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NO. COA05-1171

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v.

Scotland County  
No. 04CRS050394

ALBERT WILLIE MCKENZIE

Appeal by defendant from judgment entered 17 February 2005 by Judge Robert F. Floyd, Jr. in Scotland County Superior Court. Heard in the Court of Appeals 12 April 2006.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Jane Ammons Gilchrist, for the State.*

*Stubbs, Cole, Breedlove, Prentis & Biggs, PLLC, by C. Scott Holmes, for defendant-appellant.*

HUNTER, Judge.

Albert Willie McKenzie ("defendant") appeals from judgment entered 17 February 2005 consistent with a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury. For the reasons stated herein, we find no error.

The State's evidence tends to show that defendant lived adjacent to the homes of Howard Clark ("Clark") and Reedy and Robin Barfield. Defendant's home was accessible by a dirt road that ran through Clark's property, as well as a road that led from defendant's home to Crestline Road. Defendant blocked off the road leading to Crestline Road, and began using the dirt road which ran

across Clark's property to access his home. Shortly thereafter, Robin Barfield ("Robin") spoke with Clark regarding problems she was having with defendant and requested Clark's permission to block off the dirt road where it crossed Clark's property. Clark agreed.

On 30 January 2004, Robin and her son put up a rope across the dirt road on Clark's property. Defendant cut the rope later that afternoon while driving home. Robin told her husband, Reedy Barfield ("Reedy"), and Clark that defendant had cut the rope. Clark agreed to put up a cable.

While Clark was putting up the cable, defendant came out of his home and walked towards the group, which included Clark, Robin, Reedy, their two sons, and James Locklear ("Locklear"). Defendant's hands were in his pocket as he approached. Defendant inquired as to what Clark was doing and Clark explained that he was blocking the road. Defendant came up behind Reedy and remarked, "[i]t's because of trashy-assed white people and their damned you[n]guns.'" Reedy responded, "[w]ait a minute[,]" and turned towards defendant. Defendant then stabbed Reedy in the stomach with a knife. Reedy grabbed his stomach and instructed his son to go get a gun. Defendant then returned to his home.

Defendant's evidence tended to show that on 30 January 2004, defendant argued with Robin regarding a rope that was placed across his driveway. Defendant returned to his home and took a nap. When he awoke near dusk, defendant discovered that a cable had been placed across his driveway. Defendant went out into the driveway where Reedy, Robin, their two sons, and neighbors Clark and

Locklear were gathered. Defendant and Reedy argued about the cable, which Reedy refused to remove. Defendant commented that Reedy's children were "'trashy-ass unruly kids[,]'" and Reedy responded that defendant couldn't "'talk about my kids that way.'" Reedy then jumped on defendant's back. Defendant reached for a knife that he carried and swung for Reedy's knee, but missed and hit his abdomen with the knife. Reedy then came at defendant from his blind side and knocked out defendant's artificial eye. Reedy then released defendant and yelled for his son to get the gun. Defendant retreated to his house.

Defendant was found guilty by a jury of assault with a deadly weapon inflicting serious injury and was sentenced to a term of twenty-nine to forty-four months. Defendant appeals.

I.

Defendant first contends the trial court erred in admitting evidence of prior bad acts. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence states that:

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. Gen. Stat. § 8C-1, Rule 404(b) (2005).

Recent cases decided by this Court under Rule 404(b) state 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. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

"Whether the evidence should be excluded is a decision within the trial court's discretion." *State v. Burgess*, 134 N.C. App. 632, 635, 518 S.E.2d 209, 211 (1999). "'Hence, the trial court's decision will not be disturbed, unless it 'is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.'" *Id.* (citations omitted).

Here, in response to a question regarding how and why the previously good relationship with defendant had deteriorated, Robin testified that:

He just got ill with us and decided everything we had done was wrong, and he had an opinion on it. And he was in my yard all the time; he was going through my stuff all the time; he was picking on my kids or picking on the dog or picking on me. He ran into the back of my vehicle one time-- . . . slowly.

. . .

He's--I was standing in the front yard, and the next thing I know, he's standing behind me, screaming and yelling at me. And I was on the phone with his daughter at that time. He knocks the phone out of my hand because he said I was standing in his yard. I was in Deanna McKenzie's front yard, the place I was residing at. It was just a constant battle. I hated to even go out on my front porch because I knew [defendant] would be there.

Due to these problems, Robin went to Clark and asked if she could block the road on Clark's property. Such evidence of prior bad

acts was offered to show defendant's motive for the commission of the crime, the deterioration of the relationship between defendant and the victim's family, and the reason for the road closure which led to the stabbing. The trial court admitted the evidence as "proof of motive" under Rule 404(b) after a lengthy *voir dire*. See Rule 404(b). Furthermore, the trial court gave limiting instructions to the jury to consider the evidence solely for those purposes. As we find no abuse of discretion in the trial court's ruling, this assignment of error is overruled.

II.

Defendant next contends that the trial court erred in allowing the publication of an exhibit for corroborative purposes which made reference to bad acts the trial court had previously determined were inadmissible. We disagree.

N.C.R. App. P. Rule 10(b)(1) requires that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." *Id.*; see also *State v. Taylor*, 128 N.C. App. 394, 398 496 S.E.2d 811, 814 (1998) (holding that the defendant's failure to object on the grounds argued on appeal waived issue despite objection on other grounds).

Here, defendant objected to the admission of Clark's statement to police on the ground that he "ha[d] already testified." The trial court overruled the objection and received the statement into

evidence for purposes of corroboration. Defendant did not object to the admission of any portion of the statement as a violation of Rule 404(b). As defendant failed to preserve this issue for review, this assignment of error is overruled.

III.

Defendant finally contends that the display of a tool not admitted into evidence by the State during closing arguments was structural error. We disagree.

"Structural error is a rare form of constitutional error resulting from 'structural defects in the constitution of the trial mechanism' which are so serious that 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 113 L. Ed. 2d 302, 331 (1991)), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). *Garcia* found that the United States Supreme Court has

identified only six instances of structural error to date: (1) complete deprivation of right to counsel, *Johnson v. United States*, 520 U.S. 461, 468-69, 137 L. Ed. 2d 718, 728 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963)); (2) a biased trial judge, *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927); (3) the unlawful exclusion of grand jurors of the defendant's race, *Vasquez v. Hillery*, 474 U.S. 254, 88 L. Ed. 2d 598 (1986); (4) denial of the right to self-representation, *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122 (1984); (5) denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984); and (6) constitutionally deficient jury instructions on reasonable doubt, *Sullivan v.*

*Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182  
(1993).

*Id.*

In this case, the prosecutor produced a multi-purpose tool during closing arguments, stating that it was not the object used by defendant but that he intended to use it to illustrate a point. The trial court inquired as to whether the item had been introduced into evidence, and the State indicated it had not. The trial court then sustained defendant's objection to the use of the tool for illustrative purposes during closing arguments.

Here, the State's display of a tool during closing arguments does not rise to the level of structural error identified by the United States Supreme Court. Unlike in the case of *State v. Eagle*, 233 N.C. 218, 63 S.E.2d 170 (1951), cited by defendant, the trial court in the instant case both intervened to query the State as to whether the evidence had been admitted, and sustained defendant's objection to the use of the tool for illustrative purpose. As defendant has failed to establish that structural error occurred, the assignment of error is overruled.

As the trial court did not abuse its discretion in admitting evidence of defendant's prior bad acts and defendant has failed to establish structural error, we find no error.

No error.

Judges McGEE and STEPHENS concur.

Report per Rule 30(e).