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NO. COA01-1535

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

STATE OF NORTH CAROLINA

v.

Lincoln County
Nos. 00 CRS 692
00 CRS 693

DAVID LYNN PECHE

Appeal by defendant from judgment entered 28 September 2000 by Judge Timothy L. Patti in Lincoln County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General E. Burke Haywood, for the State.

David A. Phillips for defendant-appellant.

THOMAS, Judge.

Defendant, David Lynne Peche, appeals convictions of felonious breaking and entering and assault with a deadly weapon with intent to kill inflicting serious injury. For the reasons discussed herein, we find no error.

The State's evidence tends to show the following: Defendant broke into the residence of his estranged wife on the evening of 9 February 2000. After gaining entrance into the residence, defendant attempted to embrace Ms. Peche. When she rebuffed his advances, defendant stabbed Ms. Peche in the hand, head and arm with a knife, which resulted in serious injuries. He then fled and

Ms. Peche called for assistance.

Defendant presented the testimony of his father, Richard Peche, Sr., that his son and Ms. Peche had been separated since April 1999. He was unaware of any contact between the two since May 1999.

A jury subsequently found defendant guilty, and the trial court sentenced him to consecutive sentences of 20-24 months imprisonment for the breaking and entering conviction and 168-211 months imprisonment for the assault with a deadly weapon with intent to kill inflicting serious injury conviction. Defendant appeals.

By his first assignment of error, defendant argues that the trial court committed reversible error in admitting a tape recording of the assault in violation of N.C. R. Evid. 403. We disagree.

Rule 403 provides for the exclusion of otherwise relevant evidence "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. R. Evid. 403 (2001). Our Supreme Court elucidated in *State v. Mercer* that:

Rule 403 calls for a balancing of the proffered evidence's probative value against its prejudicial effect. Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree. The relevant evidence is properly admissible under Rule 402 unless the judge determines that it must be excluded, for instance, because of the risk of "unfair prejudice."

State v. Mercer, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986). "The responsibility to determine whether the probative value of relevant evidence is outweighed by its tendency to prejudice the defendant is left to the sound discretion of the trial court." *State v. Alston*, 341 N.C. 198, 231, 461 S.E.2d 687, 704 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). The trial court's decision to admit evidence after a Rule 403 analysis is reviewable only upon a showing of an abuse of discretion, i.e., that the court's ruling was "manifestly unsupported by reason or [was] so arbitrary it could not have been the result of a reasoned decision.'" *State v. Thibodeaux*, 352 N.C. 570, 579, 532 S.E.2d 797, 804-05 (2000), *cert. denied*, 531 U.S. 1155, 148 L. Ed. 2d 976 (2001) (quoting *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993), *reh'g denied*, 510 U.S. 1066, 126 L. Ed. 2d 707 (1994)).

In the present case, the State presented the testimony of the victim, defendant's estranged wife, as to the events which transpired on the evening in question. Ms. Peche testified that she had recorded the events of the evening, and over defendant's objection, the court permitted the State to admit into evidence the audio recording. Defendant did not present any evidence which tended to rebut the State's evidence and the admission of said recording does not constitute a manifest abuse of discretion. We thus reject this argument.

By his second assignment of error, defendant argues that the trial court erred in admitting evidence regarding a prior incident

of domestic violence against Ms. Peche, in violation of N.C. R. Evid. 404(b). We disagree.

Rule 404(b) governs the admission of evidence regarding specific acts of misconduct by a defendant. It provides:

(b) *Other crimes, wrongs, or acts.*--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. R. Evid. 404(b) (2001). It is well settled that "Rule 404(b) is a general rule of inclusion of relevant evidence of other crimes or wrongs committed by a defendant and is subject to but one exception which requires exclusion of such evidence only if offered to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Alston*, 341 N.C. at 228-29, 461 S.E.2d at 703. Significantly, "[our Supreme] Court has repeatedly held that a defendant's prior assaults on the victim, for whose murder defendant is presently being tried, are admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim." *Id.* at 229, 461 S.E.2d at 703. Remoteness in time generally goes to the weight of the evidence. *State v. Wilds*, 133 N.C. App. 195, 202, 515 S.E.2d 466, 473 (1999).

The State presented evidence that on 4 April 1999, some ten months prior to the events of this case, defendant traveled to Ms. Peche's residence and began to argue with her. Defendant also

threw a pot of boiling water at her, threatening, "'If I wasn't on probation, I'd beat the hell out of you' . . . , 'I'd tear your car up[.]'" The State offered this evidence "to demonstrate intent or motive or ill will toward the victim."

We conclude that the trial court properly admitted the evidence under Rule 404(b). While it is true, as defendant argues, that Rule 404(b) evidence is subject to Rule 403's balancing test, the evidence of the prior assault was sufficiently similar and not too remote in time to prohibit its admission under the balancing test of Rule 403. *State v. Moseley*, 338 N.C. 1, 43, 449 S.E.2d 412, 437 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). ("It is not necessary that the similarities between the two situations 'rise to the level of the unique and bizarre.' Rather, the similarities must tend to support a reasonable inference that the same person committed both the earlier and later acts."); *Wilds*, 133 N.C. App. at 202, 515 S.E.2d at 473 ("Remoteness in time may be significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan. However, remoteness is less significant when the prior crime is introduced to show intent, motive, knowledge, or lack of accident."). We thus reject this argument.

By his third and fourth assignments of error, defendant argues that the State did not present sufficient evidence of his intent to kill to submit the assault charge to the jury. He also contends that the State did not present sufficient evidence of his intent to commit a felony or larceny when he broke and entered the residence

of Ms. Peche, so as to submit the breaking and entering charge to the jury. We disagree.

To obtain a conviction for assault with a deadly weapon with intent to kill inflicting serious injury, the State must present substantial evidence of each of the following: "(1) an assault; (2) with a deadly weapon; (3) with intent to kill; and (4) inflicting serious injury not resulting in death." *State v. Grigsby*, 351 N.C. 454, 456, 526 S.E.2d 460, 462 (2000). The State properly obtains a conviction for the offense of felonious breaking and entering upon a showing of substantial evidence that there was (a) a breaking and entering (b) of any building (c) with the intent to commit a felony or larceny therein. *State v. Sluka*, 107 N.C. App. 200, 204, 419 S.E.2d 200, 202 (1992). Substantial evidence has been defined as that amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Grigsby*, 351 N.C. at 456, 526 S.E.2d at 462. If the trial court determines that the evidence, when viewed in the light most favorable to the State, permits a reasonable inference of the defendant's guilt, the court must deny the defendant's motion to dismiss and send the case to the jury although the evidence also supports reasonable inferences of the defendant's innocence. *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994).

Concerning the assault charge, defendant only disputes the sufficiency of the evidence as to the intent to kill element. The North Carolina Supreme Court recently reiterated, "[a]n intent to kill is a mental attitude, and ordinarily it must be proved, if

proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred." *Grigsby*, 351 N.C. at 457, 526 S.E.2d at 462 (quoting *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956)). "Defendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.'" *State v. Washington*, 142 N.C. App. 657, 661, 544 S.E.2d 249, 252 (2001) (quoting *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988)).

In the case *sub judice*, the State presented evidence, through the testimony of Ms. Peche, that defendant broke into her home on 9 February 2000, and that after she rebuffed his sexual advances, he repeatedly stabbed her with a knife. Defendant first stabbed Ms. Peche in the hand when she attempted to protect her face. That wound extended some three and one-half inches from knuckle to wrists, and was deep enough to sever the tendons and leaders in Ms. Peche's hand. The wound to the hand prevented her from using her hand for three months, and required further plastic surgery to repair the damage. The second stab wound was to her mouth, which split her lip. It required extensive stitches and also necessitated plastic surgery. Defendant next stabbed Ms. Peche in the temple area. It also required stitches and left her in severe pain for an extended period of time. The final stab wound was to her arm.

The unprovoked, vicious knife attack on Ms. Peche would clearly permit a reasonable fact finder to infer that defendant had

the requisite intent to kill so as to support a conviction for assault with a deadly weapon with intent to kill inflicting serious injury. The trial court did not err in denying defendant's motion to dismiss this charge.

Defendant also disputes the sufficiency of the evidence as to the intent to commit a felony element of the felony breaking and entering charge. In *State v. Williams*, 330 N.C. 579, 411 S.E.2d 814 (1992), the Supreme Court explained, "[t]he criminal intent of the defendant at the time of breaking or entering may be inferred from the acts he committed subsequent to his breaking or entering the building. In other words, the jury may find the defendant's intent at the time of the breaking or entering from his subsequent acts." *Id.* at 585, 411 S.E.2d at 818 (citations omitted).

The evidence tends to show that after breaking into Ms. Peche's home, defendant repeatedly stabbed her and left her lying in a pool of blood. In accordance with the decision in *Williams*, this evidence was sufficient to show that defendant intended to commit a felony at the time of entering her home. Consequently, the trial court did not err in denying defendant's motion to dismiss the charge of felonious breaking and entering. Defendant's third and fourth arguments are rejected.

NO ERROR.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).