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NO. COA08-292

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 05 CRS 244094
ISRAEL GRANT, 05 CRS 244095
Defendant. 05 CRS 76342

Appeal by defendant from judgments entered 17 August 2007 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 November 2008.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.
James N. Freeman, Jr. for defendant-appellant.

GEER, Judge.

Defendant Israel Grant appeals from his convictions of two counts of robbery with a dangerous weapon and possession of a firearm by a felon. Although defendant first contends that the trial court erred in admitting evidence that defendant had a prior felony conviction for conspiracy to commit armed robbery and in failing to give a limiting instruction, the record reveals that defendant refused to stipulate to the conviction for purposes of the possession of a firearm charge and objected at trial to a limiting instruction. Defendant additionally challenges as plain error the admission of testimony regarding prior bad acts under

Rule 404(b) of the North Carolina Rules of Evidence. Since, however, some of the challenged evidence was relevant to defendant's motive to commit armed robbery, thus falling within the permissible purposes of Rule 404(b), and the remainder would not likely have affected the jury's verdict, we find no error in defendant's trial.

Facts

The State's evidence at trial tended to show the following facts. At about 3:30 in the afternoon of 15 August 2005, Christine Adcock, along with her boyfriend Jason Taylor and their son, drove to an ATM in Charlotte and withdrew money. Adcock then drove to a nearby convenience store. As Taylor began to get out of the car, he felt a gun pushed against his neck. A man demanded money and told Taylor he would kill him if he "[made] the wrong move[.]" Taylor and Adcock gave the man approximately \$285.00, and the man sped away in a car. Taylor and Adcock told police the car was a burgundy Crown Victoria with the rear window covered with a sheet of plastic secured by duct tape.

Officer Brian Kiker, who responded to Taylor's 911 call, testified that he recognized the car's description from e-mail alerts. Officer Kiker testified that police were looking for the car because, "[i]t was either [involved in] robberies or involved in a shooting, but I remember the description of the vehicle being distinctive." Officer Kiker also testified that defendant was known to drive a vehicle like the one described.

The next day, 16 August 2005, a patrol officer conducted a traffic stop of a burgundy Crown Victoria with plastic over the back window secured by duct tape. Because there was "a lookout for a vehicle that matched that description" from the robbery the day before, two other officers who heard a radio dispatch regarding the stop went to the scene to provide back up. Defendant was driving the car. Since there were no outstanding arrest warrants, defendant was allowed to leave.

On 27 August 2005, defendant was arrested on an unrelated warrant. Defendant waived his *Miranda* rights and denied involvement in the robberies. Defendant told officers that he was completing a job application at the time of the robberies, and defendant's girlfriend testified that she and defendant were together between 9:30 a.m. and 3:45 p.m. on the day of the robberies.

On 15 September 2005, Taylor identified defendant from a photo lineup. Even though he knew defendant, Taylor did not identify defendant by name. Defendant was indicted for two counts of robbery with a dangerous weapon of Jason Taylor and Christina Adcock and one count of possession of a firearm by a felon.

At trial, both Taylor and Adcock admitted that they knew defendant prior to the robbery. Taylor testified that a couple of weeks before the robbery he arranged a meeting between defendant and David Harris. Defendant bought a quarter pound of marijuana from Harris. According to Taylor, defendant told him the next day that the marijuana was "short," and he was angry. Defendant said

he was holding Taylor responsible for reimbursing defendant for the difference. Taylor testified that he did not tell officers how he knew defendant because he feared criminal charges. Adcock testified she frequently saw defendant's car parked across the street from her home while he visited a friend.

Over defendant's objection, the State introduced a certified copy of the judgment from a prior conviction of defendant for conspiracy to commit robbery with a dangerous weapon. Defendant declined to stipulate to the conviction. Later, during the charge conference, *the State* requested a jury instruction that the judgment was only relevant as evidence that defendant had a prior conviction to prove the possession of a firearm by a felon charge. The prosecutor subsequently expressed concern that a limiting instruction might highlight the prior conviction for the jury and indicated that he would leave it to the court's discretion whether to give the instruction. Defense counsel stated that he objected to the instruction, and the trial court, therefore, gave no limiting instruction.

The jury found defendant guilty of two counts of robbery with a dangerous weapon and one count of possession of a firearm by a felon. The trial court sentenced defendant to two consecutive sentences of 103 to 133 months imprisonment for the robbery convictions and a consecutive sentence of 16 to 20 months for the possession of a firearm conviction.

Discussion

Defendant first contends that the trial court committed plain error when it admitted the certified copy of defendant's prior conviction of conspiracy to commit robbery with a dangerous weapon. We disagree.

Defendant was indicted for possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1 (2007). That statute specifically provides that "[w]hen a person is charged under this section, records of prior convictions of any offense . . . shall be admissible in evidence for the purpose of proving a violation of this section." N.C. Gen. Stat. § 14-415.1(b). In *State v. Wood*, 185 N.C. App. 227, 232, 647 S.E.2d 679, 684, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007), this Court observed that when a defendant does not agree to stipulate to his prior felony conviction, "the State ha[s] no choice but to introduce evidence of defendant's conviction in order to prove its case as to the charge of possession of a firearm by a felon."

Here, defense counsel objected to admission of the evidence of the conviction, but refused to stipulate that defendant had a prior conviction. As a result, the trial court did not err in admitting the conviction. *Id.*

Defendant further argues that the court committed plain error when it failed to give a limiting instruction regarding the prior conviction. Defense counsel, however, objected to the giving of the limiting instruction after it was requested by the State. N.C. Gen. Stat. § 15A-1443(c) (2007) provides: "A defendant is not prejudiced by the granting of relief which he has sought or by

error resulting from his own conduct." As our Supreme Court has stated, "[t]o the extent that defendant agreed with the trial court's manner of instruction, defendant has invited any alleged error, and he may not obtain relief from such error." *State v. Gainey*, 355 N.C. 73, 110, 558 S.E.2d 463, 486, cert. denied, 537 U.S. 896, 154 L. Ed. 2d 165, 123 S. Ct. 182 (2002). Accordingly, this assignment of error is overruled.

Defendant next contends that the trial court committed plain error when it admitted evidence of (1) defendant's drug deal involving Taylor and (2) Officer Kiker's having received an e-mail advising him to look for defendant's vehicle because it was suspected of being involved in prior robberies or a shooting. Defendant argues that in both instances the evidence was general bad character evidence prohibited by Rule 404(b).

Defendant filed a pre-trial motion in limine to exclude testimony describing his drug transaction with Taylor, but did not object to the testimony at trial. As a result, this Court reviews admission of the evidence for plain error. See *State v. Oglesby*, 361 N.C. 550, 553-54, 648 S.E.2d 819, 821 (2007); see also N.C.R. App. P. 10(c)(4). Plain error is error "'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), cert. denied, 485 U.S. 1036, 99 L. Ed. 2d 912, 108 S. Ct. 1598 (1988)).

Although Rule 404(b) precludes the admission of evidence of other crimes, wrongs, or acts to prove the character of a person or that he acted in conformity therewith, it expressly provides that such evidence is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.R. Evid. 404(b) (emphasis added). Here, the evidence was admitted to prove motive and identity.

With respect to Taylor's testimony regarding the marijuana transaction, it tended to show that defendant robbed Taylor because he believed that Taylor owed him money over a dispute stemming from the drug transaction. We found evidence of drug transactions to be admissible under similar circumstances in *State v. Lundy*, 135 N.C. App. 13, 519 S.E.2d 73 (1999), *appeal dismissed and disc. review denied*, 351 N.C. 365, 542 S.E.2d 651 (2000). In *Lundy*, one of the co-defendants in a murder trial sought exclusion of evidence that showed the defendants had a recent dispute with the victim over drug money. The drug evidence in *Lundy* was admissible because it tended to show the co-defendants' motive to murder the victim. *Id.* at 22, 591 S.E.2d at 81.

Defendant further argues that even if the evidence was admissible, it should have been excluded under Rule 403 of the Rules of Evidence. "[T]o be excluded under Rule 403, the probative value of the evidence must not only be outweighed by the danger of unfair prejudice, it must be *substantially* outweighed." *State v. Lyons*, 340 N.C. 646, 669, 459 S.E.2d 770, 783 (1995) (holding

evidence of defendant's drug transaction admissible to show motive). We hold that evidence of defendant's prior drug transaction with Taylor was highly probative of defendant's motive, and defendant has not demonstrated that any potential for unfair prejudice substantially outweighed its probative value.

Defendant also argues that Rule 404(b) barred Officer Kiker's testimony that "[e]arlier we received e-mails in reference to that vehicle to be on the lookout for the vehicle. It was either for robberies or involved in a shooting, but I remember the description of the vehicle being distinctive." Officer Kiker also testified that the e-mails indicated that defendant was known to be the operator of the vehicle.

We cannot agree that admission of this evidence could be said to have "'probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" See *Hammett*, 361 N.C. at 98, 637 S.E.2d at 522 (quoting *Bagley*, 321 N.C. at 213, 362 S.E.2d at 251). Given Taylor's and Adcock's description of the perpetrator's vehicle as being a burgundy Crown Victoria with plastic over the back window secured by duct tape and the testimony of two officers that defendant was stopped the next day driving a vehicle that matched that description exactly, we believe that even without Officer Kiker's testimony, it is highly unlikely that the jury would have reached a different verdict. This assignment of error is, therefore, overruled.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).