NO. COA11-818
NORTH CAROLINA COURT OF APPEALS

Filed: 21 February 2012

STATE OF NORTH CAROLINA

v. Wake County
Nos. 08 CRS 85093
10 CRS 653

RYAN PATRICK HARE,
Defendant.

Appeal by defendant from judgments entered 24 September 2010 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 10 January 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Danielle Marquis Elder, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

HUNTER, Robert C., Judge.

Ryan Patrick Hare ("defendant") appeals from judgments entered after a jury found him guilty of first degree murder, attempted first degree murder, and two counts of conspiracy to commit murder for his role in the death of Matthew Silliman in 2008. Defendant seeks a new trial arguing: (1) the trial court

erred by failing to intervene *ex mero motu* during closing arguments to preclude the prosecutor's expression of his personal belief that the State's witnesses were credible; and (2) for allowing evidence to be admitted, despite defendant's objection, that had no probative value other than of defendant's bad character. After careful review, we find no error.

Background

The facts underlying this appeal stem from the attempted murder of eighteen-year-old Matthew Silliman ("Silliman") on 25 November 2008 and his murder on 30 November 2008. Four of Silliman's alleged friends were charged in connection with his murder: defendant, Aadil Kahn ("Kahn"), Drew Shaw ("Shaw"), and Allegra Dahlquist ("Dahlquist").

Kahn and Dahlquist entered into plea arrangements whereby they agreed to testify against defendant in exchange for reduced charges; of these two, however, only Dahlquist was called to testify. Shaw also testified for the State, but did not enter into a plea arrangement.

At defendant's trial, the evidence tended to show that defendant conspired with Dahlquist, Kahn, and Shaw to murder Silliman in revenge for Silliman's interest in defendant's and Kahn's girlfriends. Central to the murder conspiracy was a person named "Roger," whom defendant claimed to be real, but whom Shaw and Dahlquist never met. Defendant's attorney

conceded to the jury that he could not prove Roger exists. Several witnesses testified that defendant spoke of Roger as a mysterious person who changed his appearance frequently, who was involved in criminal activity, and for whom defendant performed various jobs such as stealing things and constructing bombs that defendant claimed Roger would sell. Ultimately, defendant used Roger as a motivation for Silliman's murder.

Dahlquist testified that in mid- to late-November 2008, defendant told her that Roger "had people watching" and Roger knew Silliman had done something to upset defendant. Defendant told Dahlquist that Roger had another job for defendant to do and, in exchange, Roger would either pay defendant $2,000 or "take care of the Matt [Silliman] problem." Defendant claimed to have turned down Roger's request, but said Roger would be back in town in two weeks. A few days later, Dahlquist told Silliman about Roger and of Roger's offer to defendant to "take care of" Silliman. Approximately one week later, in a conversation with Dahlquist and Kahn, defendant claimed that Roger had given him an ultimatum: if defendant did not kill Silliman, Roger would kill defendant.

During the initial attempt on Silliman's life on 25 November 2008, Kahn told Silliman that he, Dahlquist, and defendant were only trying to fake Silliman's death because Roger was following them. After this failed attempt to strangle

Silliman, the four agreed that Silliman had to leave town in order for him to stay safe. However, Dahlquist testified that she, Kahn, and defendant had a subsequent conversation in which they expressed concern that even if they got Silliman out of town, he might come back; and if he did, "Roger would do something." Consequently, the three made a plan to murder Silliman.

Dahlquist further testified that on the night of Silliman's murder, 30 November 2008, she, Kahn, and defendant convinced Silliman that he had to die because of Roger. Defendant tried to kill Silliman first by hitting him in the head with a hammer. When that attempt failed, Dahlquist provided Silliman with horse tranquilizers, which Silliman mixed with wine and drank in an attempt to overdose on drugs. Once Silliman was unconscious, Dahlquist and defendant bound Silliman's hands and feet, taped his mouth shut, tied a plastic bag around Silliman's head and torso, and secured the bag with zipties around his neck. An autopsy confirmed that Silliman was alive when the plastic bag was placed over his head and that he died from asphyxiation, not from a drug overdose.

The following day, Shaw told his grandmother of Silliman's murder. This prompted an investigation by the Apex Police Department that resulted in the arrests of Shaw, Khan, Dahlquist, and defendant. Defendant was tried in Wake County

Superior Court before Judge Paul C. Ridgeway. Because defendant was 17 years of age at the time the crimes were committed, he was tried non-capitally. On 24 September 2010, the jury found defendant guilty of first degree murder, attempted first degree murder, and two counts of conspiracy to commit murder.

For the first degree murder conviction, defendant was sentenced to life imprisonment without parole. For the three remaining convictions, defendant was sentenced to three additional terms of imprisonment, each term being for a minimum of 144 months and a maximum of 182 months. Defendant timely entered written notice of appeal.

Discussion

In his first argument, defendant contends the trial court erred by failing to intervene *ex mero motu* when, during closing arguments, the prosecutor expressed his personal belief that the State's witnesses were credible. Defendant alleges that the credibility of the State's key witnesses, Shaw and Dahlquist, was questionable due to their motivations to please the district attorney with their testimony. Consequently, defendant contends, the prosecutor argued the following to the jury during closing arguments:

> When we started this trial, I told you, you may hear from Aadil Khan . . . . You didn't hear from Aadil Khan. No denying it. There's also no denying that he was Ryan Hare's right-hand man, that he was with him

> every step of the way. It's our job as prosecutors to put before you the credible evidence, or what we believe to be the credible evidence. You're the final judges of credibility, but we put the evidence before you, and then you make the final call. *We have done our best to put before you what we believe is the credible evidence before you——the believable evidence.*
>
> You're not to consider what is going to happen to Aadil Khan. As it says there, he will have his day in court. This case, this jury, is to decide about Ryan Hare. We'll deal with Aadil on a later date.

(Emphasis added.) Defendant contends the prosecutor's statement prejudiced defendant in that it created more than a reasonable probability that had the statement not been made the verdict would have been different. Defendant did not object to the prosecutor's statement, but argues the trial court erred by not intervening *ex mero motu*. We disagree.

Our General Statutes expressly state that during closing arguments to the jury an attorney may not "express his personal belief as to the truth or falsity of the evidence." N.C. Gen. Stat. § 15A-1230(a) (2011). Furthermore, our Supreme Court has held that "[w]hen the prosecutor becomes abusive, injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate and it becomes the duty of the trial judge to intervene to stop improper argument and to instruct the jury not to consider it." *State v. Smith*, 279 N.C. 163, 166, 181 S.E.2d 458, 460 (1971).

However, "'[t]he standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.'" *State v. Waring*, 364 N.C. 443, 499, 701 S.E.2d 615, 650 (2010) (quotation marks omitted) (quoting *State v. McNeill*, 360 N.C. 231, 244, 624 S.E.2d 329, 338 (citations omitted), *cert. denied*, 127 S. Ct. 396, 166 L. Ed. 2d 281 (2006)). In light of this standard of review, the *Waring* Court explained that "'[o]nly an *extreme impropriety* on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.'" *Id.* (quoting *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001), *cert. denied*, 122 S. Ct. 2605, 153 L. Ed. 2d 791 (2002)) (quotation marks omitted and emphasis added).

In *Waring*, our Supreme Court concluded the trial court did not err for failing to intervene *ex mero motu* when the prosecutor expressed his personal opinion as to the guilt of the defendant. 364 N.C. at 501, 701 S.E.2d at 651. There, the prosecutor argued to the jury, "'I think the evidence is overwhelming, the defendant is guilty under that theory of first-degree murder. I believe the evidence is overwhelming

that the defendant is guilty of first-degree felony murder . . . also." *Id.* at 500, 701 S.E.2d at 651. While acknowledging this statement was "obviously improper," the *Waring* Court held it was not "so grossly improper that it 'infected the trial' so as to 'render[] the conviction fundamentally unfair.'" *Id.* (citation omitted) (alteration in original).

Recently, in *State v. Hartley*, __ N.C. App. __, __, 710 S.E.2d 385, 398-99, *review denied*, __ N.C. __, 717 S.E.2d 383 (2011), this Court rejected a similar argument. In *Hartley*, the prosecutor, upon referring to the defendant's actions, argued to the jury, "'If that . . . isn't murder, I don't know what is[,]'" and "'I know when to ask for the death penalty and when not to. This isn't the first case, it's the ten thousandth for me.'" *Id.* We concluded in *Hartley*, the prosecutor's statements did not warrant a new trial. *Id.* at __, 710 S.E.2d at 399.

Here, while the prosecutor commented that the State had put before the jury the evidence it believed to be credible, he reminded the jury members that they were the "final judges of credibility." It is evident from the context that the prosecutor was explaining his duty to put forth credible evidence and why the State had not called as a witness defendant's codefendant Kahn. Kahn's role in the murder of Silliman was described by multiple witnesses during their

testimony. In this context, we conclude the prosecutor's comments were not improper.

Assuming, ***arguendo***, the prosecutor's comments were improper, in light of the standard applied in ***Waring*** and ***Hartley***, we cannot conclude the statements rise to the level of extreme impropriety that warrants a new trial. Defendant's argument that the trial court erred in failing to intervene ***ex mero motu*** is overruled.

Next, defendant argues the trial court erred in admitting, over defendant's objection, evidence that defendant had been expelled from school for shooting paintballs at a school bus because it had no probative value other than of defendant's bad character. Consequently, defendant argues it was error for the trial court to admit the evidence and that the error warrants a new trial. We disagree.

Approximately nine months before Matt Silliman was murdered, defendant was suspended from his high school for shooting a school bus with a paintball gun. At least one potential witness for the State was prepared to testify that defendant blamed the shooting on Roger. Upon notice from the State of its intent to use this evidence, defendant filed a motion ***in limine*** to exclude it from trial.

In a pretrial hearing, the trial court reserved ruling on defendant's motion until trial. When offered by the State

during trial, the trial judge ruled that the evidence was not unduly prejudicial and would be admitted as evidence of defendant's plan, knowledge, identity, or preparation for the crimes charged.

Shaw was then called as a witness for the State and testified, over defendant's objection, that defendant had been kicked out of school for shooting paintballs at a school bus. The trial court instructed the jury that the testimony could only be considered for the limited purpose of establishing the identity of the perpetrator, and of a plan, scheme, system, or design for the crimes charged. Shaw further testified that defendant told him Roger had fired the paintball gun, but admitted on cross-examination that defendant had only said someone else had fired the gun.

Two additional witnesses, however, testified that defendant blamed the paintball incident on Roger. Dahlquist testified that defendant blamed the paintball incident on Roger, ***without objection*** by defendant. Over defendant's objection defendant's former girlfriend, Sarah Grimsrud Rayner, testified that defendant had told her that Roger shot the paintball gun; the trial court provided a limiting instruction with Rayner's testimony.

"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) (2011). Rule 404(b) is a "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. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

> Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried."

Id. at 279, 389 S.E.2d at 54 (quoting *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (citation omitted), *cert. denied*, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988)). Rule 401(b) defines relevant evidence as "evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." N.C. Gen. Stat. § 8C-1, Rule 401 (2011) (emphasis added).

When determining whether evidence of a defendant's other acts is admissible under Rule 404(b), the trial court must also consider the similarity between, and temporal proximity of, the crime charged and the act for which evidence is being offered. *State v. Twitty*, __ N.C. App. __, __, 710 S.E.2d 421, 425 (2011). Similarity of a defendant's other acts (or crimes) with the crime charged may be established under Rule 404(b) when there are "some unusual facts present in both crimes." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991). Such similarities must only support a "*reasonable* inference" that the defendant committed both acts. *Id.* Finally, even if the trial court concludes the evidence is relevant to something other than the defendant's bad character, as well as sufficiently similar and temporally related to the crime charged, the evidence may be excluded under Rule 403 if the trial court determines, in its discretion, that admission of the evidence would result in unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (2011); *Twitty*, __ N.C. App. at __, 710 S.E.2d at 425.

Defendant's argument that the paintball incident and the murder of Silliman by asphyxiation are too dissimilar to support the admission of the evidence of the paintball shooting is unpersuasive. The similarity between the acts is not the weapons used by defendant but is defendant's use of Roger. That defendant blamed the paintball shooting on Roger and used the

threat of Roger's violence as a motivating factor for defendant and his codefendants to murder Silliman provides an "unusual fact[,]" *Stager*, 329 N.C. at 304, 406 S.E.2d at 890-91, to justify admission of the testimony under Rule 404(b). The testimony was not solely relevant to defendant's bad character, but was also relevant to establishing defendant's preparation for, and identity as the perpetrator of, the crimes charged. As for temporal proximity, the paintball incident and Silliman's murder were not too distant from each other to require exclusion of the evidence. Finally, we do not believe the trial court abused its discretion in concluding that the evidence was not unfairly prejudicial under Rule 403.

Assuming, *arguendo*, the admission of the evidence was error, defendant has failed to show that he suffered prejudice by it. *See* N.C. Gen. Stat. § 15A-1443(a) (stating that defendant bears the burden of establishing he was prejudiced by an alleged error by showing a "reasonable probability" of a different outcome had the error not occurred). The record reveals copious evidence of defendant's participation in planning and committing the murder of Silliman such that it excludes a reasonable probability of a different verdict had the testimony of the paintball shooting not been admitted. Defendant's argument is overruled.

Conclusion

We conclude the trial court did not err in failing to intervene *ex mero motu* in response to the prosecutor's statement regarding the credibility of the State's witnesses. Nor did the trial court err in admitting into evidence testimony regarding defendant's expulsion from school for shooting a school bus with a paintball gun. Defendant received a trial free from prejudice and his arguments to the contrary are overruled.

No error.

Judges THIGPEN and McCULLOUGH concur.

Report per Rule 30(e).