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NO. COA07-367

NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2007

STATE OF NORTH CAROLINA

v.

Forsyth County  
Nos. 06 CRS 565; 52524

BARRY WAYNE WELCH

# Court of Appeals

Appeal by defendant from judgment entered 2 November 2006 by Judge Michael E. Helms in Superior Court, Forsyth County. Heard in the Court of Appeals 27 August 2007.

*Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett Baker, for the State.*

# Slip Opinion

*Michael J. Reece for defendant-appellant.*

WYNN, Judge.

The North Carolina Rules of Evidence allow evidence of other crimes to show proof of motive, intent, identity, and common scheme or plan.<sup>1</sup> Here, Defendant Barry Wayne Welch argues that testimony of his involvement in a subsequent robbery was impermissible character evidence. Because we find that the evidence was properly offered to show proof of motive, intent, identity, and common scheme, we find no error.

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<sup>1</sup> N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005).

The State's evidence tended to show that on 8 February 2006, Andrea Miller was working as a clerk at the Exprez-It convenience store on Reidsville Road. Around noon, Ms. Miller noticed a purple Grand Am "go through the parking lot and then out the exit the same way it came in[.]" Shortly thereafter, a black male wearing blue jeans, a hoodie, a coat, sneakers, and sunglasses and later identified as Defendant, entered the store, walked around, and then approached the register. The only other person in the store was the store manager in the back office.

Defendant said to Ms. Miller, "Give me the money out of the register." Ms. Miller first thought Defendant was joking, but Defendant then hit Ms. Miller in the face on her left cheekbone with his right fist. When store manager Janeth Horne heard a raised voice, she walked out of the office and into the store and observed Ms. Miller, visibly upset and pulling money out of the register. Defendant made a fist towards Ms. Horne and said, "Stay back, stay back, I will hit you." Ms. Miller gave Defendant \$208.00 from the register. Ms. Miller could see Defendant's eyes because he "was looking over [the sunglasses], not through them[.]" and she saw Defendant leave in a purple Grand Am. Ms. Miller then called the police and hit the emergency button.

Detective Terry Gray of the Forsyth County Sheriff's Department arrived at the scene and interviewed Ms. Horne and Ms. Miller. Ms. Miller, who had red markings on her left cheek, told Detective Gray that a black male wearing a navy blue coat and hood, blue jeans, and dirty white Nike tennis shoes had entered the

store; that the male demanded money from the register; that the male hit her in the face; that she gave the money to the male; and that after the male left she saw a purple Grand Am in the parking lot. Ms. Horne told Detective Gray that she was in the office, heard a loud voice, went out and saw a black male at the counter. The man told Horne to "get back and made a fist and shook it at her." Ms. Miller and Ms. Horne identified Defendant in open court as the robber of the store.

On 26 February, Stokes County Sheriff's Deputy Scott Smith stopped Defendant, who was driving a purple Grand Am, for driving while license revoked. After being informed that Defendant had been driving a purple Grand Am and was in custody in Stokes County, Detective Gray spoke with Defendant about the car and the robbery. Defendant told Detective Gray that he had only driven the car the day he was arrested and denied the robbery.

On 2 March 2006, Detective Gray showed Ms. Miller a photo lineup consisting of eight photos, and she identified Defendant as the person who robbed her. The next day, Detectives Gray and another detective went back to Stokes County to question Defendant. Defendant was advised of his rights and signed a rights waiver. Defendant told Detective Gray that the purple car was not involved in the Exprez-It Mart robbery and stated that he walked to the store from Old Greensboro Road, went inside, and walked around before going to the counter and demanding money. When the clerk said no, Defendant said he put his hand in her face and demanded money and she gave him the cash. Defendant stated that after he

left the store, he walked to Walkertown where he obtained a ride back to Walnut Cove. He indicated that he took about \$90.00 from the Exprez-It Mart robbery.

A jury found Defendant guilty of common law robbery and assault on a female, and found that Defendant had attained habitual felon status. The trial court sentenced defendant to 133 to 169 months' imprisonment. Defendant appeals, arguing that the trial court erred when it admitted evidence, in violation of North Carolina Rule of Evidence 404(b), of an attempted robbery committed by Defendant a week after the Exprez-It robbery. We disagree.

North Carolina Rule of Evidence 404(b) states:

(b) Other crimes, wrongs, or acts. -- 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). Rule 404(b) is a rule of inclusion, not exclusion. *State v. Agee*, 326 N.C. 542, 550, 391 S.E.2d 171, 175 (1990). Moreover, Rule 404(b) evidence is relevant and admissible so long as the incidents are sufficiently similar and not too remote in time. *State v. Blackwell*, 133 N.C. App. 31, 35, 514 S.E.2d 116, 119, *disc. review denied*, 350 N.C. 595, 537 S.E.2d 483 (1999). Nevertheless, evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2005). The admission or exclusion of evidence under Rule 403 is within the

trial court's sound discretion, and we will reverse "only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision[.]" *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985).

At trial, the State sought to introduce evidence through the testimony of Vena Matthews related to a robbery attempt of a Kangaroo Mart. Defendant objected on the grounds that the testimony was not offered for a proper purpose under Rule 404(b). After conducting a *voir dire* hearing, the trial court found that the State's forecast of evidence was admissible under Rule 404(b) and that the probative value of the evidence outweighed any prejudice.

Ms. Matthews testified that on 14 February 2006, she was working the 11:00 p.m. to 7:00 a.m. shift at the Kangaroo Mart in Rural Hall. Ms. Matthews came out of the restroom to find Defendant wearing a down-filled coat with a hood over his head. When Ms. Matthews finished with other customers, Defendant put down a box of cigars and asked for a pack of cigarettes. After Ms. Matthews rang him up, Defendant said, "Give me all your money." When Ms. Matthews did not immediately respond, Defendant said, "I said, give me all your money[.]" and swung his fist at Ms. Matthews, then attempted to open the register. Ms. Matthews hit the silent alarm button, told the defendant that she had done so, and picked up her cell phone and said, "I'm going to call them, I'm going to call the police." Defendant grabbed the phone, and Ms.

Matthews ran to the office. Defendant threw the cell phone before fleeing the store.

Ms. Matthews identified Defendant in open court. Over Defendant's objection, evidence of the attempted robbery was also admitted through Detective Gray's testimony that he took a statement from Defendant regarding the robbery attempt of the Kangaroo Mart. The trial court instructed the jury that it could consider evidence of the subsequent robbery, but only for the limited purposes of showing motive, intent, identity, and common scheme or plan.

The robbery in this case shares similarities with the attempted robbery of the Kangaroo Mart. The crimes occurred while the female clerk was alone; Defendant wore a hood; Defendant demanded money from the register by saying, "give me the money;" and Defendant used his fist to threaten the victims. The Kangaroo Mart attempted robbery occurred six days after the robbery in this case, a short period of time. Given these similarities, we see no abuse of discretion in the trial court's ruling that the evidence of the other attempted robbery was admissible under Rule 404(b) and that its probative value was not substantially outweighed by the danger of unfair prejudice.

Even assuming *arguendo* that it was error to admit the evidence, in light of the other overwhelming evidence presented at trial against Defendant, we conclude that he has failed to show the prejudice necessary to require a new trial, as there is no "reasonable possibility" that the jury would not have convicted had

they not heard the testimony that the trial court allowed. See N.C. Gen. Stat. § 15A-1443(a) (2005) ("A defendant is prejudiced by errors . . . 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.").

No error.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).