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NO. COA02-1559

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 99 CRS 44811
99 CRS 44812

FRANK ROBINSON, JR.

Appeal by defendant from judgment entered 7 February 2002 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 2003.

*Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.*

*William D. Auman, for defendant-appellant.*

LEVINSON, Judge.

Defendant (Frank Robinson, Jr.) appeals from convictions of first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. For the reasons discussed below, we conclude that the defendant had a fair trial, free from reversible error.

On 29 November 1999, defendant was indicted for the 12 November 1999 assault with a deadly weapon with intent to kill inflicting serious injury against Iris Black, and the first degree murder of Iris's daughter, Kamaka Hammonds. The case was capitally tried and defendant was convicted of both charges on 4 February

2001. Following a sentencing hearing that resulted in a deadlocked jury, the trial court sentenced defendant to life in prison without parole for the murder. He was also sentenced to a term of 166 to 209 months for the assault, which judgment was arrested. From these judgments and convictions, defendant appeals.

The State's evidence tended to show, in pertinent part, the following: In 1999, David and Laura Roseboro lived at 1212 Effingham Road, in Charlotte, North Carolina. David Roseboro had known the defendant for most of the defendant's life, and considered him to be "just like a son." In November, 1999, the defendant was living rent-free in the Roseboro's garage with his girlfriend, Iris Black.

On 12 November 1999, Iris was employed at Highland Mills, in Charlotte. She finished work at around 3:30 p.m., bought defendant's supper at a take-out restaurant, and then rode the bus back to Effingham Road. Iris testified that when she arrived home at 5:00 or 5:30 p.m., the defendant was "upset" at her for coming home "late." He also told Iris that Kamaka had called his pager. As defendant did not have a phone, Iris went to the Roseboro's house to call Kamaka. After speaking with Kamaka, Iris visited with Laura Roseboro for about 30 minutes, until Kamaka arrived in her car.

When Kamaka arrived, Iris went outside to greet her daughter. As she walked towards Kamaka's car, the defendant approached from the garage area and demanded to know where she was going. Iris replied that she just wanted to speak privately with her daughter,

and continued walking towards the car. Kamaka got out of the car and asked Iris whether something was wrong, and Iris explained that the defendant thought she was "going somewhere." She testified that as she arrived at Kamaka's car, the defendant suddenly said "Well, I'll tell you where, m___ f___r, you leave me, I'm going to spend the rest of my life in prison." At that point Iris and Kamaka were on opposite sides of Kamaka's car. Defendant then "pulled out a weapon and started to fire it," hitting both Iris and Kamaka.

Iris was struck by several bullets and fell to the ground. Laura Roseboro assisted her until an ambulance arrived and took Iris to the hospital. Dr. Robert Solyamvari testified that Iris had suffered multiple gunshot wounds, and had been seriously injured. She was shot in the chest, arm, and thigh; the bullets passed near vital organs, and she needed a wheelchair or crutches for several months after the shooting.

Kamaka also suffered multiple gunshot wounds and was fatally injured in the shooting. At trial, Dr. Michael Sullivan, a forensic pathologist and the Medical Examiner for Mecklenburg County, testified that Kamaka had been shot three times. One bullet struck her in the chest, perforating her left lung. Another struck her pelvis, perforating her bowel and causing extensive hemorraging. A third bullet hit her right buttock. Dr. Sullivan testifed that Kamaka died as a result of the gunshot wounds to her chest and pelvis.

Laura Roseboro testified that on 12 November 1999 Iris came over to use her phone and to visit. When Kamaka arrived at the house, Iris went outside. Laura got up and watched from her doorway as Iris went to meet her daughter. She saw the defendant come up to Iris from behind, and heard them talking. Iris kept walking towards Kamaka. As Iris approached Kamaka's car, Laura heard defendant say "Is that the way you're going to do me m___r f__k"? When Iris "got down by [Kamaka's] car" Laura, who was "still standing there at the door looking," saw defendant in front of Kamaka's car with a gun in his hand, and heard him fire "at least three or four" gunshots. She immediately called her husband David, yelling that "Frank shot Iris." David testified that when he came to the door defendant was "standing there with the gun," holding it with his arm raised and extended. After firing the shots, defendant "dropped his arm, stood there for a few seconds, and walked off."

Mark Roseboro, David Roseboro's son, testified that defendant had "grown up with" his family. When he arrived at 1212 Effingham on 12 November 1999, he saw Iris and Kamaka lying on the ground on opposite sides of the car. Mark assisted police officers in locating the defendant.

After locating defendant at an apartment belonging to a friend, Officer Chris Miller asked defendant if he "still had the gun on him that he had used to shoot two people," and defendant responded that he had already thrown it on the ground, and described the general area where he had discarded the gun. The

defendant agreed to speak with investigators at the law enforcement center, and Officer Miller drove him downtown. On the way there, the defendant said repeatedly how sorry he was, and stated that his "life was over."

Detective Valerie Gordon of the Charlotte-Mecklenburg police testified that defendant was informed of his legal rights when arrived at the law enforcement center, and agreed to speak with detectives. She and another law enforcement officer then conducted a formal tape-recorded interview with defendant. Defendant's statement to the law enforcement officers was generally corroborative of Iris's testimony. He told the officers that Iris brought him a take-out supper after she got off work; that she went to the Roseboro's to return a call from Kamaka; and that when Kamaka arrived, Iris and the defendant quarreled about where Iris was going. Defendant explained to the law enforcement officers that he was afraid that Iris might be planning to leave him. Regarding the shooting, defendant told the detectives that he had a "silver .38" on his person, and that when Iris made a "smart remark" he became angry at her and "started reaching for [his] gun." He stated, "If I'm not mistaken, I shot Iris first and then I shot her daughter," and that the shooting "was out of anger. But I don't think I intended to kill her."

The defendant's testimony at trial also corroborated much of the State's evidence. He testified that on 12 November 1999 he was living with Iris in the Roseboro's garage; that Iris was in a "stormy" mood when she came home from work that day, and that while

Iris was at the Roseboro's house calling Kamaka, he went to a nearby store and bought a beer. Defendant was standing in the street drinking the beer and visiting with a neighbor when Kamaka arrived. When Iris came out of the Roseboro's house and approached Kamaka's car, defendant asked if she was "leaving him" and according to defendant's testimony the two began "talking and arguing."

Regarding the actual shooting, defendant testified that he could not recall the details and that, although he shot at Iris, he did not intend to kill her, and had not intended to shoot or kill Kamaka. He stated that he "just remember[ed] pulling the gun out" while he and Iris were talking; that he "had a habit of talking with my weapon," and that his turning around to shoot Kamaka was a "spontaneous reflex" when he heard or felt gravel shifting under his feet.

On cross-examination, defendant characterized the shooting as "an accident" and testified that when he displayed a weapon it was generally done to scare a person by shooting "past" them. He explained that on the occasions when he pulled out a gun to scare someone, he usually did not fire the weapon because "I have self control." He conceded that he had once suspected his brother of a sexual involvement with Iris; he had fired his gun in the direction of his brother and Iris to scare them, and that on another occasion he had shot at and wounded his brother. He also admitted that neither Kamaka nor Iris had a weapon on 12 November 1999; that neither one had threatened him; and that he had to pull the trigger

separately for each shot. Defendant acknowledged that after shooting Iris and Kamaka he did not ask anyone to summon help, either at 1212 Effingham or at the friend's house where the law enforcement officers found him. Other evidence will be discussed as necessary to resolve the issues raised on appeal.

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Defendant presents six arguments on appeal. He argues first that the trial court erred by failing to disqualify the office of the District Attorney from prosecuting this case, on the grounds that a conflict of interest existed. We disagree.

On 20 January 2000, defendant filed a motion to disqualify the office of the District Attorney for the 26th Judicial District from prosecuting him. Evidence presented at a hearing on defendant's motion tended to show the following: When defendant was indicted in November 1999, the prosecution of defendant's case was initially assigned to Assistant D. A. Marsha Goodenow. In September, 2001, Assistant District Attorneys Glenn Cole and David Graham were assigned to defendant's case. However, shortly thereafter, Cole and Graham determined that, during the course of their previous employment as Assistant Public Defenders, each had represented the defendant. Accordingly, his case was reassigned again, this time to Assistant District Attorneys Carla Archie and Barry Cook.

Graham's previous representation of defendant was for a property crime occurring over ten years before the instant offenses, and was not part of defendant's claim of a conflict of interest. Cole had represented defendant in 1995 on a misdemeanor

charge of communicating a threat. Defendant was also represented in 1995 by Assistant Public Defender Tony Purcell on a felony charge of assault with a deadly weapon with intent to kill inflicting serious injury, involving the same incident and the same victim as the charge of communicating a threat. Defendant pled guilty to the felony assault charge, and the misdemeanor charge was dismissed.

On this basis, defendant argued that Cole "constructively represented" defendant on the 1995 felony assault arising from the same incident as the misdemeanor charge on which Cole represented him, and that he might have obtained confidential information about defendant pertaining to the 1995 felony assault charge. Defendant contended that, because the fact of defendant's 1995 conviction of the felony assault could be submitted to the jury during the sentencing phase of trial, that any confidential information that Cole might have about the earlier assault could possibly be used to defendant's detriment.

On 23 January 2002, the trial court denied defendant's motion. The trial court applied a "balancing test" weighing the defendant's right to "due process under the United States Constitution and the law of North Carolina, and the right and obligation of the District Attorney to prosecute cases within the jurisdiction of that office[,]" and found "no evidence that Mr. Cole obtained any confidential information from his representation of the Defendant in those misdemeanor cases in 1995 and 1996 which is likely to be used to the detriment of the Defendant in these cases." The court

concluded that "the rights of the Defendant are not shown to be so affected as to require the withdrawal of the District Attorney's office in these cases."

The leading case on this issue is *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991), in which the North Carolina Supreme Court articulated the standard to be applied to claims of a conflict of interests. In *Camacho*, as in the instant case, an assistant district attorney in the office prosecuting the defendant had previously been employed as an assistant Public Defender. She had been an assistant public defender during defendant's first trial on the charges at issue on appeal and had performed legal research for trial counsel pertaining to a motion alleging ineffective assistance of counsel. However, she had "neither been assigned to nor had any involvement with the merits of the defendant's case[.]" *Id.* at 591, 406 S.E.2d at 870. The trial court nonetheless disqualified the D. A.'s office from prosecuting the case, "in order to avoid even the possibility or impression of any conflict of interest[.]" *Id.* at 593, 406 at 870. The North Carolina Supreme Court reversed. Citing *United States v. Goot*, 894 F.2d 231, 236 (7th Cir. 1990), *cert. denied*, 498 U.S. 811, 112 L. Ed. 2d 22 (1990), the Court held that in evaluating claims of a conflict of interest, the court should:

> balance the respective interests of the defendant, the government, and the public. . . . [The defendant] has a fundamental interest in his fifth amendment right not to be deprived of liberty without due process of law and in his sixth amendment right to counsel. The government has an interest in fulfilling its public protection function.

*Id.* at 600, 406 S.E.2d at 874-75 (citations omitted). The Court "conclude[ed] that the balancing test applied in *Goot* satisfies the requirements of the fifth and sixth amendments to the Constitution of the United States and article I, [§ §] 19 and 23 of the Constitution of North Carolina[,]" and held:

> a prosecutor may not be disqualified from prosecuting a criminal action in this State unless and until the trial court determines that an actual conflict of interests exists. In this context, an "actual conflict of interests" is demonstrated where a District Attorney or a member of his or her staff has previously represented the defendant with regard to the charges to be prosecuted **and**, as a result of that former attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant's detriment at trial. Even then, however, any order of disqualification ordinarily should be directed only to individual prosecutors who have been exposed to such information.

*Id.* at 600-01, 406 S.E.2d at 875 (emphasis added). The principles enunciated in *Camacho* are applicable to similar claims. *See State v. Anthony*, 354 N.C. 372, 393, 555 S.E.2d 557, 573 (2001) (assistant district attorney had briefly represented defendant on the same charges at issue on appeal; Court upholds trial court's denial of motion to disqualify District Attorney, noting that "[t]his issue is controlled by our holding in [*Camacho*]"), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002).

In the present case, the record contains no evidence that Cole either (1) represented defendant on the charges herein, or that he (2) obtained confidential information that could be used to the defendant's detriment. We conclude that the trial court applied

the proper standard and that the court did not err by denying defendant's motion. This assignment of error is overruled.

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We next address defendant's argument that the trial court erred by denying his motion to dismiss all charges against him on the grounds that the evidence was insufficient as a matter of law. This contention is without merit.

"Upon a defendant's motion to dismiss, the court must consider whether the State has presented substantial evidence of each essential element of the crime charged." *State v. Alexander*, 152 N.C. App. 701, 705, 568 S.E.2d 317, 319 (2002). "'Substantial evidence' is relevant evidence that a reasonable mind might accept as sufficient to support a conclusion." *State v. Allen*, 346 N.C. 731, 739, 488 S.E.2d 188, 192 (1997).

> In determining whether the State has presented sufficient evidence to support a conviction, "the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State." Thus, "[c]ontradictions and discrepancies must be resolved in favor of the State, and the defendant's evidence, unless favorable to the State, is not to be taken into consideration."

*State v. Shelman*, __ N.C. App. __, __, 584 S.E.2d 88, 92 (2003) (quoting *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002), and *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984)).

In the instant case, defendant was charged with first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant asserts that "there was no

substantial evidence that Mr. Robinson committed the act of first-degree murder or felonious assault with a deadly weapon with intent to kill inflicting serious injury." This contention is meritless.

Defendant was prosecuted on the theory that he committed first degree felony murder. The jury was not instructed on premeditated and deliberate murder, but only on first degree felony murder. Under N.C.G.S. § 14-17 (2003), this offense is defined as follows:

> A murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, <u>or other felony committed or attempted with the use of a deadly weapon</u> shall be deemed to be murder in the first degree, a Class A felony. . . .

(emphasis added). Premeditation, malice, and/or intent to kill are not elements of this offense. *State v. York*, 347 N.C. 79, 97, 489 S.E.2d 380, 390 (1997). Thus:

> First-degree murder based upon the felony murder rule has <u>only two elements</u>: (1) the defendant knowingly committed or attempted to commit one of the felonies indicated in [N.C.G.S. § 14-17], and (2) a related killing. Whether the defendant committed the killing himself, intended that the killing take place, or even knew that a killing might occur is irrelevant. More specifically, a killing during the commission or attempt to commit one of the felonies indicated in the statute is murder in the first degree without regard to premeditation, deliberation or malice.

*State v. Mann*, 355 N.C. 294, 311-12, 560 S.E.2d 776, 787 (2002) (citation omitted).

In the light most favorable to the State, the evidence showed the following: On 12 November 1999 defendant and Iris quarreled when she came home from work; Iris went to the Roseboro's house to

call Kamaka; when Kamaka arrived at the house, defendant followed her to Kamaka's car, demanding to know where she was going and if she was leaving him, and threatening "m__ f___r, you leave me, I'm going to spend the rest of my life in prison"; defendant then pulled out a gun and shot both Iris and Kamaka; neither Iris nor Kamaka were armed or had threatened him physically when he shot them; defendant confessed to law enforcement officers that he had shot both women in anger, and later testified at trial that he was responsible for the shootings.

The predicate felony supporting defendant's conviction of first degree felony murder of Kamaka was his assault with a deadly weapon with intent to kill inflicting serious injury against Iris. "In order to prove this crime under N.C.G.S. § 14-32(a), four essential elements must be shown: (1) assault; (2) with a deadly weapon; (3) with intent to kill; and (4) serious injury not resulting in death." *State v. James*, 321 N.C. 676, 687, 365 S.E.2d 579, 586 (1988). Defendant cannot seriously dispute that he shot both Iris and Kamaka with a deadly weapon, that Iris suffered serious injuries, or that Kamaka died as a result of the shooting. Defendant, however, asserts that "the issue of sufficiency must rise and fall on the <u>element of specific intent to shoot and kill</u> Ms. Black." (emphasis added). Defendant argues that there was no evidence that he had the specific intent to kill. We disagree. The specific intent to kill is an essential element of assault with a deadly weapon with intent to kill inflicting serious injury.

G.S. § 14-32(a). Further:

> An intent to kill is a mental attitude, and ordinarily it must be proved . . . by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred. An 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. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956) (citation and quotation marks omitted). "Moreover, an assailant must be held to intend the natural consequences of his deliberate act." *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (citation and quotation marks omitted).

In the present case, the defendant acknowledged shooting both victims in anger. In addition there was evidence from which the jury could find that: defendant had uttered threats and obscenities just before the shooting; David and Laura Roseboro saw defendant holding the gun as the shots were fired, and David saw defendant with his arm extended pointing the gun towards the women; the two victims were on opposite sides of the car, suggesting defendant had to turn around to shoot Kamaka; defendant had to pull the trigger separately for each shot; defendant testified that he generally exercised "self control" regarding whether to fire his gun; Iris and Kamaka each suffered multiple gunshot wounds inflicted at relatively close range; and defendant did not try to summon help after shooting the women.

"When considering a motion to dismiss, if the trial court determines that a *reasonable* inference of the defendant's guilt *may*

be drawn from the evidence, it must deny the defendant’s motion . . . even though the evidence may also support reasonable inferences of the defendant’s innocence.” *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994) (citation and quotation marks omitted). We conclude that there was more than sufficient evidence from which the jury could infer that defendant acted with the intent to kill, and that the trial court did not err by denying defendant’s motion to dismiss for insufficiency of the evidence. This assignment of error is overruled.

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Defendant argues next that the trial court erred by allowing the State to introduce testimony by “Laura Roseboro, defendant’s land[lady]” that defendant had previously been incarcerated, and had been “in and out of trouble.” We disagree.

Preliminarily, we note that the challenged testimony was offered, not by Laura Roseboro, but by her stepson Mark Roseboro. The testimony was as follows:

> PROSECUTOR: Mr. Roseboro, give us a little background about - you commented that [the defendant] grew up with your family.
> MARK ROSEBORO: Yes.
> PROSECUTOR: Give us a little background about that circumstance.
> MARK ROSEBORO: Well, he has been on and off because he has been in and out of trouble. And I know when he went to prison one time.

Because defendant failed to object to the admission of this testimony, appellate review is limited to review for plain error. *State v. Davis*, 353 N.C. 1, 43, 539 S.E.2d 243, 270 (2000), *cert denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001) (citation omitted).

Moreover, defendant did not allege plain error in his assignment of error, and thus failed to comply with N.C.R. App. P. 10(c)(4), which states:

> In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error <u>where the judicial action questioned is specifically and distinctly contended to amount to plain error</u>.

(emphasis added). Where defendant fails to allege plain error he waives the right to review even for plain error. *State v. Truesdale*, 340 N.C. 229, 233, 456 S.E.2d 299, 301 (1995). However, despite defendant's failure to properly preserve this issue for review, in the interests of justice and pursuant to our authority under N.C.R. App. P. 2, we elect to review defendant's argument for plain error. Plain error is "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or . . . grave error which amounts to a denial of a fundamental right of the accused." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). "[T]o prevail under a plain error analysis, a defendant must show: (1) there was error; and (2) without this error, the jury would probably have reached a different verdict." *State v. Smith*, 152 N.C. App. 29, 37-38, 566 S.E.2d 793, 799, *cert. denied*, 356 N.C. 311, 571 S.E.2d 208 (2002) (citation omitted).

We conclude that, in view of the overwhelming evidence of defendant's guilt as summarized above, the admission of the challenged testimony was not plain error. *State v. Smith*, 351 N.C.

251, 265, 524 S.E.2d 28, 39 (2000) ("[D]efendant has failed to show plain error in light of the overwhelming evidence in the record of defendant's guilt."). We also note that in his opening argument, defense counsel informed the jury that defendant had been in prison. This assignment of error is overruled.

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Defendant argues next that the trial court erred by allowing the defendant to be cross-examined concerning an incident in 1993 in which he had fired a gun at his brother.

On cross-examination defendant was questioned briefly about an earlier incident in which he had fired a gun at his brother. Defendant did not object to the introduction of this evidence, and on appeal he states only that admission of the challenged testimony "amounts to plain error." However, defendant has not presented any argument as to why admission of this cross-examination testimony was a fundamental error whose prejudice is so great as to require reversal, notwithstanding defendant's failure to object. As noted by the North Carolina Supreme Court

> The rule that unless objection is made to the introduction of evidence at the time the evidence is offered, . . . any objection thereto is deemed to have been waived is not simply a technical rule of procedure. Were the rule otherwise, an undue if not impossible burden would be placed on the trial judge. . . . [A] party [may] feel[] that evidence which might be incompetent would be advantageous to him, therefore, he does not object. Since the party does not object a trial judge should not have to decide "on his own" the soundness of a party's trial strategy.

*State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983).

Moreover, defendant failed to specifically and distinctly assign plain error, as required by N.C.R. App. P. 10(c)(4). He has thus failed to preserve the alleged error for review even for plain error. *State v. Washington*, 134 N.C. App. 479, 485, 518 S.E.2d 14, 17 (1999) ("Defendant has waived plain error review by failing to allege in his assignment of error that the trial court committed plain error."). We conclude that, by failing either to object to the testimony at trial, or to specifically allege the existence of plain error in his assignment of error, the defendant has waived review of this issue. Moreover, we find no compelling reason to exercise our discretion under N.C.R. App. P. 2. This assignment of error is dismissed.

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Defendant's final two arguments challenge the trial court's denial of defendant's objection to admission of cross-examination testimony regarding prior assaults by defendant. Because these assignments of error involve similar issues, we address them together. One of these assaults was against Iris, and the other was an assault against a former girlfriend, Mary (or 'Tina') Blackwell. Defendant contends that the trial court committed reversible error by admitting this evidence. We disagree.

The trial court ruled that the challenged evidence was admissible under North Carolina Rule of Evidence Rule 404. Rule 404(b) provides:

> *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.G.S. § 8C-1, Rule 404(b) (2003). Our Supreme Court has held that:

> Rule 404(b) is a clear 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. Lloyd*, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001) (citation omitted). "Accordingly, evidence of other offenses is admissible so long as it is *relevant to any fact or issue other than* the character of the accused." *Id.* (citations and quotation marks omitted).

In ruling on a motion to admit evidence under Rule 404(b), the trial court must also consider whether the evidence, although relevant, should "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C.G.S. § 8C-1, Rule 403 (2003). "Whether or not to exclude evidence under Rule 403 is a matter within the sound discretion of the trial judge." *State v. Bynum*, 111 N.C. App. 845, 849, 433 S.E.2d 778, 781 (1993).

Thus, unless it is unduly prejudicial, evidence of prior assaults may be admissible under Rule 404(b) to rebut a defendant's claim that a shooting occurred accidentally. *Lloyd*, 354 N.C. at

89, 552 S.E.2d at 608 (noting that where "defendant testified that the shooting was accidental and that he did not intend to shoot the victim" appellate cases hold that "evidence of similar acts is more probative than in cases in which an accident is not alleged") (citation omitted).

Our Supreme Court has also noted that:

> The recurrence or repetition of the act increases the likelihood of a *mens rea* or mind at fault. In isolation, it might be plausible that the defendant acted accidentally or innocently; a single act could easily be explained on that basis. However, in the context of other misdeeds, the defendant's act takes on an entirely different light. The fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed. The coincidence becomes telling evidence of *mens rea*.

*State v. Stager*, 329 N.C. 278, 305, 406 S.E.2d 876, 891 (1991) (citation omitted); *see also State v. Taylor*, 154 N.C. App. 366, 371, 572 S.E.2d 237, 241 (2002) (where defendant argued that shooting "was an accident caused by his and [victim's] struggle for the pistol" evidence of earlier threats to shoot another woman admissible "to rebut the defense of accident, . . . and was probative of whether or not the shooting of [victim] was accidental").

In the instant case, defendant testified on cross-examination that:

> PROSECUTOR: What does your religion say about killing?
> DEFENDANT: <u>You call it killing. I don't call it killing</u>.
> PROSECUTOR: What would you call it?
> DEFENDANT: <u>Call it accident</u>.

(emphasis added). Defendant also testified that "usually if I pull my gun out, it's to scare. It's to shoot by you, to shoot past you[;]"; that his shooting of Kamaka was no more that a "spontaneous reflex[;]" and that he did not intend to shoot or kill Kamaka, and did not intend to kill Iris. To rebut this testimony, the State sought to admit evidence that defendant had previously fired a gun at Iris, and had previously assaulted Tina Blackwell, his ex-girlfriend, with a knife. Following a *voir dire*, the trial court made findings of fact regarding defendant's prior assault on Blackwell, including in pertinent part, findings that:

> [1.] [O]n direct examination, . . . the defendant was asked did he intend to kill Kamaka, and he said, no, he didn't intend to shoot Kamaka. He didn't intend to kill Iris.
>
> [2.] The matter . . . about Tina Blackwell was 1996. The matter involving this offense was 1999.
>
> [3.] Both of them involved women with whom the defendant was living. Both of them involved confrontations or arguments about their personal relationship and something about leaving or arguments between them about their future.
>
> [4.] [T]here are also similarities in that the defendant assaulted the victims more than once.

The trial court concluded that:

> [1.] [T]he three year period of time [between the 1996 conviction and the 1999 offenses] is not so temporally remote as to be a constraint on the application of Rule 404(b). . . .
>
> [2.] Rule 404(b) can apply to these circumstances to allow an inquiry or presentation of evidence about the details in

> regard to the crime upon which the defendant was convicted, that is the felonious assault on Tina Blackwell. . . .
>
> [3.] [A]s to the [Rule] 403 consideration . . . the probative value is greater than any prejudicial effect that might come from the admissibility of this evidence on this matter.

Thereafter, defendant was asked about the 1995 incident in which he had assaulted Blackwell. Defendant's response amounted to an extensive monologue occupying five transcript pages, in which defendant volunteered an extremely detailed account of the incident, the events surrounding the assault, and his feelings at the time. The gist of defendant's testimony was this: Blackwell had a car given to her by her ex-husband; as a result defendant was "hurting[;]" when Blackwell came to his place of employment in this car, they quarreled; defendant responded to the situation by stabbing Blackwell multiple times with a pocket knife, then walking away without summoning help.

On appeal from a trial court's ruling on admission of Rule 404(b) evidence, the standard of review is whether the trial court abused its discretion in admitting the evidence. *State v. Bynum*, 111 N.C. App. 845, 848-49, 433 S.E.2d 778, 780-81 (1993). In the instant case, we conclude that the trial court applied the proper standard in determining the admissibility of evidence of defendant's stabbing of Blackwell. Competent evidence supports the trial court's findings, which in turn support its conclusion. In addition, the trial court gave the jury a limiting instruction on their consideration of the testimony. We conclude that the trial

court did not make an error of law, or abuse its discretion, in admitting this evidence. This assignment of error is overruled.

We next consider the trial court's admission of cross-examination testimony that defendant had previously fired a gun in the direction of Iris and defendant's brother. The testimony to which defendant objects merely expanded slightly on testimony that had been earlier admitted without objection. Defendant had testified that on a prior occasion he had fired his gun at Iris to scare her. Upon being cross-examined later in the trial concerning the same incident, defendant testified that when he learned that Iris and his brother had some previous sexual involvement, he felt betrayed and, in response, had fired his gun in their direction to scare Iris and his brother.

"Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) (citation omitted). "It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979). In the instant case, the testimony to which defendant objects was "of a similar character" to that which was earlier introduced without objection. Furthermore, in view of the overwhelming evidence of defendant's guilt, the error, if any, in admitting this testimony, was harmless. This assignment of error is overruled.

For the reasons discussed above, we conclude that the defendant's trial was free of prejudicial error.

No Error.

Judges WYNN and TYSON concur.

Report per Rule 30(e).