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NO. COA09-1229

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

STATE OF NORTH CAROLINA

v.

Randolph County
No. 07 CRS 8

JESSIE WADE SLYCORD

Appeal by defendant from judgment entered 6 March 2009 by Judge Edgar B. Gregory in Randolph County Superior Court. Heard in the Court of Appeals 25 February 2010.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Richard L. Harrison, for the State.

Haral E. Carlin, for defendant-appellant.

JACKSON, Judge.

Jessie Wade Slycord ("defendant") appeals from a judgment entered on 6 March 2009 upon a jury's verdict finding defendant guilty of second-degree murder. For the reasons set forth below, we hold no error.

Kenneth Tate ("Tate") recently had received \$10,000.00 from a settlement for an injury he sustained in an automobile accident. On or about Saturday, 21 October 2006, defendant, Katie Myrick ("Myrick"), and others were at defendant's apartment in Ramseur, North Carolina. Defendant was showing his friends his collector's

knives and "bragging" about previously having cut Scott Cox ("Cox"). Defendant showed everyone at his home, including Myrick, a knife, which Myrick described as "gold[, a]round the outside of it, it's got a silver blade, a little Indian symbol on it. It's got a[n] Indian man holding what looks to be . . . something dead."

At defendant's home, defendant stated that he wanted Tate's money.

On or about 22 October 2006, defendant, Tate, Myrick, and others went to defendant's house and consumed marijuana and cocaine that Tate had purchased. Defendant and Michael Cox ("Michael") did not consume cocaine. Defendant again stated that he wanted Tate's money. Myrick testified that she saw defendant with the knife again. Defendant, Tate, Myrick, Brandy Woods ("Woods") and others went to Woods's trailer. At the trailer, before Tate arrived, defendant again said that he wanted Tate's money. Woods asked Myrick to help her keep Tate busy by having sex with him while defendant and Michael took his money. Myrick, Woods, and Tate went into Woods's bedroom while defendant, Michael, and Woods's mother remained in the living room. Later in the evening, Tate went to get a drink and noticed that his bag was misplaced. Myrick explained that she heard what sounded like a car door shutting, and Tate went outside to check his car. When Tate learned that his money had been stolen, he said he would "kick their butts," referring to defendant and Michael. Myrick told him that both defendant and Michael had knives and that "it wasn't worth it." Tate claimed that he had a knife as well, and that he was not scared of defendant or Michael.

Later that night, Myrick heard a knock on the door, and Tate ran outside. Myrick heard shouting, screaming, and banging on the side of the trailer. She went outside with Woods to where Tate was standing, and he said "[t]hey've stabbed me. I've been stabbed. Help me." Defendant walked by them with a knife in his hand and said "[y]ou're messing with the wrong one, mother fucker." Myrick observed defendant throw up over the side of the porch and walk inside Woods's trailer. Myrick went inside to get Tate's phone to call an ambulance and walked past defendant washing his hands in the bathroom. Myrick saw blood on defendant and noticed that he had changed his shirt when he came out of the bathroom. Myrick went outside to help Tate by holding his hand while Woods and her mother attempted to perform CPR on him. After the Sheriff's Department arrived, they all went back inside, and defendant said that he would never be able to live this down and that he would "come after" anybody who told on him.

Dr. Kraft, from the Office of the Chief Medical Examiner in Chapel Hill, North Carolina, explained that Tate died from multiple stab wounds. The only identifiable fingerprints from the crime scene were of defendant and Tate. Investigators from the local Sheriff's Department searched Woods's trailer and found defendant's knife folded inside towels in the bathroom. Lieutenant Christopher Maness identified the knife as having "an Indian on it holding up a - what appears to be a cow's skull."

Approximately six months prior to this occurrence, defendant had been involved in an altercation with Cox. Cox attempted to

remove defendant from a car where he was sitting with Cox's wife. During this altercation, defendant cut Cox's face, causing Cox to require over 100 stitches. At trial, Myrick testified that defendant said he "cut [Cox] from asshole to appetite. It's a figure of speech." The State conducted a *voir dire* examination of Cox at trial, and defendant objected to Cox's being allowed to testify about defendant's cutting him. After hearing both parties' arguments, the trial court overruled defendant's objection and motion *in limine* and allowed the testimony. On 6 March 2009, a jury found defendant guilty of second-degree murder. The trial court entered judgment sentencing defendant to 220 to 273 months imprisonment. Defendant appeals.

On appeal, defendant presents four arguments: (1) that the trial court erred by denying defendant's motion *in limine* and allowing Cox's testimony of defendant's prior assault on Cox into evidence, (2) that the trial court erred by overruling defendant's objection and allowing Myrick's testimony regarding defendant's prior assault on Cox, (3) that the trial court committed plain error by giving the jury conflicting instructions regarding the North Carolina Rules of Evidence, and (4) that the trial court committed plain error by "failing to make findings of fact, conclusions of law, or perform a balancing test" after defendant's objection and allowing testimony by Myrick concerning defendant's prior assault in violation of North Carolina Rules of Evidence, Rules 403 and 404(b). For the reasons set forth below, we hold no error.

Defendant's first and second arguments concern North Carolina Rules of Evidence, Rules 403 and 404(b). Defendant argues that the trial court committed reversible error when it denied defendant's motion *in limine* and allowed Cox's testimony regarding defendant's prior assault on him into evidence. Defendant also argues that the trial court erred by allowing testimony from Myrick concerning the same assault. Defendant suggests that the trial court's actions violated North Carolina Rules of Evidence, Rules 403 and 404(b). We disagree.

"The exclusion of evidence under Rule 403 is a matter left to the sound discretion of the trial judge, and we will reverse a Rule 403 decision of the trial court only when the decision is arbitrary or unsupported by reason." *State v. Brockett*, 185 N.C. App. 18, 23, 647 S.E.2d 628, 633 (citing *State v. Hyatt*, 355 N.C. 642, 566 S.E.2d 61 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003)), *disc. rev. denied*, 361 N.C. 697, 654 S.E.2d 483 (2007). Similarly, "[w]e review a trial court's admission of evidence under Rule 404 of the North Carolina Rules of Evidence for an abuse of discretion." *Id.* at 21, 647 S.E.2d at 632 (citing *State v. Summers*, 177 N.C. App. 691, 629 S.E.2d 902, *appeal dismissed and disc. rev. denied*, 360 N.C. 653, 637 S.E.2d 192 (2006)).

Pursuant to Rule 403,

[a]lthough 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 (2007). Pursuant to Rule 404(b),

[e]vidence 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). Our Supreme Court has explained that Rule 404(b) is

a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Maready, 362 N.C. 614, 622, 669 S.E.2d 564, 569 (2008) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)) (emphasis in original) (internal quotation marks omitted).

Defendant contends that the testimony regarding Cox did not satisfy requirements of similarity or temporal proximity that 404(b) inclusion contemplates. *State v. Al-Bayyinah*, 356 N.C. 150, 154-55, 567 S.E.2d 120, 123 (2002) ("To effectuate . . . important evidentiary safeguards, the rule of inclusion . . . is constrained by the requirements of similarity and temporal proximity.") (citing *State v. Lloyd*, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001)). This temporal proximity standard requires that "[w]hen otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor.'" *State v. Badgett*, 361 N.C. 234, 243, 644 S.E.2d 206, 212

(quoting *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)), *cert. denied*, 552 U.S. 997, 169 L. Ed. 2d 351 (2007) (brackets in original).

In the instant case, defendant objected to any testimony regarding defendant's previous assault on Cox. Defendant explained that the two cases were distinguishable because defendant's prior act was an excessive use of force in self-defense and "[t]hat doesn't have anything to do with motive in this case. It doesn't have anything to do with opportunity . . . intent . . . preparation, plan, knowledge, or identity in this case here." The State responded by explaining that the defendant's argument at trial was that "[he] didn't cut anybody with a knife[,] and that "[defendant is] gonna lay the blame on Mr. [Michael] Cox. So identity is definitely at issue here[.]" Further, the State explained the similarity of the two cases, stating that in each instance defendant "cut an unarmed man who was coming at him." After hearing these arguments, the trial court explained that the evidence was admissible because it tended "to show plan, scheme, and intent," and "the evidence is relevant and its probative value does significantly and substantially outweigh the possible prejudicial effect."

The facts in this case support the trial court's reasoned conclusion that the two events were similar; they tended to show a common plan, scheme, and intent; and their temporal proximity was not too remote. This Court previously has noted that "[i]n

determining whether the prior acts are sufficiently similar, . . . the similarities need not 'rise to the level of the unique and bizarre. Instead, 'the similarities simply must tend to support a reasonable inference that the same person committed both the earlier and later acts.'" *State v. Martin*, 191 N.C. App. 462, 467-68, 665 S.E.2d 471, 475 (2008) (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991)) (emphasis in original). In *State v. Morgan*, 359 N.C. 131, 604 S.E.2d 886 (2004), cert. denied, 546 U.S. 830, 163 L. Ed. 2d 79 (2005), the defendant was convicted of first-degree murder after evidence indicated that he had killed the victim with a broken bottle. The defendant's prior bad acts were properly admitted when the evidence showed that he previously had cut other persons with broken bottle pieces. Our Supreme Court noted that "[the] defendant was aware that the act of striking another individual with a beer bottle was a reckless and dangerous act that could cause serious injury. The trial court properly admitted this evidence under Rule 404(b) to show intent." *Id.* at 159, 604 S.E.2d at 903.

In the case *sub judice*, defendant's assault on Cox shows a similar intent. In defendant's altercation with Cox, only six months earlier, Cox entered into a physical confrontation with defendant when he found defendant in a car with his wife. Defendant cut Cox's face severely enough that Cox required approximately 100 stitches. Defendant told his friends of the confrontation, saying he "cut [Cox] from asshole to appetite" while showing off his knives. In the present case, Tate explained that,

after learning that his money had been stolen, he would "kick [defendant's and Michael's] butts." Tate's statement and the fact that he ran outside when he heard a knock suggests that he, like Cox, entered into a physical confrontation with defendant. In both instances, defendant responded by cutting Cox and Tate. As in *Morgan*, defendant was aware "that the act of striking another individual with a [knife] was a reckless and dangerous act that could cause serious injury." *Id.* Given these facts, we hold that, as in *Morgan*, "[t]he trial court properly admitted this evidence under Rule 404(b) [.]" *Id.*

Moreover, any prejudice that may have resulted from this evidence did not substantially outweigh its probative value. The trial court gave the jury a limiting instruction, explaining that the evidence was to be considered "for the *limited purpose* of showing the defendant's *plan, motive, and intent* in the case you are considering. If you believe this evidence, you may consider it but only for the limited purpose I just described." (emphasis added). Our Supreme Court has held that limiting instructions adequately obviate the risk of a prejudicial effect, explaining that the trial court may guard "against the possibility of prejudice by instructing the jury to consider [witness's] testimony only for the *limited purposes* of *motive, intent, identity, or common plan*. The trial court specifically admonished the jury not to consider [witness's] testimony on the issue of defendant's character." *Hyatt*, 355 N.C. at 662, 566 S.E.2d at 74-75 (emphasis

added). Accordingly, the trial court did not abuse its discretion by admitting evidence of defendant's prior assault on Cox.

Next, defendant argues that the trial court committed plain error when it gave the jury conflicting instructions as to the limited purpose for which 404(b) evidence shall be considered. We disagree.

Under plain error review, our Supreme Court requires that "the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant.'" *State v. Mitchell*, 317 N.C. 661, 669, 346 S.E.2d 458, 463 (1986) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)). Pursuant to the plain error standard of review, a defendant is entitled to a reversal "only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

In the case *sub judice*, defendant argues plain error because the trial court instructed the jury, prior to Cox's testimony, to consider the evidence for the purpose of "showing defendant's *identity*, the defendant's plan or scheme and intent in the case" differed from the final instruction for the jury to consider the evidence "for the limited purpose of showing the defendant's plan, motive, and intent[.]" (Emphasis added). Defendant suggests that the limiting instruction did not address the "only purpose for

which the State asked the evidence to be received." However, our Supreme Court previously has explained that

[a]lthough the State offered the evidence specifically to show identity, the trial court admitted it for the multiple purposes of showing proof of motive, opportunity, intent, identity, or absence of mistake. 'Where at least one of the [other] purposes for which the prior act evidence was admitted was [proper,]' there is no prejudicial error.

Morgan, 359 N.C. at 158, 604 S.E.2d at 903 (quoting *State v. Haskins*, 104 N.C. App. 675, 683, 411 S.E.2d 376, 382 (1991), *disc. rev. denied*, 331 N.C. 287, 417 S.E.2d 256 (1992)). In this case, the trial court's instruction does not involve a misrepresentation of the law, but rather omits the word "identity" in listing proper purposes for which the evidence presented may be considered. We cannot say that the omission of this single word altered the outcome of the jury's verdict. See *Jones* 355 N.C. at 126, 558 S.E.2d at 103. Accordingly, we hold no error.

Defendant's final assignment of error is that the trial court committed plain error by failing to "make findings of fact, conclusions of law or perform a balancing test" as required by North Carolina Rules of Evidence 404(b) and 403 after overruling defendant's objection and allowing Myrick's testimony concerning a prior assault. We disagree.

Defendant's contentions directly contradict the trial court's conclusions. After hearing both parties argue, the trial court stated:

I have listened carefully to the arguments of both sides and this Court has done a 404(b) – a Rule 402 and a Rule 403 analysis. And under

Rule 404(b), this Court rules that the evidence is admissible because the other alleged bad acts involving Scott Cox are similar in nature and are not too remote in time and are tending to show plan, scheme, and intent, and this other evidence of an act involving Mr. Scott Cox is not kept out because it is in [sic] permissible character evidence and it is not kept out under Rule 403 because this Court concludes that *the evidence is relevant and its probative value does significantly and substantially outweigh the possible prejudicial effect*. Therefore, this Court, in the exercise of its discretion, overrules the objection and overrules the motion *in limine*.

(Emphasis added).

The trial court clearly explained that Myrick's testimony was relevant *after* Cox testified. The "balancing test" required by Rule 403 requires comparing evidence's probative value with its prejudicial effect on the defendant. *State v. Mercer*, 317 N.C. 87, 93, 343 S.E.2d 885, 889 (1986). We conclude that the trial court's decision to overrule defendant's objection and allow Myrick's testimony regarding a prior assault by defendant was a proper exercise of the trial court's discretion and did not prejudice defendant in the outcome of his case. *See State v. Washington*, 141 N.C. App. 354, 367, 540 S.E.2d 388, 398 (2000) (holding that because "the procedure that was followed demonstrated that the trial court conducted the balancing test under Rule 403[,] [w]e cannot say that the trial court abused its discretion in admitting the evidence."), *disc. rev. denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). Accordingly, we hold no error.

No Error.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).