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NO. COA05-1638

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v.

Cabarrus County
No. 04CRS012677

JOHNNY MELVIN KLUTTZ

Appeal by defendant from judgment entered 28 April 2005 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 20 September 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kevin Anderson, for the State.

Franklin E. Wells, Jr. for defendant-appellant.

HUNTER, Judge.

Johnny Melvin Kluttz ("defendant") appeals from a judgment of the trial court entered consistent with a jury verdict finding him guilty of voluntary manslaughter. Defendant contends the trial court erred in allowing the State to impeach a witness with a prior inconsistent statement and by admitting evidence of defendant's prior bad acts. For the reasons set forth herein, we find no error.

The State presented evidence at trial tending to show the following: Defendant lived with his girlfriend, Stephanie Ford ("Ford"). Ford was acquainted with Tim Groth ("Groth"), who sought

a romantic relationship with her. Shortly before noon on 3 July 2004, defendant discovered Ford sitting in the passenger-side seat of Groth's vehicle, speaking with Groth, who sat on the driver's side. The vehicle was parked in front of a local laundromat several blocks away from Ford and defendant's residence. The passenger-side door of the vehicle where Ford sat was open. Defendant approached the vehicle, put his hand on Ford's arm, and ordered her to "[g]et out of the truck." Groth told defendant, "[g]et your M-F hands off of her." He then got out of the vehicle and the two men began fist-fighting.

Witnesses to the incident included Tyrone Miller ("Miller") and Ford's three daughters, Tawanda Mason ("Tawanda"), Falisa Ford, and Charlene Ford. During the fight, Tawanda attempted to restrain defendant, and called on Miller to hold Groth. Miller held Groth in "a bear hug." A woman warned "[h]e's got a knife." Miller then felt a knife strike his arm, and he released Groth. He looked up to see defendant, who had broken free of Tawanda's grasp, holding a knife with a six-inch blade. Groth and defendant resumed fighting. Defendant struck Groth several more times with the knife. The fight paused when Ford yelled "stop," before Groth charged defendant, at which point defendant stabbed him again, and Groth fell to the ground. Defendant apologized to Miller for striking him with the knife, then fled the scene.

Groth telephoned emergency assistance and informed them that a "guy by the name of Johnny" had stabbed him. Upon arrival, responders administered emergency medical care, but Groth died

shortly thereafter. An autopsy revealed seven fresh knife wounds on Groth's body, and the medical examiner confirmed that a stab wound to the chest was the cause of death.

Defendant testified that Groth was the aggressor, and that defendant had taken the knife from Groth to prevent being beaten or stabbed by him. In the hours following the incident, Ford told police that she witnessed defendant stab Groth, but she denied this at trial. In Ford's original statement, she said she saw defendant pull out the knife and stab Groth. At defendant's trial, Ford testified that the statement was not correct; she knew a knife was involved in the fight, but she never saw defendant with it. The State questioned Ford about her previous statement, then refreshed her recollection with it and introduced the statement into evidence.

Upon consideration of the evidence, the jury found defendant guilty of voluntary manslaughter, and the trial court imposed a sentence of 117 to 150 months imprisonment. Defendant appeals.

I. Prior Inconsistent Statement

Defendant first contends the trial court erred in allowing the State to impeach Ford with her prior inconsistent statement, arguing that the statement was improperly used for its substantive content. Defendant contends he is thereby entitled to a new trial. We do not agree.

Defendant did not object to the admission of Ford's prior statement at trial. Our review is therefore limited to plain error review. *State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63

(1998). "To prevail on plain error review, defendant must show that (i) a different result probably would have been reached but for the error or (ii) the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *Id.* On appeal, this Court reviews the entire record to determine if the error had a probable impact on the jury's verdict. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983).

Where a witness admits having made a prior statement, impeachment by that statement is allowed. *State v. Riccard*, 142 N.C. App. 298, 303, 542 S.E.2d 320, 323 (2001).

[W]here there is testimony that a witness fails to remember having made certain parts of a prior statement, denies having made certain parts of a prior statement, or contends that certain parts of the prior statement are false, our courts have allowed the witness to be impeached with the prior inconsistent statement.

Id.; see also *State v. Whitley*, 311 N.C. 656, 663, 319 S.E.2d 584, 589 (1984) (where the witness testified that she did not remember making specific statements to the police which tended to inculcate the defendant, and then denied having made those specific statements, our Supreme Court held that because "the prior statement with which [the witness] was impeached was inconsistent in part with her testimony and material in that it related to events immediately leading to the shooting," the witness could be impeached concerning the inconsistencies in her prior statement).

"[W]hile North Carolina Rule of Evidence 607 allows a party to impeach its own witness on a material matter with a prior inconsistent statement, impeachment is impermissible where it is

used as a mere subterfuge to get evidence before the jury which is otherwise inadmissible." *Riccard*, 142 N.C. App. at 304, 542 S.E.2d at 324. To show the impeachment was proper, there must be evidence the State acted in good faith in impeaching its own witness, such as "the facts that the witness's testimony was extensive and vital to the government's case; that the party calling the witness was genuinely surprised by his reversal; or that the trial court followed the introduction of the statement with an effective limiting instruction[.]" *State v. Hunt*, 324 N.C. 343, 350, 378 S.E.2d 754, 758 (1989) (citations omitted).

In the instant case, Ford testified she remembered giving the statement to law enforcement officers shortly following the incident. However, she contradicted key elements of her prior statement. The State refreshed her recollection with the statement, then attempted to re-question her about what she had said to police. When Ford continued to contradict the statement, the trial court asked her directly what she had stated to police, to which she replied, "[t]hat [defendant] stabbed [Groth] with the knife." Ford testified that despite her earlier statement, "that ain't [sic] what happened."

The testimony of record indicates "good faith and the absence of subterfuge." *Id.* at 350, 378 S.E.2d at 758. Ford's testimony was important for the State, as she was not only an eyewitness, but the apparent cause of the fight between defendant and Groth. The State would have been surprised when its own witness drastically altered her account of the struggle. The interaction with Ford on

the stand made it clear that she was contradicting herself, understood that, and would continue to contradict her prior statement. Finally, the trial court gave a proper limiting instruction. Thus, the State's use of the prior statement to impeach Ford was proper, and the trial court committed no error, plain or otherwise. We overrule this assignment of error.

II. Prior Bad Acts

By further assignment of error, defendant argues the trial court erred in allowing evidence that defendant previously assaulted Ford. At trial, the State questioned Ford over defendant's objections regarding an incident in June of 2002 during which defendant twice struck Ford in the face with his fist. The State also introduced into evidence the warrant Ford filed against defendant for the assault, as well as a photograph depicting the injury to Ford following the assault. Defendant argues that introduction of the evidence was improper, in that its only tendency was to depict defendant's bad character. We disagree.

Rule 404(b) of the North Carolina Rules of Civil Procedure governs the admissibility of evidence of a defendant's prior bad acts. "Under Rule 404(b), evidence of prior acts is admissible 'so long as it is relevant to any fact or issue other than the character of the accused.'" *State v. Moseley*, 338 N.C. 1, 42, 449 S.E.2d 412, 437 (1994) (quoting *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)). If the purpose of the evidence does not violate Rule 404(b), the trial court must determine whether the evidence is relevant under Rule 401, then balance its probative

value against its prejudicial effect under Rule 403. *State v. Morgan*, 315 N.C. 626, 636-40, 340 S.E.2d 84, 91-93 (1986).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2005). This determination is within the sound discretion of the trial court, and thus may be reversed only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Everhardt*, 96 N.C. App. 1, 18, 384 S.E.2d 562, 572 (1989) (citations omitted).

Here, the State's asserted purposes in presenting the 404(b) evidence was its importance in the chain of circumstances or context to the crime, and defendant's motive and intent to exert control over Ford by fighting Groth. The trial court also found a purpose for the evidence as explaining Ford's fear of defendant and her reluctance in testifying against him, "totally separate and apart from that 404(b)." The trial court held that the evidence was admissible under Rule 404(b) for the purposes of showing a chain of circumstances, context, and intent. It also stated that the evidence was admissible to explain why Ford first testified

during *voir dire* she had never been assaulted, evidencing her fear of another assault.

The evidence of the prior assault formed part of the context of the instant crime because it explained why the fight with Groth was not a random occurrence. *State v. Agee*, 326 N.C. 542, 547-48, 391 S.E.2d 171, 174 (1990) (holding 404(b) allows evidence that pertains to the chain of events explaining the context, motive, or incentive of the crime if it is linked in time and circumstance with the charged crime, or if it completes a story of the crime for the jury). This history would also help the jury understand both defendant's and Groth's states of mind at that point in time. Defendant had a history of physical abuse toward Ford, and when he approached Groth's vehicle, he put his hand on Ford's arm and ordered her to get out. Apparently acting to protect Ford, Groth told defendant to take his hands off of Ford, then stepped out of the vehicle to approach defendant.

The trial court performed the necessary steps to admit the 404(b) evidence, first finding the purpose was proper, then finding that it was relevant to the charged crime, and that its probative value was not substantially outweighed by its prejudicial effect under Rule 403. *Morgan*, 315 N.C. at 636-40, 340 S.E.2d at 91-93. We find no abuse of discretion in its ruling. *Everhardt*, 96 N.C. App. at 18, 384 S.E.2d at 572. We overrule defendant's assignment of error.

In the judgment of the trial court, we find

No error.

Judges HUDSON and CALABRIA concur.

Report per Rule 30(e).