NO. COA03-1614

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2004

STATE OF NORTH CAROLINA

v. Harnett County
No. 02-CRS-52697

KENNETH EARL BYRD, JR.

Appeal by defendant from judgment entered 8 May 2003 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 1 September 2004.

*Attorney General Roy Cooper, by Special Deputy Attorney General Edwin W. Welch, for the State.*

*Bruce T. Cunningham, Jr. for defendant-appellant.*

THORNBURG, Judge.

Defendant Kenneth Earl Byrd, Jr. was convicted of first-degree murder and sentenced to life imprisonment without parole. On appeal, defendant argues that the trial court erred by denying defendant's motion in limine to prohibit the State from introducing defendant's statement that he did not want to go back to prison. After careful consideration of the transcript, record and briefs, we find no prejudicial error.

Defendant was arrested on 7 May 2002 in connection with the disappearance of Brenda Renee Lancaster. After being advised of his rights, defendant gave a statement to Lieutenant Joseph C.

Webb, a detective with the Harnett County Sheriff's Department. In the statement, defendant indicated that Lancaster pointed a gun at him and threatened to kill him. Defendant grabbed the barrel of the gun and twisted it away from himself. The gun went off, shooting Lancaster in the neck. The statement then continues as follows:

> Blood was everywhere, and Renee was gagging for breath. It was a mess, and I panicked. Renee was holding her neck, and the gun fell into my hands. She was still standing. I panicked, and I pointed the gun at her and shot her three to four more times. I don't know where I shot her at. I'm not sure if I was angry. I don't remember being angry. I was just scared and didn't want to go back to prison. The first thing I thought was, "I don't want to go back to prison."

According to his statement, defendant then hid Lancaster's body in a ditch in the woods. The next day defendant returned and buried the body deeper into the ground. Several weeks later, defendant was apprehended in a hotel room in South Carolina and charged with first-degree murder.

Prior to jury selection at defendant's trial, defense counsel made a motion to redact the reference to going back to prison from defendant's statement. The trial judge heard arguments from counsel but declined to rule on the motion. At trial, the prosecutor and defense counsel again argued the issue outside of the presence of the jury. Defense counsel objected to the prosecution using defendant's statement about not wanting to go back to prison and argued that telling the jury that defendant had been in prison would be more prejudicial than probative. The State argued that

the statement was necessary to prove motive and that admitting the statement was not the same as admitting defendant's criminal record. The trial court denied defendant's motion. Defense counsel then made another motion asking for redaction of just the word "back," which the trial court also denied. Over objection by the defendant, the State introduced defendant's statements made to police and relatives indicating that he did not want to go back to prison.

The dispositive issue on appeal is whether the trial court abused its discretion by denying defendant's motion in limine and thus, allowing the jury to hear that defendant had previously been in prison. "A ruling on a motion *in limine* is within the sound discretion of the trial court and will only be disturbed on appeal in the case of a manifest abuse of discretion." *State v. Clapp*, 135 N.C. App. 52, 55, 519 S.E.2d 90, 92 (1999). Under Rule 402 of the North Carolina Rules of Evidence, all relevant evidence is admissible at trial. N.C. Gen. Stat. § 8C-1, Rule 402 (2003). However, "the trial court must exclude evidence of other crimes, wrongs, or acts if the purpose of the evidence is to show defendant's propensity to commit the crime." *State v. Fritsch*, 351 N.C. 373, 383, 526 S.E.2d 451, 458 (2000), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "[S]uch evidence may 'be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.'" *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 404(b)).

Defendant cites Judge Wynn's dissent in *State v. Wilkerson*, which was adopted by the North Carolina Supreme Court in reversing this Court's majority decision, as support for his argument that the references to defendant having been in prison were irrelevant and prejudicial. *State v. Wilkerson*, 148 N.C. App. 310, 559 S.E.2d 5 (2002)(Wynn, J., dissenting), *dissent adopted per curiam*, 356 N.C. 418, 571 S.E.2d 583 (2002). In *Wilkerson*, the defendant was tried for possession with intent to sell or deliver cocaine and trafficking in cocaine. *Wilkerson*, 148 N.C. App. at 311, 559 S.E.2d at 6. At trial, the State called an employee of the clerk's office to testify that the defendant had prior convictions. The *Wilkerson* dissent rejected the State's argument that these convictions were admissible for a legitimate Rule 404(b) purpose and emphasized that the admission under this rule of the bare fact of a defendant's prior conviction where the defendant does not testify is prejudicial, reversible error. *Id.* at 328-29, 559 S.E.2d at 16-17 (Wynn, J., dissenting), *dissent adopted per curiam*, 356 N.C. 418, 571 S.E.2d 583.

On appeal, defendant argues that introducing his statement that he had previously been in prison was equivalent to introducing the bare fact of his prior conviction. Without deciding whether being in prison is evidence of a prior crime or bad act and thus, within the scope of Rule 404(b), we conclude that the statement at issue was relevant to and probative of motive and intent. In *Wilkerson*, Judge Wynn indicated that in certain circumstances evidence of a prior conviction could be relevant to motive:

> [F]or instance, the bare fact that defendant was convicted of an offense could be probative of a defendant's motive or intent in committing a subsequent crime of assaulting a witness that helped procure the earlier conviction. Even then, the trial court would be required to assess the prejudice of allowing the bare evidence of the prior conviction under Rule 403.

*Id.* at 327 n.2, 559 S.E.2d at 15-16 n.2. In the case at bar, the State argued at trial that even if the first shot fired was an accident, the rest of the shots fired were intended to kill Lancaster because defendant was afraid to go back to prison. Therefore, unlike the situation in *Wilkerson*, the evidence at issue in the present case was probative of defendant's motive and intent. Furthermore, the trial judge properly weighed the potential prejudice against the probative value of the statements outside of the presence of the jury. N.C. Gen. Stat. § 8-C, Rule 403 (2003). Accordingly, we hold that the trial court did not abuse its discretion by denying defendant's motion in limine to redact this statement.

No error.

Judges GEER and LEVINSON concur.

Report per Rule 30(e).