NO. COA08-1581

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 2009

STATE OF NORTH CAROLINA

v. Hoke County
Nos. 05 CRS 2457-59
05 CRS 50199

KELVIN RAY SMITH

Appeal by Defendant from judgments dated 27 August 2007 by Judge Richard T. Brown in Superior Court, Hoke County. Heard in the Court of Appeals 19 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for Defendant-Appellant.

McGEE, Judge.

A jury found Kelvin Smith (Defendant) guilty of robbery with a firearm, first-degree burglary, conspiracy to commit robbery with a firearm, and first-degree murder under the first-degree felony murder rule on 20 August 2007. Defendant was sentenced to a term of life imprisonment without parole. Defendant appeals.

The evidence at trial tended to show that April Pate (Ms. Pate), a twenty-three-year-old house cleaner, was shot and killed on 15 January 2005. Ms. Pate lived in a trailer on Hunters Run in Raeford, North Carolina. She was employed by her mother and was

paid in cash, or by checks, which she then cashed. Ms. Pate had no bank account and kept her money hidden in various places inside her trailer.

On the morning of 14 January 2005, Defendant and Tony Locklear broke into Ms. Pate's trailer and robbed her. On the evening of 14 January 2005, Defendant, Tony Locklear, and Steven Locklear (no relation) agreed to return to Ms. Pate's trailer and rob her again. Defendant knew of Ms. Pate's hidden money because he had been involved in a relationship with her for some time.

The plan for the second robbery called for Defendant to remain in his car and speak with Ms. Pate on his cell phone while Tony Locklear and Steven Locklear, wearing masks, broke into the trailer. Tony Locklear testified that Defendant told him Ms. Pate might have a gun, and Tony Locklear replied that he would shoot her "if she did anything stupid." Defendant replied that Tony Locklear should "do what [he] got to do." Defendant testified, however, that it was his understanding that Ms. Pate would not be physically harmed.

The three men made two unsuccessful attempts to execute their plan to rob Ms. Pate a second time. The first attempt was thwarted when Tony Locklear and Steven Locklear thought they heard someone in the woods near the trailer and decided to return to Defendant's car. The second attempt failed when Tony Locklear knocked on the trailer door instead of kicking it in, and he and Steven Locklear were frightened away when Ms. Pate saw them from a window. After the second attempt, Defendant took Steven Locklear home, and Steven

Locklear told Defendant that he was not "going back."

Tony Locklear testified to the following sequence of events. After taking Steven Locklear home, Defendant told Tony Locklear that he wanted to return to the trailer and attempt to have sex with Ms. Pate. Defendant and Tony Locklear then returned to an area near the trailer and came up with a new plan to rob Ms. Pate. Defendant would go to the trailer and keep Ms. Pate company. Tony Locklear would then arrive, tie up both Ms. Pate and Defendant, and take Ms. Pate's money. In order to carry out this plan, Defendant twice dropped Tony Locklear off near the trailer. Both times, Tony Locklear called Defendant and asked to be picked up, and both times, Defendant left the trailer and picked him up. The second time, Defendant assured Tony Locklear that "[he] [could] do [the robbery]."

After being picked up the second time, Tony Locklear came to agree with Defendant that he could complete the robbery. Defendant told him to lie in the back seat of Defendant's car and wait while Defendant went into the trailer to distract Ms. Pate. Defendant entered the trailer and Tony Locklear waited in the car for thirty-five to forty-five minutes. Tony Locklear then approached the trailer, carrying a gun, and kicked in the trailer door. Ms. Pate was sitting on the couch and Defendant was lying on the couch with his head in her lap. Ms. Pate reached for her gun and Tony Locklear began to back out the door. Ms. Pate pointed her gun at Tony Locklear and he fired at her, hitting her in her midsection. Tony Locklear left immediately and returned to the backseat of

Defendant's car. Defendant came out a few minutes later, got into his car, and dropped Tony Locklear off at the end of the road.

Defendant testified to a different version of the events. Defendant testified that, after taking Steven Locklear home, Tony Locklear insisted he could carry out the robbery if Defendant was in the trailer with Ms. Pate to ensure that no one else was present. Defendant twice dropped Tony Locklear off at the end of Ms. Pate's road and each time was called to pick him up. After picking Tony Locklear up the second time, Defendant berated him for having done too much cocaine to carry out the robbery and decided that they should wait for another opportunity. However, Defendant still wanted to have sex with Ms. Pate, so they returned to the trailer. Defendant testified that he told Tony Locklear to hide in the back seat of Defendant's car until Defendant was finished and that, at that time, Defendant and Tony Locklear were in agreement that there would be no robbery that night.

Defendant testified that he and Ms. Pate sat with each other on the couch. He laid his head in her lap and fell asleep. He awoke to the sound of Tony Locklear kicking in the trailer door. Ms. Pate grabbed for her gun, but she did not reach it before Tony Locklear fired his gun at her. Tony Locklear then went into the kitchen and grabbed in the direction of a table on which Defendant had earlier seen a wad of money. Tony Locklear then fled the trailer as Defendant attempted to comfort Ms. Pate.

Defendant testified that he saw that Ms. Pate was injured and called 911. He then decided to drive to Ms. Pate's mother's house

for assistance. When Defendant reached his car, he found Tony Locklear hiding in the back seat. Defendant dropped Tony Locklear off on his way to Ms. Pate's mother's house. After Defendant arrived at Ms. Pate's mother's house, Ms. Pate's step-father followed Defendant back to the trailer. When Ms. Pate's step-father arrived at the trailer, the table was bare and the money Defendant had seen earlier was gone.

In his sixth assignment of error, Defendant argues that the trial court erred in allowing the testimony of Steven Locklear and Tony Locklear concerning prior crimes or bad acts committed by Defendant. Steven Locklear testified concerning two prior robberies in which he and Defendant had been involved. The first occurred approximately six weeks prior to Ms. Pate's death. Steven Locklear went with Defendant and two other men to the home of a man Steven Locklear did not know. Defendant developed the plan to steal drugs and money from the man. Steven Locklear and Defendant brought masks similar to the ones used during one of the attempted robberies of Ms. Pate's trailer on the evening of 14 January and Defendant used a .40 caliber gun. One of the robbers knocked on the front door and, when the occupant answered, the robbers pointed a gun at him. Steven Locklear, Defendant, and one of the other robbers entered the house and took money and drugs.

The second robbery occurred approximately four weeks prior to Ms. Pate's death. Pursuant to a plan developed by Defendant, Steven Locklear and Defendant again went to the home of a man Steven Locklear did not know to obtain drugs and money. Steven

Locklear carried the same .32 caliber gun that he would later carry during the events of 14 January and Defendant used his .40 caliber gun. Defendant kicked open the door of the residence, but the occupant began shooting at them and they fled.

The trial court gave the jury limiting instructions to consider Steven Locklear's testimony only for purposes of determining Defendant's identity, motive, intent, knowledge, and common plan or scheme pursuant to Rule 404(b) of the North Carolina Rules of Evidence.

Tony Locklear testified concerning four prior breakings and enterings he had committed with Defendant. On the Monday before Ms. Pate's murder, Defendant and Tony Locklear drove to a residence in Dillon, South Carolina. They knocked on the front door, but no one answered. Defendant told Tony Locklear to kick in the door, which he did. They took a shotgun, a .357 derringer, and jewelry from the house. Defendant gave Tony Locklear cocaine for his participation.

Three to four days prior to Ms. Pate's murder, Defendant and Tony Locklear drove to a house in Dillon. They knocked on the front door, but no one answered. Defendant again had Tony Locklear kick in the door. They stole jewelry and guns from the house. Tony Locklear took some of the jewelry and exchanged the guns with Defendant for cocaine.

Six to eight days prior to Ms. Pate's murder, Defendant and Tony Locklear drove to a house in Bennettsville, South Carolina for another break-in. After knocking on the door and receiving no

answer, Tony Locklear kicked in the door. The two of them stole a .357 gun, video cameras, golf clubs, and a shotgun. Tony Locklear sold the shotgun to get cocaine.

The final incident Tony Locklear testified about involved a breaking and entering of a new, modular home in Dillon. Tony Locklear kicked in the front door and he and Defendant stole a rifle, money, jewelry, a chain saw, and golf clubs. Tony Locklear kept the rifle and traded other items for cocaine.

The trial court allowed Tony Locklear's testimony, and provided the jury limiting instructions to consider the testimony only as to Defendant's intent and motive pursuant to Rule 404(b).

Defendant asserts that the evidence of the prior robberies and breakings and enterings was impermissible character evidence and that the trial court erred in not excluding it pursuant to Rule 404(b). We disagree.

N.C.G.S. § 8C-1, Rule 404(b) provides, in pertinent 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.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007). Rule 404(b) is a general rule of inclusion and requires exclusion only where the sole purpose of the evidence is to prove that the defendant has a tendency to engage in conduct similar to that charged. *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (citing *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)).

Admission of evidence offered pursuant to Rule 404(b) must be "carefully scrutinized" to avoid the introduction of improper character evidence. *Id.*

Evidence of such incidents must be deemed "'sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403.'" *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (quoting *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)).

A. Time

With respect to temporal proximity, the events testified to by Steven Locklear and Tony Locklear occurred no more than six weeks prior to Ms. Pate's murder, and as close in time as the Monday before her murder. The trial court admitted the evidence for the purposes of proving intent, motive, knowledge, identity, and common plan or scheme. Remoteness in time "is a less significant factor in determining Rule 404(b) admissibility when the prior acts go to prove something other than a common plan or scheme, such as knowledge or intent." *Stevenson*, 169 N.C. App at 801, 611 S.E.2d at 210.

Our Supreme Court has held prior acts admissible even when they occurred as much as ten years prior to the conduct charged. *See State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991) (holding that prior acts occurring ten years before charged conduct not too remote); *see also Stevenson*, 169 N.C. App. at 801, 611 S.E.2d at 210 (holding that prior acts occurring six years prior to

charged conduct not too remote); *State v. Alvarez*, 168 N.C. App. 487, 497, 608 S.E.2d 371, 377-78 (2005) (holding that a series of robberies occurring both "immediately prior to" the charged conduct, and "within weeks of one another" sufficiently close in time). We therefore hold that six weeks is sufficiently close in time to render this evidence admissible under the temporal proximity prong of Rule 404(b).

B. Similarity

If the proffered evidence contemplates only "generic behavior" or "'characteristics inherent to most' crimes of that type," then the burden of similarity cannot be satisfied. *State v. Carpenter*, 361 N.C. 382, 390, 646 S.E.2d 105, 111 (2007) (quoting *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123). However, "the similarities need not be 'unique and bizarre.'" *Stevenson*, 169 N.C. App. at 800, 611 S.E.2d at 209 (quoting *Stager*, 329 N.C. at 304, 406 S.E.2d at 891). A prior incident is sufficiently similar if there are "some unusual facts present in both crimes." *Carpenter*, 361 N.C. at 388, 646 S.E.2d at 110 (quoting *Stager*, 329 N.C. at 304, 406 S.E.2d at 890-91). Evidence of prior misconduct will generally be admissible "if it constitutes 'substantial evidence tending to support a reasonable finding by the jury that the defendant committed the *similar* act.'" *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123 (quoting *Stager*, 329 N.C. at 303, 406 S.E.2d at 890).

With respect to Steven Locklear's testimony of Defendant's prior bad acts, Defendant contends that the factors common to each incident are "generic to the crime of a home invasion robbery."

Defendant analogizes the facts from *Al-Bayyinah*, in which our Supreme Court held that evidence generic to the crime of robbery was inadmissible because there was no showing of "substantial evidence of similarity among the prior bad acts and the crimes charged[.]" *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123. In *Al-Bayyinah*, the trial court erroneously admitted evidence of two prior robberies of a grocery store where the crime charged was the robbery of a different grocery store. During the prior crimes, "[t]he robber wore dark, nondescript clothing that obscured his face; carried a weapon; demanded money; and fled upon receiving it." *Id.* Defendant further argues that there are no discernible similarities between the charged conduct and the incidents of prior crimes testified to by Tony Locklear.

The State counters that a series of cases concerning the admissibility of prior crimes under Rule 404(b) control. In *State v. Morgan*, 183 N.C. App 160, 169-70, 645 S.E.2d,93, 101 (2007), *disc. review denied*, 362 N.C. 241, 660 S.E.2d 536 (2008), our Court found evidence of other robberies occurring within fifteen days admissible where, in each robbery involved, "one of the perpetrators brandished a gun at the victims at public establishments, demanded money, fired a shot, stole property of others, and fled the scene." The State further argues that in *State v. Hagans*, 177 N.C. App. 17, 24, 628 S.E.2d 776, 782 (2006), our Court held evidence of another robbery admissible where it showed:

> (1) the same three men participated in the earlier robbery; (2) the men wore dark

> clothing and covered their faces; (3) the same .38 revolver was used; (4) the same Cadillac was used; and (5) one man stayed behind in the car while the other two men robbed the store.

In *State v. Hall*, 134 N.C. App. 417, 426, 517 S.E.2d 907, 913 (1999), our Court held evidence of prior robberies admissible where

> 1) each had occurred in the dark early morning hours while the affected commercial establishment was empty and closed, 2) defendant waited in the darkness and then, armed with a firearm, forced or attempted to force an employee into the establishment in order to rob it, 3) all three crimes occurred in Wake County within a four month period, 4) the establishments closed late or opened early, and 5) all were robbed pursuant to a plan.

Also in *State v. Allred*, 131 N.C. App. 11, 18, 505 S.E.2d 153, 158 (1998), our Court held evidence of a prior robbery admissible where the robberies occurred within ten days of each other, and "[b]oth incidents began with a knock at the door at approximately midnight . . . [and] both cases involved two perpetrators, and in each case, the victims were asked to give up their 'stash.'"

In the case before us, a comparison of the conduct in the prior incidents testified to by Tony Locklear and Steven Locklear to the crimes with which Defendant was charged reveals numerous similarities. On 14 January 2005, Defendant, Tony Locklear, and Steven Locklear entered into a conspiracy to commit robbery. Defendant chose the victim, developed the plan, and drove the vehicle during the course of the evening. The plan was for Tony Locklear and Steven Locklear to approach the residence, kick in the front door, and enter armed with pistols. During one of the

attempts on 14 January 2005, Tony Locklear and Steven Locklear wore masks similar to the ones used during the prior robberies.

We agree with the State's assertion that the present case is more analogous to the cases cited by the State rather than to *Al-Bayyinah*. Comparing the charged conduct to the prior incidents, we find numerous similarities, including: (1) the identity of the parties, (2) the use of guns, (3) the use of masks, (4) Defendant's involvement as planner and driver, (5) the intent to steal drugs and money, and (6) the kicking in of the doors to the residences. These similarities were sufficient to allow the jury to form a "reasonable finding" that Defendant committed both the conduct charged and the prior bad acts. *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123 (quoting *Stager*, 329 N.C. at 303, 406 S.E.2d at 890). We therefore find that the evidence of prior crimes testified to by Tony Locklear and Steven Locklear falls within the admissible range of the spectrum of conduct contemplated by Rule 404(b).

C. Prejudice

Evidence offered under Rule 404(b) must also be weighed against the danger of unfair prejudice to a defendant pursuant to Rule 403. *Stevenson*, 169 N.C. App. at 800, 611 S.E.2d at 209. N.C. Gen. Stat. § 8C-1, Rule 403 (2007) provides, in pertinent part, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" A determination of admissibility under Rule 403 is made at the discretion of the trial court, and will be left undisturbed unless it "is manifestly unsupported by reason or is so

arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

A trial court may guard against the potential for unfair prejudice by providing the jury limiting instructions for permissible uses of the evidence pursuant to Rule 404(b). *Stevenson*, 169 N.C. App. at 802, 611 S.E.2d at 210 (citing *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 74-75, (2002). In the case before us, the trial court instructed the jury to consider the evidence only for the purposes of determining Defendant's identity, motive, intent, knowledge, and common plan or scheme. The trial court did not abuse its discretion under Rule 403. Instead, it guarded against prejudice by providing the jury appropriate limiting instructions. We hold that the evidence offered by the State was not unfairly prejudicial.

The evidence of prior bad acts offered by the State was sufficiently close in temporal proximity and sufficiently similar to the conduct charged at trial. The trial court provided appropriate limiting instructions on the use of the evidence pursuant to rule 404(b). Because there was sufficient similarity and temporal proximity, and the trial court provided limiting instructions, we hold that the trial court did not err in admitting the evidence of prior crimes and bad acts. Defendant's assignment of error is overruled.

Defendant did not argue his remaining assignments of error and therefore they are abandoned pursuant to N.C.R. App. P. 28(b)(6).

No error.

Judges JACKSON and ERVIN concur.

Report per Rule 30(e).