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NO. COA01-1010

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v.

Northampton County
Nos. 00 CRS 2028-30

EARL ALFONSIA GOODE,
Defendant.

Appeal by defendant from judgments entered 21 February 2001 by Judge J. Richard Parker in Northampton County Superior Court. Heard in the Court of Appeals 22 April 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Judith Robb Bullock, for the State.

Ernest T. Collins for defendant-appellant.

HUDSON, Judge.

On 2 January 2001, the Northampton County grand jury indicted defendant on charges of robbery with a dangerous weapon, first degree burglary, and second degree kidnapping. A jury found defendant guilty as charged, and the trial court sentenced defendant to consecutive sentences with a combined minimum term of 280 months and a combined maximum term of 365 months imprisonment. From the trial court's judgments, defendant appeals.

At trial, the State presented evidence tending to show the following: At approximately 1:30 a.m. on 26 December 1999, the

back door of Melvin Walden's home was kicked open, and three masked men armed with automatic handguns entered. They pointed the handguns at Mr. Walden and his fiancée, then began ransacking the house and asking where the money was kept. Mr. Walden's hands were tied behind his back. He identified defendant as the man who held a gun on him. When defendant took Mr. Walden outside his home at one point, Mr. Walden observed a white Grand Prix with tinted windows which was in his driveway with the motor running. After the three men left about an hour later, Mr. Walden was able to free himself from his bonds. He testified that his pager, a PlayStation and games, a sword, approximately three hundred dollars in cash, all of his necklaces, his three watches and other items were stolen. Mr. Walden initially chose not to report the incident to police.

Upon learning of the break-in about five months later, Officer Tony Burnette spoke with Mr. Walden on 26 May 2000. When Mr. Walden identified defendant in a photographic lineup, he said "I think he is one." He also identified Clarence Boone and Erwin Hughes as the other two perpetrators. His fiancée was unable to identify any of the perpetrators. When asked why he did not initially report the incident, Mr. Walden said he was scared for his family because it had happened to other people and nobody had done anything about it. Mr. Walden indicated he had planned on taking matters into his own hands. Officer Burnette testified that defendant's mother owned a white Grand Prix with tinted windows, which he had seen defendant drive.

During a *voir dire* hearing, Belinda Deloatch testified that she, her fiancé, and her fiancé's two children returned home after midnight on 12 May 2000. She noticed her front door appeared to have been kicked open. Upon seeing an intruder inside their home, Ms. Deloatch and her fiancé entered the house. Once inside, however, three men rushed at them. One of the men had a gun. They bound her fiancé's arms with duct tape and asked where the money was kept. She said the men tore her house "all to pieces." After about forty-five minutes to an hour, her fiancé freed himself and used a rifle to make the three men leave. Ms. Deloatch looked at a photographic lineup the next day. She indicated she was not exactly positive because of the way the men's heads were back in the photographs, but she said defendant's photograph looked familiar. When asked if she recognized defendant as one of the men who came into her home, Ms. Deloatch said "[h]e is the person with the gun." Ms. Deloatch testified her home was about a mile and a half from Mr. Walden's home.

The trial court found Ms. Deloatch's evidence was relevant and admissible in that the incidents were "sufficiently similar and not so remote in time as to be more probative than prejudicial on the balancing test of 8C-1 Rule 403 of the North Carolina Rules of Evidence." Ms. Deloatch then testified in conformity with her *voir dire* testimony about the incident on 12 May 2000. She also positively identified defendant as one of the three men after seeing him in person in the courtroom.

Defendant testified and denied committing the crimes at Mr.

Walden's residence. He asserted he was at a party from 12:30 a.m. to 3:00 a.m. on the night in question. Defendant also denied breaking into Ms. Deloatch's residence and asserted he had not been charged with any crime related to that incident.

Defendant contends the trial court erred by permitting Ms. Deloatch to testify. He argues the probative value of that evidence was substantially outweighed by its prejudicial effect. Defendant's argument is unpersuasive.

"Evidence of other crimes, wrongs, or acts is . . . admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. R. Evid. 404(b) (1999). Rule 404(b) of the North Carolina Rules of Evidence is a

general 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). Although certain evidence may tend to show other crimes, wrongs, or acts by a defendant and his propensity to commit them, the evidence is admissible under Rule 404(b) so long as it is relevant for a purpose other than his propensity for the type of conduct at issue. See *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991). Further constraints upon the admissibility of such evidence under Rule 404(b) are similarity and temporal proximity. See *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993). The

similarities between the incidents "must tend to support a reasonable inference that the same person committed both the earlier and later acts." *State v. Moseley*, 338 N.C. 1, 43, 449 S.E.2d 412, 437-38 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d. 738 (1995).

Evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. R. Evid. 403 (1999). "Unfair prejudice," as used in Rule 403, means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Commentary, N.C. R. Evid. 403. The admission or exclusion of evidence under Rule 403 is within the trial court's sound discretion, and "only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision" may the ruling be reversed for an abuse of discretion. *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985).

We conclude that the evidence was relevant to the issue of identity. The similarities between the crimes committed at the residences of Mr. Walden and Ms. Deloatch support a reasonable inference that defendant took part in the commission of the crimes. Entry into both homes occurred in the late evening hours by apparently kicking a door open. Three men entered the residences and kept asking the residents where the money was kept. Mr. Walden identified defendant as one of the perpetrators, and Ms. Deloatch tentatively identified him. Both victims stated that an individual used a handgun both times. Money, necklaces, watches,

a video game machine and video games were taken from each of the residences.

We also conclude the crimes at Ms. Deloatch's home were not too remote in time and proximity from the crimes at Mr. Walden's home. The crimes at Ms. Deloatch's home occurred within five months of the crimes at Mr. Walden's home. *See, e.g., Stager*, 329 N.C. at 307, 406 S.E.2d at 893 (approximately ten-year interval between acts). Their respective residences are approximately one and one-half miles apart. We detect no abuse of discretion in the trial court's decision to allow the admission of Ms. Deloatch's testimony pertaining to the 12 May 2000 crimes, as they were sufficiently close in time, and sufficiently similar to the crimes committed on 26 December 1999. Additionally, the crimes committed at Ms. Deloatch's home on 12 May 2000 were not too remote in time from the crimes on 26 December 1999.

The trial court did not err in admitting Ms. Deloatch's testimony pursuant to Rule 404(b) and Rule 403. This assignment of error is therefore overruled. Defendant has failed to bring forward his two remaining assignments of error, and they are deemed abandoned. *See N.C. R. App. Proc. 28(b)(5) (1999)*.

No error.

Judge TYSON concurs.

Judge GREENE concurs with a separate opinion.

Report per Rule 30(e).

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GREENE, Judge, concurring.

Although I agree with the majority, I write separately to fully address the admissibility of Ms. Deloatch's testimony in light of its relevancy under Rule 404(b).

A

Relevancy

Evidence of other crimes, wrongs, or acts is admissible if it is relevant for purposes other than "to prove the character of a person in order to show that he acted in conformity therewith," N.C.G.S. § 8C-1, Rule 404(b) (1999), and if it proves "a material fact in issue in the crime charged," *State v. Johnson*, 317 N.C. 417, 425, 347 S.E.2d 7, 12 (1986). In determining the relevancy of the evidence, there must be a connection between the extraneous criminal transaction and the crime charged. *State v. Chavis*, 141 N.C. App. 553, 563, 540 S.E.2d 404, 412 (2000).

Identity

In this case, the trial court admitted Ms. Deloatch's testimony for purposes of "showing the identity of the person who committed the crimes charged in this case, if they were committed,

[and] that [there] existed in the mind of the defendant a plan [or] scheme." Evidence of other crimes may be offered to establish a "defendant's identity as the perpetrator when the *modus operandi* is similar enough to make it likely that the same person committed both crimes." *State v. Sokolowski*, 351 N.C. 137, 150, 522 S.E.2d 65, 73 (1999). "This theory of admissibility requires 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes.'" *State v. Carter*, 338 N.C. 569, 588, 451 S.E.2d 157, 167 (1994) (quoting *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995).

In this case, identity is at issue as Mr. Walden's fiancée was unable to identify the perpetrator of the crimes and at a photographic lineup, Mr. Walden stated "I think [defendant] is [the] one." Thus, the similarities between the events at Ms. Deloatch's home and the current charges are relevant to establish the identity of the perpetrator of the 26 December 1999 crimes. In both instances, the victims' homes were entered by the perpetrator kicking open a door and then ransacking; the perpetrators carried guns; the victims' hands were bound with tape; the perpetrators continuously asked where money was kept; and valuables, including money and jewelry, were removed from the victims' homes. Accordingly, the trial court properly concluded Ms. Deloatch's testimony was admissible under Rule 404(b) to establish the identity of the perpetrator of the 26 December 1999 crimes. Because the trial court properly admitted the evidence to show

identity, I do not address whether the trial court properly admitted the evidence for the purpose of establishing a common plan or scheme. See *State v. Haskins*, 104 N.C. App. 675, 683, 411 S.E.2d 376, 382 (1991) ("no prejudicial error where at least one of the two purposes for which the prior act evidence was admitted was correct"), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992).

B

Unfair prejudice

Although I believe Ms. Deloatch's testimony is relevant under Rule 404(b), "it may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Chavis*, 141 N.C. App. at 564, 540 S.E.2d at 413. "The question of whether evidence is unfairly prejudicial 'is a matter left to the sound discretion of the trial court.'" *Id.* (quoting *Haskins*, 104 N.C. App. at 680, 411 S.E.2d at 381).

In this case, the trial court admitted the evidence for the limited purposes of establishing both identity and a common plan or scheme and found the two offenses "sufficiently similar and not so remote in time as to be more probative than prejudicial." In light of the limited purposes of the evidence and the trial court's findings, I do not believe the trial court abused its discretion in admitting Ms. Deloatch's testimony concerning the 12 May 2000 incident.