NO. COA05-1469

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v. Vance County
No. 02 CRS 50479

WILLIAM RAY CLAYBORNE

Appeal by defendant from judgment entered 1 March 2005 by Judge Narley L. Cashwell in Vance County Superior Court. Heard in the Court of Appeals 11 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Terry W. Alford for defendant-appellant.

CALABRIA, Judge.

William Ray Clayborne ("defendant") appeals the judgment entered upon a jury verdict finding him guilty of stalking. We find no error.

At trial, the State presented the testimony of Kimberly Clayborne ("the victim"), defendant's ex-wife, who stated they were married in 1996 and had one child together. Defendant and the victim separated many times during their marriage with the last separation occurring in June 2000. A domestic violence protective order ("the order") issued 5 April 2001 directed defendant not to

"assault, threaten, abuse, follow, harass by telephone, visit the home or work place or other means, or interfere with [the victim]." The order remained in effect until 26 June 2002.

On 11 February 2002, the victim and defendant went to court regarding a child visitation matter. The court continued the visitation matter and, as the victim drove to work, defendant followed her in his vehicle and honked his car horn. As defendant continued to follow her, the victim feared that "something bad was going to happen" and, turned into a hospital parking lot. Defendant continued to follow her and "pulled in right behind [the victim] very fast." The victim turned to the right in the hospital parking lot and defendant turned to the left. The victim quickly leaned down to get a Polaroid camera in her vehicle but could not find it. When the victim sat up, defendant "was coming right towards [her]." Defendant proceeded to her windshield and, pointing his finger, repeatedly stated "I'm going to get you." Subsequently, the victim left the parking lot and defendant continued to follow her to a traffic light. While they were stopped at the light, defendant exited his truck, pulled "something" out from behind his seat, and it appeared put "something" under his shirt. The light then turned green and the victim drove away. The victim also testified that previously, in October 2001, while she drove to class, she noticed defendant riding in a vehicle next to her. Defendant "flail[ed] his arms up and down out the window." The victim testified defendant had some paperwork in his hand and tore it into "little pieces." As the

victim drove ahead, she noticed defendant waiting for her. The vehicle in which defendant was riding then pulled up "very close[ly]" behind the victim and followed her. The victim eventually called 9-1-1.

Defendant testified that after the court matter on 11 February 2002, he left the courthouse with his father, ate lunch, and called a co-worker to help him with some tree work. He stated he spent the entire afternoon doing tree work. Further, he testified he only saw the victim at court and was never in the vicinity of the hospital.

On 7 May 2002, defendant was convicted of misdemeanor stalking in Vance County District Court. Defendant appealed for a trial *de novo* in Superior Court. On 2 March 2005, after his trial, a jury found defendant guilty of stalking. Defendant was sentenced to 150 days imprisonment in the North Carolina Department of Correction. Defendant appeals.

I. *Motion to Dismiss-Warrant*:

Defendant first argues the trial court erred in denying his motion to dismiss the warrant on the grounds N.C. Gen. Stat. § 14-277.3 (2005) is unconstitutional both on its face and as applied to him. However, at trial, defendant moved to dismiss the warrant because "the warrant [wa]s vague and d[id] not allege what the defendant did to violate the [stalking] statute." Consequently, the defendant did not challenge the constitutionality of the statute and therefore, failed to preserve this issue for appellate review. "Constitutional issues *not raised and passed upon at trial*

will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (emphasis added). Furthermore, this Court, in *State v. Watson*, 169 N.C. App. 331, 338, 610 S.E.2d 472, 477 (2005), held the statute was not unconstitutionally vague and we rejected this same argument the defendant makes in the instant case regarding application of the statute. *Id.* at 338-39, 610 S.E.2d at 477-78. Accordingly, this assignment of error is overruled.

II. *Motion to Dismiss-Sufficiency of the Evidence*:

Defendant next argues the trial court erred in denying his motion to dismiss based upon insufficiency of the evidence. Defendant contends the State failed to present sufficient evidence the defendant engaged in the alleged conduct "on more than one occasion." We disagree.

A motion to dismiss should be denied if there is substantial evidence "(1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). When reviewing a motion to dismiss based on insufficiency of the evidence, this Court must,

> view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. . . . Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a

> reasonable doubt that the defendant is actually guilty.

Id. at 75-76, 430 S.E.2d at 918-19 (internal citations and quotations omitted) (emphasis in original). The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. *Id.* at 75, 430 S.E.2d at 918-19. N.C. Gen. Stat. § 14-277.3 (2005) states

> [a] person commits the offense of stalking if the person willfully *on more than one occasion* follows or is in the presence of, or otherwise harasses, another person without legal purpose and with the intent to do any of the following:
>
> (1) Place that person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
>
> (2) Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment, and that in fact causes that person substantial emotional distress.

(emphasis added).

In the instant case, the victim testified defendant followed her in his car "very close[ly]." Further, the victim feared "something bad was going to happen" and tried to elude defendant by pulling into a hospital parking lot. Once in the lot, the victim and defendant turned in opposite directions. However, five minutes later, the defendant reappeared in front of her vehicle, made a finger pointing gesture, and threatened he "was going to get" her. We hold the State presented sufficient evidence the defendant followed the victim "on more than one occasion." This assignment of error is overruled.

III. *Rule of Evidence 404(b)*:

Defendant next argues the trial court erred in admitting the victim's testimony regarding the October 2001 incident under Rule 404(b) of the North Carolina Rules of Evidence. Defendant contends the testimony was irrelevant and highly prejudicial. We disagree.

Rule 404(b) provides, in relevant part,

> [e]vidence 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). Our Supreme Court held Rule 404(b) is a rule of inclusion. *Lloyd*, 354 N.C. at 88, 552 S.E.2d at 608 (citing *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)). Although evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, that evidence is admissible under Rule 404(b) so long as it is also "relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried." *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986) (emphasis in original). In addition to the requirement that the evidence be offered for a proper purpose under Rule 404(b), "the admissibility of evidence under [Rule 404(b)] is guided by two further constraints -- similarity and temporal proximity [of the acts]." *Lloyd*, 354 N.C. at 88, 552 S.E.2d at 608 (citation and internal quotation marks omitted).

In the instant case, after conducting a *voir dire* hearing, the

trial court admitted evidence of the October 2001 incident for the proper purpose of showing defendant's preparation, plan, scheme and/or intent. Pursuant to *Lloyd*, *supra*, the following similarities existed between the incidents: (1) each involved the victim and defendant; (2) the defendant followed the victim as she traveled in her vehicle; and (3) the defendant harassed the victim from his vehicle. Furthermore, the October 2001 incident occurred approximately four months before the incident in the case *sub judice*. Therefore, because the State illustrated a proper purpose as well as evidence of the similarity and temporal proximity between the acts, we conclude the trial court properly admitted evidence of the October 2001 incident.

Defendant also argues the testimony regarding the October 2001 incident was highly prejudicial. The admission or exclusion of evidence under Rule 403 "is within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (citation and internal quotation marks omitted), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001). Here, the trial court excluded the victim's testimony regarding <u>all</u> of the other prior incidents between herself and the defendant except the October 2001 incident. Further, the trial court conducted a balancing test and concluded "the evidence [wa]s relevant and that its probative value [wa]s not substantially outweighed by the

danger of unfair prejudice[.]" Therefore, we conclude trial court did not abuse its discretion in admitting the victim's testimony of the October 2001 incident.

Further, our review of the record and trial transcripts reveals the judgment contains a clerical error. It reflects the trial court signed the judgment on 1 March 2005. However, the other documents in the record and the trial transcript show the judgment was signed on 2 March 2005. Accordingly, we remand for correction of this clerical error. *State v. Murray*, 154 N.C. App. 631, 639, 572 S.E.2d 845, 850 (2002).

No error in the trial. Remanded for correction of clerical error in the judgment.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).