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NO. COA07-1442

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v.

Alexander County  
No. 05 CRS 050979

KEITH EDWARD HARRINGTON

Appeal by defendant from judgment entered 4 April 2007 by Judge Kimberly S. Taylor in Alexander County Superior Court. Heard in the Court of Appeals 17 April 2008.

*Attorney General Roy Cooper, by Assistant Attorney General Charles E. Peace, for the State.*  
*Glenn Gerdiny, for defendant-appellant.*

TYSON, Judge.

Keith Edward Harrington ("defendant") appeals judgment entered after a jury found him to be guilty of second-degree murder pursuant to N.C. Gen. Stat. § 14-17. We find no prejudicial error.

#### I. Background

Defendant lived in a mobile home in Alexander County from approximately 2001 through 2005. In 2003, defendant allowed Christopher Payne ("Payne") to move in and share living expenses. Defendant and Payne worked together at a construction business owned by Payne's father. After Payne moved into the mobile home, defendant and Payne began to have a very contentious relationship.

Various witnesses testified that Payne often verbally and physically abused defendant.

Payne had multiple physical confrontations with defendant including: (1) pushing defendant off the front porch; (2) choking or wrestling defendant; (3) punching defendant in the face and jaw; (4) slapping defendant for sitting next to Payne's girlfriend; and (5) cutting defendant's hair while another person held defendant down.

On the evening of 12 May 2005, the undisputed facts show that defendant consumed alcohol at a friend's residence and returned home at approximately 6:00 p.m. Defendant found Payne and Rhiannon Forrest ("Forrest") using Xanax and smoking marijuana. Payne and defendant subsequently got into an altercation. Payne refused to allow defendant to drink beer Payne had purchased earlier that day. While Payne was outside, defendant testified he walked into the kitchen, took a beer out of the refrigerator, and went back into his bedroom.

After approximately five minutes, Payne discovered defendant had taken the beer and allegedly entered defendant's bedroom. Payne stated to defendant, "Now you're really going to get your a-- beat. I told you not to get no more [sic] beer, you son of a b--ch." Defendant retrieved his .22 caliber rifle from underneath his bed and stated, "No you're not. You need to go back in there. I am not going to let you beat on me no more [sic]. I can't take it." Defendant alleged Payne walked to the corner of defendant's

bed "to attack" him. Defendant testified that he was afraid for his life so he shot Payne in the chest.

Upon the realization that Payne had been seriously injured, defendant ran to his neighbor's residence to call 911. Defendant returned to his mobile home and waited for paramedics to arrive. Payne was later pronounced dead at the scene.

Defendant was indicted on one count of non-capital first-degree murder. Prior to trial, defendant filed a motion *in limine*, which sought to exclude evidence regarding allegations that defendant had previously shot his cousin and former roommate, David Harrington ("Harrington"). The trial court ordered the District Attorney to refrain from making any direct or indirect reference to these allegations until they became relevant at trial.

On 29 March 2007, the State filed a response to defendant's motion *in limine* indicating "[t]he State intend[ed] to cross examine defense witnesses about the [prior shooting] incident should either the defendant's character for peacefulness or the defendant's state of mind at the time of the shooting come into issue." After defendant testified on direct examination, the State moved for re-consideration of defendant's motion *in limine*. The trial court conducted a *voir dire* of Harrington.

During *voir dire*, Harrington testified that he had previously lived with defendant in his mobile home in 2002. Harrington testified that on the evening of 3 April 2002, defendant had been drinking and initiated an argument over "paying the bills." Defendant entered Harrington's room, pointed his .22 caliber rifle

at Harrington, and asked him "if [he] felt like dying[.]" After Harrington responded that he did not want to die, defendant shot him once in the foot. Defendant immediately stated the shooting was an accident. Harrington did not press charges against defendant.

After considering Harrington's *voir dire* testimony, the trial court announced its order in open court and subsequently prepared a written order reflecting its findings and conclusions:

2. The court finds that the evidence is offered for the proper purposes of showing the defendant's motive, the absence of accident, and that there existed in the defendant's mind at the time Christopher Payne was killed a plan, scheme, or design which illuminates the intent of the defendant.

3. The evidence, as offered, satisfies this proper purpose and is admissible under Rule 404(b).

4. The evidence is more probative than prejudicial and is admissible under Rule 403.

The trial court allowed the State to cross-examine defendant about "the particulars of this incident."

On 4 April 2007, after a week-long trial, the jury found defendant to be guilty of second-degree murder. The trial court determined defendant had a prior record level of IV and sentenced him to a minimum term of 240 and a maximum term of 297 months imprisonment. Defendant appeals.

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## II. Issues

Defendant argues the trial court erred by: (1) allowing the State to cross-examine defendant regarding a prior incident in

which he shot Harrington and (2) incorrectly calculating defendant's prior record level.

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III. 404(b) Evidence

Defendant argues the trial court violated Rule 404(b) of the North Carolina Rules of Evidence by allowing the State to cross-examine defendant about a previous incident in which he shot his former roommate and cousin. Defendant alternatively argues that even if the evidence was admissible under Rule 404(b), it was unduly prejudicial and inadmissible under Rule 403.

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A. Standard of Review

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006) (internal citations omitted).

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B. Analysis

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007) provides, in relevant part:

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.

Rule 404(b) is generally a rule of inclusion, not exclusion. *State v. Agee*, 326 N.C. 542, 550, 391 S.E.2d 171, 175 (1990) (citation omitted).

The use of evidence permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity. When the features of the earlier act are similar to the offenses with which the defendant is currently charged and the stretch of time between the instances is not too remote, such evidence has probative value. The similarity between the prior conduct and the crime with which the defendant is charged need not rise to the level of the unique and bizarre, but must tend to support a reasonable inference that the same person committed both the earlier and the later acts.

*State v. Smith*, 152 N.C. App. 514, 527, 568 S.E.2d 289, 297 (internal citations and quotations omitted), *disc. rev. denied*, 356 N.C. 623, 575 S.E.2d 757 (2002). The admissibility of Rule 404(b) evidence is also subject to a relevancy determination. *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986).

Defendant primarily relies on *Morgan* for his contention that the trial court erred by allowing the State to introduce evidence of defendant's previous bad acts. *Id.* at 626, 340 S.E.2d at 84. In *Morgan*, our Supreme Court found the trial court erred by admitting testimony tending to show defendant had pointed a shotgun at two persons approximately three months prior to killing the victim, for which defendant was charged and found guilty of first-degree murder. *Id.* at 639, 340 S.E.2d at 93. The Court rejected the State's argument that this evidence "was relevant to show that defendant's pointing of the shotgun at the decedent and shooting him was not in self-defense." *Id.* at 638, 340 S.E.2d at 92. Our Supreme Court stated:

The State's rationale here is precisely what is prohibited by Rule 404(b). In order to reach its conclusion, the State is arguing

that, because defendant pointed a shotgun at [someone] three months earlier, he has a propensity for violence and therefore he must have been the aggressor in the alleged altercation with [the victim] and, thus, could not have been acting in self-defense. Indeed, the Commentary to N.C.G.S. § 8C-1, Rule 404(b) infers that "evidence of a violent disposition to prove that the person was the aggressor in an affray" is an impermissible use of "evidence of other crimes, wrongs, or acts." *The theory of relevancy articulated by the State on this appeal is plainly prohibited by the express terms of Rule 404(b) disallowing "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith."*

*Id.* (emphasis supplied).

Here, during the hearing on the State's Rule 404(b) motion, the State made a very similar argument: "The State would contend that [the prior shooting incident] goes to [defendant's] intent on this occasion, his intent, and also his motive. His motive was to commit a malicious act prompted by malice, *not prompted by self-defense.*" (Emphasis supplied). At trial, the State argued that because defendant had previously fired his .22 caliber rifle at a former roommate, defendant was not acting in self-defense when he shot Payne three years later. This line of reasoning has been previously rejected by our Supreme Court and we hold the rationale applied in *Morgan* is applicable to the case at bar:

The fact that defendant may have pointed a gun at another person sometime in the past, without more, has no tendency to show that the defendant did not fear [the victim] or to make the existence of his belief as to the apparent necessity to defend himself from an attack more or less probable than it would be without the evidence.

*Id.* at 639, 340 S.E.2d at 92 (citation and quotation omitted). The trial court erred by allowing the State to cross-examine defendant regarding the prior shooting incident for the purpose of showing defendant was not acting in self-defense when he committed the offense at issue.

Because we find the trial court erred in the admittance of this particular Rule 404(b) evidence, we must now determine whether the error was so prejudicial to entitle defendant to a new trial. *Id.* at 640, 340 S.E.2d at 93. N.C. Gen. Stat. §15A-1443(a) (2007) provides that an error is prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."

At trial, other overwhelming evidence was presented from which a jury could find the defendant was guilty of second-degree murder beyond a reasonable doubt: (1) the history of animosity between defendant and Payne; (2) expert testimony that after being shot in the chest, Payne's ability to move would have been very limited indicating that Payne could not have been inside defendant's bedroom when he was shot; (3) testimony that no signs of a struggle or fight were present in the mobile home and that blood was only found in the living room; (4) testimony that defendant stated prior to the shooting, "I'm going home. I've got business to take care of[;]" and (5) defendant's own testimony that approximately two to three weeks prior to this incident, defendant warned Payne not to come into his bedroom because he had a gun. In light of this other



evidence, we hold the trial court's admittance of the contested Rule 404(b) evidence constituted harmless error.

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IV. Calculation of Prior Record Level

Defendant argues the trial court erred in its calculation of defendant's prior record level by including one point for being on probation at the time the offense was committed. Defendant asserts he neither admitted nor stipulated to his probationary status and this issue was not submitted to the jury for a determination beyond a reasonable doubt.

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A. Standard of Review

The failure to submit a sentencing factor to the jury is subject to harmless error review. In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so overwhelming and uncontroverted that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt.

*State v. Colson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 650 S.E.2d 656, 659-60 (internal citations and quotation omitted), *disc. rev. denied*, 362 N.C. 89, 656 S.E.2d 280 (2007).

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B. Analysis

In *Colson*, this Court held the trial court erred by not submitting the defendant's probationary status to the jury citing *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). *Id.* at \_\_\_, 650 S.E.2d at 660. However, this Court found it unnecessary to conduct a harmless error review because defendant was granted a new trial on other grounds. *Id.* Because we have not otherwise found reversible error in this case, it is necessary to conduct such review.

Here, during defendant's sentencing hearing, the State asserted that "at the time of this offense the defendant was on probation for the possession of drug paraphernalia conviction in Alexander County[.]" In support of its contention, the State submitted a printout of the ACIS records, marked exhibit 92, which referenced this particular conviction. The printout listed the date of the possession offense as 22 May 2004 and shows defendant was placed on supervised probation for twelve months. Payne's death occurred on 12 May 2005, a date clearly within the twelve month probationary period.

Further, the trial court asked defense counsel whether he wanted to be heard regarding defendant's prior record level. Defense counsel specifically objected to the point assigned for defendant's conviction for injury to personal property. When the trial court asked if counsel had any other objections, counsel stated, "I don't have any specific contentions with regard to the other record points."

After a thorough review of the record, we hold the evidence presented tending to show defendant was on probation at the time the offense was committed "was so overwhelming and uncontroverted that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* The trial court's failure to submit defendant's probationary status to the jury was harmless beyond a reasonable doubt. This assignment of error is overruled.

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V. Conclusion

The trial court erred by allowing the State to cross-examine defendant regarding a prior incident in which he shot his cousin and former roommate. In light of other overwhelming evidence presented, we hold that there is no reasonable possibility that, had the error in question not been committed, the jury would have reached a different result at trial. N.C. Gen. Stat. § 15-1443(a).

The trial court also erred by failing to submit defendant's probationary status to the jury for a determination beyond a reasonable doubt. Based upon "overwhelming" and "uncontroverted" evidence presented tending to show defendant was on probation at the time the offense was committed, the trial court's error was harmless beyond a reasonable doubt. *Colson*, \_\_\_ N.C. App. at \_\_\_, 650 S.E.2d at 660. Defendant received a fair trial, free from the prejudicial errors he preserved, assigned, and argued.

No prejudicial error.

Judge MCCULLOUGH and STROUD concur.

Report per Rule 30(e).