclusion of his shift, Accimeus disarmed himself, placing his firearm inside his vehicle parked at the rear of the restaurant. Shortly thereafter, he was fatally gunned down by a masked man attired in dark clothing. As Accimeus was shot at close range, blood spattered on the exterior of the assailant's mask.

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[1] Williams v. State, 110 So. 2d 654 (Fla. 1959); § 90.404(2)(a), Fla. Stat. (2019).

[2] We decline to embrace a final claim of error grounded upon witness bolstering, without further elaboration. See Rogowski v. State, 643 So. 2d 1144, 1145 (Fla. 3d DCA 1994) ("[T]he state attorney committed no error in eliciting on several occasions from three of the [S]tate's witnesses that they had entered into certain plea agreements as co-defendants in the case to testify truthfully against the defendant upon pain of being prosecuted for perjury.").

Clinton Saunders resided in close proximity to the restaurant. On the evening of the homicide, he detected the sound of gunshots, immediately followed by the reverberation of an accelerating engine. Moments later, he observed a man he later deduced to be the perpetrator of the homicide, cloaked in a ski mask and dark apparel. As the man traversed the street, secreting himself between parked vehicles, he locked eyes with Saunders and brandished his firearm. Saunders sought refuge underneath his vehicle and the individual fled, discarding numerous objects along the way.

Homicide detectives responded to the crime scene and discovered several items of evidentiary value, among them the ski mask. Nonetheless, the case remained unsolved for a protracted period of time. Eventually, law enforcement officers interviewed Pedley's girlfriend and confidante, Shana Wright. Wright was not extended immunity during her initial statement. She inculpated both Pedley and Silver in multiple crimes, but she did not originally disclose any knowledge regarding the homicide.

Shortly after obtaining Wright's statement, Miami-Dade Police Department Homicide Detective Michael Scott sought and procured DNA samples from Silver and Pedley. A forensic analysis of the ski mask later revealed Silver as a possible contributor to serological specimens recovered from three areas of the interior, at varying degrees of statistical significance, and Accimeus as a contributor to a blood

sample harvested from the exterior. Additionally, Accimeus's blood was identified on a semi-automatic firearm, an item of clothing, a piece of twine, and gloves recovered from the scene.

Wright was arrested for a third-unrelated robbery, and agreed to a plea bargain requiring her to testify under a grant of immunity. She eventually recounted that, while studying at Florida International University ("FIU"), she allowed Pedley, Silver, and Silver's girlfriend, Jonika Maynor, to reside in her dormitory room located on the FIU Biscayne Bay Campus.[3] At that time, Silver was employed at Esther's Restaurant on 27th Avenue ("Esther's 27th Avenue"), also located in Miami-Dade County, Florida, and Pedley was employed at Esther's 103rd Street. Each man owned a firearm. The men routinely wore two layers of dark clothing, in order to facilitate expedient changes in appearance. They stored their firearms, along with extra clothing, gloves, and ski masks, in a rucksack.

Toward the end of October 2006, Silver and Pedley formulated a plan to rob Esther's 27th Avenue. They utilized a dry-erase board in Wright's dormitory room to diagram the layout of the targeted venue and sought Wright's assistance in serving as a decoy to obtain access to the back entrance.

[3] Prior to this testimony and at the final charge, the lower court gave the standard limiting and cautionary instruction regarding Williams rule evidence. See Fla. Std. Jury Instr. (Crim.) 3.8(a).

On November 6, 2006, Silver and Pedley donned dark clothing, gloves, and ski masks. They armed themselves with their respective firearms, retrieved the rucksack, and proceeded to the rear of the restaurant at closing time. Wright remained behind, as the entrance was open and accessible. Silver and Pedley carried out the robbery and returned to the vehicle with a register drawer containing currency. All three fled the scene together.

The three subsequently planned to perpetrate a robbery at Esther's 103rd Street. The men expressed concern regarding the venue's unique challenge, as an armed security guard was charged with policing the business. Nonetheless, they again diagrammed the venue on the dry-erase board in the dormitory room, donned multiple layers of dark clothing, armed themselves with the same firearms, fetched the rucksack, and proceeded to the rear of the restaurant at closing time. On this occasion, Wright's role was slightly different, as she was tasked with exchanging vehicles to avoid detection. However, the robbery was aborted for unexplained reasons, and the men unexpectedly returned to the awaiting vehicle without having garnered any proceeds. Thereafter, Wright was excluded from further criminal objectives.

On the evening of the homicide in the instant case, Wright observed Silver and Pedley both attired in dark clothing. They carried the rucksack and departed from the dormitory room. Upon their return, approximately one hour later, the men

were clothed in different outfits. Silver appeared "frantic" and was breathing heavily. He apologized to Pedley for losing Pedley's firearm and stated, "I told you, Bro, if I had to do it that I would." Silver repeatedly inquired as to whether Maynor perceived the "smell [of] . . . death" and then promptly showered, while Pedley watched a news program. The men left and Wright and Maynor continued watching television. They learned that the security guard at Esther's 103rd Street had been shot earlier that evening.

In anticipation of trial, the State furnished the requisite notice under section 90.404(2), Florida Statutes (2019), setting forth its intention to introduce similar fact evidence. Specifically, the State sought to offer evidence of two other armed robberies committed by Pedley and Silver, one at Esther's 27th Avenue in Miami-Dade County and one at Picasso's Restaurant in Palm Beach County.

The lower tribunal conducted a preliminary hearing and determined that only the former crime satisfied the stringent admissibility requirements promulgated under the Florida Evidence Code. Accordingly, it excluded reference to the robbery at Picasso's Restaurant. At trial, the State introduced evidence regarding the robbery of Esther's 27th Avenue and testimony that DNA samples from Silver and Pedley were obtained immediately after Wright's initial statement. Silver was convicted of first-degree murder and conspiracy to commit armed robbery, as charged in the indictment. The instant appeal ensued.

STANDARD OF REVIEW

"The admission of evidence is within the sound discretion of the trial court, constrained by the application of the rules of evidence and the principles of stare decisis." Hayward v. State, 183 So. 3d 286, 325 (Fla. 2015) (citing Davis v. State, 121 So. 3d 462, 481 (Fla. 2013)). "A trial court has broad discretion to determine the relevancy of evidence." Wright v. State, 19 So. 3d 277, 291 (Fla. 2009). Thus, we will not disturb a trial court's decision to admit collateral act evidence absent an abuse of discretion. See Whisby v. State, 262 So. 3d 228, 231 (Fla. 1st DCA 2018). "However, the question of whether evidence falls within the statutory definition of hearsay is a matter of law, subject to de novo review." Burkey v. State, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006) (citation omitted).

LEGAL ANALYSIS

I. Admissibility of Williams Rule Evidence

Silver contends the trial court erred in admitting Williams rule evidence of the antecedent robbery at Esther's 27th Avenue, as the two crimes did not bear sufficient "hallmarks" of identity to warrant introduction. "The prerequisite to the admissibility of evidence is relevancy. All evidence tending to prove or disprove a material fact is admissible, unless precluded by law." Wright, 19 So. 3d at 291 (citing §§ 90.401-90.402, Fla. Stat. (2000)). As codified in section 90.404(2)(a), Florida Statutes (2019), "[s]imilar fact evidence of other crimes, wrongs, or acts is

admissible when relevant to prove a material fact in issue, including, but not limited to, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[4] Nonetheless, such evidence is "inadmissible when the evidence is relevant solely to prove bad character or propensity." § 90.404(2)(a), Fla. Stat.

> Before admitting collateral crime evidence,
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> > the trial court must make four determinations: [(1)] whether there is sufficient evidence that defendant committed the collateral crime; [(2)] whether the collateral crime meets the similarity requirements necessary to be relevant; [(3)] whether the collateral crime is too remote, so as to diminish its relevance; and [(4)] whether the prejudicial effect of the collateral crime substantially outweighs its probative value.

Peterson v. State, 2 So. 3d 146, 153 (Fla. 2009). While Silver does not contest the three formative requirements, he contends the pervasive characteristics between the two criminal episodes are common of many robberies, and thus, insufficient to

[4] Here, the State introduced evidence regarding the prior robbery to prove several material issues, including identity, intent, and motive. As these issues were material facts disputed at trial, the evidence was relevant. See McLean v. State, 934 So. 2d 1248, 1255 (Fla. 2006) ("[E]vidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion.") (quoting Williams, 110 So. 2d at 663). Evidence presented to suggest a general propensity to commit crimes may not be introduced as, concededly, such purpose would be impermissible under section 90.404(2), Florida Statutes. Milton v. State, 19 So. 3d 1143, 1144 (Fla. 1st DCA 2009).

establish the relevancy required to prove identity. We confine our analysis, accordingly.

As a threshold matter, a body of well-reasoned jurisprudence imposes a variance in the degree of similarity required in admitting evidence for the purpose of establishing motive or intent, as opposed to identity. See Floyd v. State, 913 So. 2d 564, 572 (Fla. 2005) ("Evidence of other crimes factually dissimilar from the charged crime are nevertheless admissible if relevant, e.g., to support the State's theory of the motive in the case."); Harden v. State, 87 So. 3d 1243, 1246 (Fla. 4th DCA 2012) ("Accordingly, even if prior bad acts do not bear a striking similarity to the charged offenses, the prior acts are admissible if they are relevant to show motive and intent.") (citations omitted); cf. Huddleston v. United States, 485 U.S. 681, 686, 108 S. Ct. 1496, 1499, 99 L. Ed. 2d 771 (1988) ("The threshold inquiry a court must make before admitting similar acts evidence . . . is whether the evidence is probative of a material issue other than character."). Here, Silver was indicted for felony murder, predicated upon an attempted robbery, and, in the alternative, first-degree murder. Accordingly, his motive and intent were directly at issue in trial, and nothing "so unique or particularly unusual about the perpetrator or his modus operandi" was required to support the introduction of the collateral crime evidence. Buenoano v. State, 527 So. 2d 194, 197 (Fla. 1988). Nonetheless, as Silver

contended at trial that Pedley was the perpetrator, identity was also in dispute, and we do not unnecessarily truncate our scrutiny.

"[I]n cases where the purported relevancy of the collateral crime evidence is the identity of the defendant, [the Florida Supreme Court has] required 'identifiable points of similarity' between the collateral act and charged crime that 'have some special character or be so unusual as to point to the defendant.'" McLean v. State, 934 So. 2d 1248, 1255 (Fla. 2006) (quoting Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981) ("The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared.")). It is well-established that "collateral crime evidence is not required to be so unique that no other perpetrator could have committed both offenses. Rather, the two crimes must share some unique features suggesting the same perpetrator." Black v. State, 630 So. 2d 609, 618 (Fla. 1st DCA 1993) (citation omitted) (finding the facts of a collateral crime admissible as the evidence that "large retail stores were robbed at the end of weekend business; store employees were confined, given similar instructions, and telephones were dismantled; the robber in each instance appeared to have some prior knowledge of the business premises and, the robber in each instance wore a ski mask, gloves, carried a large automatic pistol, and had the same physical characteristics," when considered in conjunction, "demonstrat[ed] a pattern in regard to the commission of each crime"). "Thus, '[a] mere general similarity

will not render the similar facts legally relevant to show identity.'" Peterson, 2 So. 3d at 153 (alteration in original) (quoting Drake, 400 So. 2d at 1219). Consequently, we consider both similarities and dissimilarities to determine whether "a sufficiently unique pattern of criminal activity [justifies] admission." Peek v. State, 488 So. 2d 52, 55 (Fla. 1986) (citation omitted).

Here, the robberies at issue were committed in close temporal proximity and at the same restaurant chain. During both robberies, two perpetrators approached the rear of the business at the time of closing. They concealed their identities by donning ski masks and dressing in dark clothing. By obtaining employment prior to committing the crimes, Silver and Pedley were able to thoroughly scout the venues. The information garnered was then diagrammed on the same dry-erase board in the same dormitory room for each target location. The two crimes were committed using the same firearms.[5] Silver and Pedley changed or discarded their clothing immediately following the crimes. Accordingly, we conclude that "[w]hen the circumstances of the crimes are considered cumulatively, 'identifiable points of

[5] We have held previously that when the same firearm is used in multiple robberies, "the only inquiry for the trial court to make was whether such evidence of collateral crimes, which included both physical evidence and eyewitness testimony, was relevant to the issue of the perpetrator's identity–not whether the evidence revealed uniquely similar factual situations." State v. Williams, 992 So. 2d 330, 333 (Fla. 3d DCA 2008) (citing Fernandez v. State, 722 So. 2d 879, 880 (Fla. 3d DCA 1998) ("Evidence of the prior shooting was relevant to issues of identity and motive and was properly admitted."); Parker v. State, 456 So. 2d 436 (Fla. 1984)).

similarity . . . pervade the compared factual situations.'" Peterson, 2 So. 3d at 154 (second alteration in original) (citation omitted). Thus, when examined "'in conjunction' [the crimes do] rise to the level of uniqueness required for admission." Id. (citing Black v. State, 630 So. 2d 609, 618 (Fla. 1st DCA 1993)).

Silver asserts certain dissimilarities between the crimes, including Wright's inconsistent participation and the unsuccessful nature of the latter offense, preclude a finding of modus operandi. However, "[d]issimilarities are not fatal when they 'seem to be a result of differences in the opportunities with which [the defendant] was presented, rather than differences in modus operandi.'" Durousseau v. State, 55 So. 3d 543, 553 (Fla. 2010) (second alteration in original) (quoting Gore v. State, 599 So. 2d 978, 984 (Fla. 1992)).

Here, the presence of an armed security guard, as ominously forecasted by Silver and Pedley prior to the crime, suggests "differences in the opportunities with which [Silver] was faced rather than significant differences in modus operandi." Chandler v. State, 442 So. 2d 171, 173 (Fla. 1983). Thus, as the crimes meet the similarity requirement, we find no error in the trial court's determination that the "admission of evidence of [Silver's] collateral crime [w]as relevant to the issue of identity in the crime charged." Id.

II. Admissibility of Hearsay by Inescapable Inference

Silver further contends the State's elicitation of testimony that immediately following Wright's initial interview law enforcement sought to harvest DNA standards from Silver was improvidently admitted, as it constituted hearsay by inescapable inference.[6] § 90.802, Fla. Stat. (2019) ("Except as provided by statute, hearsay evidence is inadmissible."); see also Wilding v. State, 674 So. 2d 114, 119 (Fla. 1996), receded from on other grounds, Devoney v. State, 717 So. 2d 501 (Fla. 1998) ("[W]here 'the inescapable inference from testimony [concerning a tip received by police] is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated.'") (second alteration in original). Silver is correct that "[w]here 'the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the

[6] Hearsay by inescapable inference is not expressly referenced in the evidence code. Nonetheless, a well-reasoned body of precedent compels us to consider the merits of this claim of error, as "[m]any statements that would be inadmissible as a matter of hearsay law bear little resemblance to [the] evidentiary practices, which the Framers proposed the Confrontation Clause to prevent." Davis v. Washington, 547 U.S. 813, 836, 126 S. Ct. 2266, 2281, 165 L. Ed. 2d 224 (2006) (Thomas, J., concurring) (citation omitted) ("[I]t is unlikely that the Framers intended the word 'witness' to be read so broadly as to include such statements."); see also Trotman v. State, 652 So. 2d 506, 507 (Fla. 3d DCA 1995) ("When the logical implication to be drawn from the testimony leads the jury to believe that a **non-testifying witness** has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay.") (emphasis added) (citation omitted).

testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated.'" Diaz v. State, 62 So. 3d 1216, 1217 (Fla. 5th DCA 2011) (quoting Postell v. State, 398 So. 2d 851, 854 (Fla. 3d DCA 1981)). Nonetheless, "[t]he primary reason for excluding hearsay is that the trier of fact has no adequate basis for evaluating the declarant's credibility, because the declarant was not subject to cross-examination under oath in the trier's presence." Roger C. Park, "I Didn't Tell Them Anything About You:" Implied Assertions as Hearsay, 74 Minn. L. Rev. 783, 785 (1990).

Here, Wright was not a "non-testifying witness." At trial she confirmed that she implicated Silver in the robbery to law enforcement, and was subsequently subject to a vigorous cross-examination. Thus, we decline to find error.

CONCLUSION

As "the collateral robber[y was] sufficiently similar to the charged crime to be probative of identity" and the evidence was relevant and admissible, the trial court did not abuse its discretion in allowing evidence of the collateral crime. Peterson, 2 So. 3d at 156. Further, as detectives did not relate the information that caused them to seek to harvest DNA standards from Silver and Pedley, and Wright, the source of the information, testified at trial, the testimony regarding the acquisition of standards

did not constitute inescapable inferential hearsay and was properly admitted. Accordingly, we affirm the conviction under review.

Affirmed.