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NO. COA02-68

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v.

Catawba County
No. 00 CRS 15037

THOMAS EDWARD DADISMAN

Appeal by defendant from judgment entered 14 August 2001 by Judge James W. Morgan in Catawba County Superior Court. Heard in the Court of Appeals 9 December 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kay Linn Miller Hobart, for the State.

Charns & Charns, L.L.P., by D. Tucker Charns, for defendant-appellant.

CAMPBELL, Judge.

Defendant appeals his conviction, following a jury trial, for one count of embezzlement. We find no error and affirm the judgment of the trial court.

The State's evidence tended to show the following: In August of 2000, defendant was employed as manager of a Petroleum World store in Hickory. One of defendant's duties as manager was to make a daily deposit of the store's previous day's receipts into its bank account. Defendant was the only employee who had a key or access to the store's safe.

On the morning of 3 August 2000, Petroleum World District Manager Jan Ellis paid a visit to defendant's store. Defendant was sitting on the floor counting money. The safe was open. Ellis saw defendant's cash report for 1 August 2000. When she asked to see the deposit slip for receipts of August 1, defendant replied that he had not yet taken the deposit to the bank. The store's receipts for August 1 should have been deposited on August 2, and defendant should have been preparing the cash report and deposit for August 2.

Defendant asked Ellis to come outside, where he threw his safe key at her and announced he was quitting because Ellis did not trust him. After defendant left, Ellis telephoned her manager, Ellen Harris. When Harris arrived at the store, they counted the money in the safe. After setting aside enough money to cover the August 1 deposit, they prepared the cash report for August 2. The store receipts for August 2 totaled \$5,111.71. However, only \$656.18 remained in the safe, leaving a shortfall of \$4,455.53. Defendant had never informed Ellis of any missing money.

Over defendant's objection, the prosecution sought to introduce evidence of defendant's prior embezzlement from a Bojangles restaurant in Lenoir, which he managed in 1993. After a voir dire hearing, the trial court ruled the evidence admissible under N.C.R. Evid. 404(b), provided that no reference was made to defendant's criminal conviction for this activity. John Watlington, who was a Bojangle's district manager in 1993, testified that defendant had post-dated deposit tickets in order to

delay or "float forward" the restaurant's daily bank deposits. Watlington explained that by holding back deposits for one day, defendant was able to take money from the restaurant's receipts and use the following day's receipts to hide the deficit. On payday, defendant would cash his paycheck and repay the balance of the money he had taken. When defendant failed to pay back \$450.00, however, Watlington discovered the scheme. Defendant ultimately admitted to Watlington that he had been floating deposits forward.

On cross-examination, defense counsel asked Watlington if defendant had repaid the \$450.00 taken from Bojangle's. Watlington responded, "The court in Caldwell County asked him to pay it back. I do not know if he paid it back or not. I'm assuming that he did." Defense counsel objected and moved for a mistrial based on Watlington's allusion to a court proceeding against defendant. The trial court denied the motion, finding that the witness did "not make any reference to criminal proceedings[.]" The court instructed the jury to disregard Watlington's "reference to a court" as "totally irrelevant to this proceeding." In its charge to the jury, the court also gave a limiting instruction that Watlington's testimony could be used only to show defendant's motive, intent, knowledge, plan, scheme or design, or the absence of mistake.

The trial court denied defendant's motion to dismiss at the conclusion of the evidence.

On appeal, defendant argues that the trial court erred in admitting Watlington's testimony about his prior act of

embezzlement in 1993. He contends this evidence showed nothing but a general propensity to commit embezzlement and was so remote in time that it was unduly prejudicial under N.C.R. Evid. 403.

Rule 404(b) provides as follows:

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). We have previously characterized this rule as a "rule of inclusion of relevant evidence of other crimes, wrongs, or acts which is subject to but one exception, evidence should be excluded 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. Blackwell*, 133 N.C. App. 31, 34, 514 S.E.2d 116, 119 (1999) (citing *State v. Jeter*, 326 N.C. 457, 459-60, 389 S.E.2d 805, 807 (1990)), *cert. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999). In order to be admissible against a defendant, Rule 404(b) evidence must be both sufficiently similar to and not too remote in time from the charged offense. See *State v. Davis*, 101 N.C. App. 12, 19, 398 S.E.2d 645, 649 (1990), *disc. rev. denied*, 328 N.C. 574, 403 S.E.2d 516 (1991)). "The similarities . . . need not be 'unique and bizarre,' but rather must simply tend to support a reasonable inference that the same person committed both the earlier and later acts." *Blackwell* at 35, 514 S.E.2d at 119 (quoting *State v. Sneed*, 108 N.C. App. 506, 509, 424 S.E.2d 449, 451 (1993), *aff'd*, 336 N.C. 482, 444 S.E.2d

218 (1994)). Moreover, our "prior cases have held that intervals of seven and ten years are not necessarily too remote to preclude the admission of prior-bad acts." *State v. Blackwell* at 36, 514 S.E.2d at 120 (citing *State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997); *State v. Shamsid-Deen*, 324 N.C. 437, 379 S.E.2d 842 (1989)).

We find the evidence of defendant's prior embezzlement from the Bojangle's restaurant in 1993 admissible under Rule 404(b) to show his intent, motive, knowledge, or the absence of mistake. Defendant's actions were sufficiently similar to reflect a distinctive *modus operandi*. In both cases, defendant used his position as manager of a retail establishment to delay or "float forward" the deposits of the store's cash receipts in order to conceal his misappropriation of funds. Moreover, the span of seven years between the two acts did not render the challenged evidence inadmissible. In *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 892 (1991), our Supreme Court upheld the use of evidence of the shooting death of defendant's first husband ten years earlier in defendant's trial for the murder of her second husband. The court first determined that the circumstances of the deaths were sufficiently similar to show defendant's intent. It then noted that "remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Id.* at 307, 406 S.E.2d at

893. Indeed, "[i]t 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." *State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986).

Defendant also asserts that the risk of undue prejudice arising from the challenged evidence outweighed its probative value and required its exclusion under N.C.R. Evid. 403. Rulings on the admissibility of evidence under Rule 403 are left to the trial court's discretion. See *State v. Robertson*, 115 N.C. App. 249, 255, 444 S.E.2d 643, 646 (1994). A trial court's decision on this issue is controlling unless it "'is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.'" *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 412-413 (1998) (citation omitted).

We find no abuse of discretion here. As mentioned above, the evidence of defendant's actions as a manager for Bojangle's was relevant to demonstrate his *modus operandi* and his "felonious intent" to convert Petroleum World's cash receipts to his own use, an essential element of the crime of embezzlement. *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 232 (1953). The trial court cured any risk of unfair prejudice by forbidding any mention of defendant's criminal conviction and by giving an appropriate limiting instruction regarding the use of Rule 404(b) evidence. See *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998). Defendant's assignment of error is overruled.

Defendant also asserts that the trial court should have granted a mistrial based on Watlington's mention of defendant's prior criminal conviction. Because he did not testify, defendant claims both that the evidence of his prior conviction was inadmissible under N.C.R. Evid. 609, and that its introduction violated his constitutional right to due process. We note that defendant raised no due process claim in the trial court and has cited no authority to support his due process argument in his appellate brief. Accordingly, this issue is not properly before us. See N.C.R. App. P. 10(b)(1), 28(b)(6); *State v. Brown*, 148 N.C. App. 683, 684, 560 S.E.2d 170, 172 (2002) (citation omitted). In any event, no reference was made to defendant's prior criminal prosecution. Therefore, defendant's invocation of Rule 609 and the right to due process is inapposite.

A trial court's denial of a motion for a mistrial is reviewed only for abuse of discretion. *State v. Mills*, 39 N.C. App. 47, 249 S.E.2d 446 (1978), *disc. review denied*, 296 N.C. 588, 254 S.E.2d 33 (1979). An abuse of discretion will be found "only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Hogan*, 321 N.C. 719, 722, 365 S.E.2d 289, 290 (1988) (citation omitted). "Where a trial court sustains an objection to incompetent evidence and instructs the jury to disregard it, the refusal to grant a mistrial based on the introduction of the evidence will ordinarily not constitute an abuse of discretion.'" *Id.* at 722-23, 365 S.E.2d

290-91 (quoting *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986)).

In *Hogan*, the Supreme Court found no abuse of discretion in the trial court's denial of the defendant's motion for a mistrial after a State's witness referred to a criminal charge pending against the defendant in Maryland. *Id.* The trial court sustained defendant's objection to the testimony and instructed the jury to ignore it, a response held sufficient by the North Carolina Supreme Court. *Id.*

Having carefully reviewed the relevant portion of the trial transcript, we conclude that the trial court's refusal to declare a mistrial was a valid exercise of its discretion. Watlington testified only that a court had ordered defendant to repay money to Bojangle's. He made no mention of a criminal action against defendant or to his conviction for any criminal offense. We note that an order to repay stolen money could just as readily have resulted from a private civil suit as from a criminal action.

As in *Hogan*, the trial court's response to Watlington's testimony was sufficient to eliminate any risk of unfair prejudice to defendant. At defendant's objection to Watlington's response on cross-examination, the court gave a timely curative instruction directing the jury to disregard any "reference to a court" as "totally irrelevant to this proceeding." No further response was required.

In his final argument, defendant contends that the trial court erred in denying his motion to dismiss based on the State's failure

to prove that he was more than sixteen years of age at the time of the alleged offense. See N.C. Gen. Stat. § 14-90 (2001) (excluding from the definition of embezzlement acts committed by "persons under the age of 16 years"). We find no merit to this claim. The State's proffer was sufficient to allow the jury to infer that defendant was more than sixteen years of age on 3 August 2000, as required to support his conviction for embezzlement under G.S. § 14-90. The State adduced evidence that defendant was employed as a restaurant manager in 1993. In addition, "[i]t is well established that a jury may 'base its determination of a defendant's age on its own observation of him even when the defendant does not testify.'" See *State v. Banks*, 322 N.C. 753, 761, 370 S.E.2d 398, 404 (1988) (quoting *State v. Gray*, 292 N.C. 270, 286, 233 S.E.2d 905, 915 (1977)).

The record on appeal contains additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to our rules, we deem them abandoned. See N.C.R. App. P. 28(b)(6).

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).