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NO. COA14-409
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 12 CRS 89510-11,
CLARENCE JOSEPH ROBINSON 13 CRS 73433-34

Appeal by Defendant from judgments entered 2 August 2013 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 6 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Carole Biggers, for the State.

Mark L. Hayes for Defendant.

STEPHENS, Judge.

Defendant Clarence Joseph Robinson was convicted in Guilford County Superior Court of assault inflicting serious injury and assault inflicting physical injury by strangulation. He then pled guilty to separate charges of assault by strangulation and assault on a female. On appeal, Defendant argues that the trial court erred in allowing the State to

introduce evidence of his alleged subsequent assault, which he contends violated N.C. Gen. Stat. § 8C-1, Rule 404(b), because the only purpose of that evidence was to show his propensity for violence. After careful review, we hold that the trial court did not err in admitting evidence of Defendant's alleged subsequent acts for the proper purposes of showing his intent and his common plan or scheme.

Facts and Procedural History

On 22 January 2013, Defendant Clarence Joseph Robinson was indicted by a Guilford County grand jury on one count of assault by strangulation and one count of assault with a deadly weapon inflicting serious injury. These charges arose from allegations that Defendant choked his estranged wife, Dena Jeffries, and hit her in the head with a clothing iron after an argument at her home on 15 September 2012. Before his trial on these charges, Defendant was indicted again on 1 July 2013 for another count of assault by strangulation and one count of misdemeanor assault on a female, with those charges arising from allegations of a separate, subsequent assault against Ms. Jeffries on 20 March 2013.

Defendant's trial for the 15 September 2012 assault began on 29 July 2013. The evidence tended to show that he and Ms.

Jeffries had endured a long history of domestic conflict since their marriage in December 2008. Defendant moved into Ms. Jeffries's home on Bernau Avenue in Greensboro but was constantly coming and going and often stayed with his daughter when he and Ms. Jeffries were not getting along.

At trial, Defendant and Ms. Jeffries offered conflicting accounts of what happened on 15 September 2012. Ms. Jeffries testified that she and Defendant had been drinking at her home and began to argue; Defendant left for a time, but then returned and started throwing things. Ms. Jeffries testified that Defendant hit her in the head with a clothing iron, got her down on the floor, began choking her, and told her he was going to kill her. Ms. Jeffries testified that as she was bleeding from her head wound, Defendant eventually stopped choking her and ran away, at which point she went to her neighbor's house to telephone her daughter for help and was taken to the hospital, where she received staples to close her head wound and was released.

Defendant's testimony offered a different version of the events. Defendant claimed he had been at a nearby park drinking a few beers with a friend, then returned to Ms. Jeffries's home to get more beer. According to Defendant, the couple began

arguing because Ms. Jeffries did not want him to take the beer, and it was Ms. Jeffries who first picked up the iron and came at him. Defendant testified that he was worried the iron was hot, so he either grabbed Ms. Jeffries by the throat or put her in a headlock; a struggle ensued and as the couple grappled, Ms. Jeffries fell over a chair and hit her head on a table. Defendant testified that he noticed she was bleeding and tried to help, but Ms. Jeffries was hysterical, and so instead he left to go back to his friend's house.

Ms. Jeffries was the State's first witness and, after she finished testifying about the 15 September 2012 assault, the trial court held a hearing outside the presence of the jury on Defendant's pre-trial motion to exclude evidence of his alleged 20 March 2013 assault against Ms. Jeffries because, he argued, under North Carolina Rule of Evidence 404(b), its only purpose was to show his propensity for violence. During the *voir dire* hearing, Ms. Jeffries testified that on 20 March 2013, she and Defendant were talking and getting along fine, then Defendant left her home to go to a friend's house and get more beer. Ms. Jeffries testified that when Defendant returned, "he come through the door like a wild man," grabbed her neck, threw her down on the bed, and choked her while shouting that he was going

to kill her. Eventually Defendant let go of her neck and ran away, and Ms. Jeffries called the police. The State also offered testimony from Detective Cody St. Pierre of the Greensboro Police Department, who responded to Ms. Jeffries's call. He testified that at the scene, she was bleeding from several areas on her face and had noticeable scratches and bruising around her throat. When he asked for her statement, Ms. Jeffries told him she had been standing on her front porch talking to a neighbor when Defendant came out of the bushes, approached her from behind, forced her into the house, and choked her for 30 to 45 seconds, then struck her face with both open and closed hands before fleeing her home. Detective St. Pierre testified further that he had personally responded to calls for assistance from Ms. Jeffries approximately 15 times in the previous four years since her marriage to Defendant, and that over the previous two to three years, the Department had received nearly 100 calls for service from her residence. The State also offered photographs of Ms. Jeffries's injuries arising from the 20 March 2013 assault for the jury to compare with photographs of Ms. Jeffries taken after the 15 September 2012 assault that had already been received into evidence.

The State contended that this evidence of Defendant's subsequent assault on Ms. Jeffries was admissible under Rule 404(b) because it was being offered for proper purposes to show the identity of Ms. Jeffries's attacker, to show that Defendant was following a common plan or scheme, and to prove lack of mistake and that Defendant had acted intentionally. Defendant's counsel objected to admission of the evidence, contending primarily that it only showed Defendant's propensity for violence. He also argued that the evidence was not distinctive enough to prove identification, and that there were minor inconsistencies between the time Ms. Jeffries alleged the subsequent assault had occurred and the time Detective St. Pierre testified he arrived at the scene.

At the close of the hearing, the trial court found substantial similarities between the two assaults, noting that they involved identical parties at the same location, were conducted in a similar manner, with Defendant choking Ms. Jeffries and then fleeing, and resulted in similar injuries. The trial court also noted that the near-six month gap between the assaults was not too remote to render the evidence of the subsequent assault inadmissible. Ultimately, the trial court ruled that the evidence was admissible, explaining

this 404(b) evidence is going to be received for the purpose of showing that the [D]efendant had the intent, which is a necessary element of the crimes charged in this case, that there existed in the mind of the [D]efendant a plan, scheme, or design involving the crimes charged in this case and the absence of mistake.

The trial court then concluded that the evidence was relevant and that its probative value was not substantially outweighed by any danger of unfair prejudice. However, the trial court did grant Defendant's objections to allowing Ms. Jeffries or Detective St. Pierre to testify about any other calls to Ms. Jeffries's home and included appropriate limiting instructions for the jury. When the trial resumed, Defendant made continuing objections to the introduction of the Rule 404(b) evidence.

On 1 August 2013, the jury returned verdicts finding Defendant guilty of assault inflicting physical injury by strangulation and assault inflicting serious injury. On 2 August 2013, Defendant entered a plea of guilty to the still-pending charges stemming from his alleged 20 March 2013 attack on Ms. Jeffries of assault by strangulation and assault on a female. The trial court sentenced Defendant to a minimum of 20 and maximum of 33 months imprisonment for the assault by strangulation conviction, with a consecutive term of 150 days for the assault inflicting serious injury conviction, to be

followed upon its expiration by an additional prison term of 16 to 29 months for the charges to which Defendant pled guilty.

Defendant gave written notice of appeal on 7 August 2013 and through his attorney on 12 August 2013. However, neither of these notices contained a certificate of service, which is a violation of N.C.R. App. P. 4. Defendant subsequently petitioned for a writ of *certiorari* pursuant to Rules 2 and 21 of our State's Rules of Appellate Procedure. Our prior cases make clear that it is within this Court's discretion to excuse technical violations to review the judgments filed in this case. See *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). Accordingly, we grant Defendant's petition for *certiorari* review to reach the merits of his argument.

Analysis

On appeal, Defendant argues that the trial court erred in admitting the evidence of his alleged 20 March 2013 assault on Ms. Jeffries, which he contends did not serve any proper purpose under Rule 404(b) but was instead merely evidence of his propensity for violence. Further, Defendant claims that even if the evidence of his alleged 20 March 2013 assault was relevant,

its probative value was substantially outweighed by its danger of unfair prejudice. We disagree.

It is well established that when reviewing a trial court's admission of evidence under Rule 404(b), our State's appellate courts

conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Rule 404(b) provides that "[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," but such evidence may 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) (2013). Our Supreme Court has characterized Rule 404(b) as

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. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). Furthermore, this Court has recognized that

[w]hen the evidence is offered for a proper purpose, the ultimate test of admissibility is whether the incidents are sufficiently similar to those in the case at bar and not so remote in time as to be more prejudicial than probative under the Rule 403 test. . . . The similarities between the acts do not have to be unique or bizarre; rather, they must tend to support a reasonable inference that the same person committed both acts. . . . Remoteness in time generally affects the weight to be given to the evidence, but not its admissibility.

State v. Love, 152 N.C. App. 608, 612, 568 S.E.2d 320, 323 (2002) (citations omitted), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 66 (2003). Therefore,

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 [the] defendant has the propensity for the type of conduct for which he is being tried.

State v. Bagley, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988) (citation

and internal quotation marks omitted; emphasis in original). In *Bagley*, our Supreme Court recognized that Rule 404(b) evidence can be introduced for the legitimate purpose of establishing any element of the offense charged, notwithstanding its tendency to demonstrate a defendant's propensity for committing similar crimes or acts. See *id.* at 208, 362 S.E.2d at 248 (approving of the trial court's charge to the jury that it "may consider this evidence for two purposes only [including, first] whether or not the defendant had the intent, which is a necessary element of the crime charged in this case").

In the present case, Defendant argues that because he "relied on a theory of self-defense" at trial, the Rule 404(b) evidence of his alleged 20 March 2013 assault on Ms. Jeffries was not probative of any contested issue and therefore served no purpose other than to show his propensity for violence. In support of this argument, Defendant relies on this Court's decision in *State v. Mills*, 83 N.C. App. 606, 351 S.E.2d 130 (1986), and our Supreme Court's decision in *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986), for the proposition that evidence cannot be admitted under Rule 404(b) merely to show that a defendant who relies on a theory of self-defense was the aggressor in the crime charged.

In *Mills*, this Court held that the trial court committed prejudicial error by admitting evidence under Rule 404(b) that a defendant charged with first-degree murder had previously pointed a gun at the victim and fired it at the ceiling because this evidence merely showed that the defendant, who relied on a theory of self-defense, was the aggressor in the crime charged and had a propensity for violence. 83 N.C. App. at 612, 351 S.E.2d at 134. Similarly, in *Morgan*, our Supreme Court held that evidence that the defendant, who was charged with first-degree murder, once aimed his shotgun at other people and threatened to shoot, should have been excluded by the trial court. The *Morgan* Court explained that because the defendant relied on a theory of self-defense and admitted to purposefully shooting the victim, the element of intent was not at issue, and so it was error to admit evidence for the purpose of showing intent or the absence of accident or mistake under Rule 404(b). 315 N.C. at 639-40, 340 S.E.2d at 92-93.

Here, Defendant insists that his case is analogous to *Mills* and *Morgan* because his testimony and his trial counsel's opening statement and timely objections made it clear that he would be relying on a theory of self-defense. Specifically, Defendant contends that because he admitted grabbing Ms. Jeffries by the

neck during the 15 September 2012 assault and never claimed that her injuries resulted from an accident, his intent was never a contested issue, so the introduction of any Rule 404(b) evidence regarding his intent was erroneous. Moreover, Defendant claims that because premeditation was not an element of any offense charged, the trial court erred by admitting evidence of the alleged subsequent assault as proof of a common plan or scheme. Thus, Defendant urges this Court to grant him a new trial because "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 [this] appeal arises." *State v. Maske*, 358 N.C. 40, 50, 591 S.E.2d 521, 528 (2004).

Defendant's argument ignores a crucial distinction between the cases he cites and the facts of his own case. Namely, unlike the defendants in *Mills* and *Morgan*, Defendant never actually raised the issue of self-defense before the trial court. A careful review of the record reveals that, contrary to his appellate counsel's characterization of the proceedings below, Defendant did not affirmatively plead self-defense as his defense at trial, nor did he specifically alert the trial court or opposing counsel of his plans to do so.

We note first that Defendant did not raise the issue of self-defense in his pre-trial motion to exclude the 404(b) evidence. Moreover, during the hearing on that motion, Defendant's counsel had ample opportunity to clarify that he intended to rely on a theory of self-defense and that Defendant's intent was therefore not at issue, thus rendering the 404(b) evidence irrelevant as to that issue. Indeed, the trial court asked:

THE COURT: Does [the evidence of the subsequent 20 March 2013 assault] have anything to do with the intent in this case? The State has to prove intent.

[THE STATE]: Yes, Your Honor. When it shows - when - it shows the intent in terms of 404(b). It shows this was a deliberate act. Someone's got to put their hands around your neck and squeeze. We don't get intent from someone saying, Yes, I meant to do it. We have to look at the facts and look at the circumstances. What that evidence shows to the State is that someone intentionally put their hands around her throat and applied enough pressure to cause a physical injury by strangulation. And also someone intentionally took Ms. Jeffries and punched her repeatedly in the face causing bruising.

Defendant's counsel made no objection during this hearing regarding his supposed reliance on a theory of self-defense. While it is true that Defendant's trial counsel alluded during his opening statement to the fact that "it was Ms. Jeffries that

came at [Defendant] with an iron" on 15 September 2012, the majority of his argument to the jury was dedicated to highlighting inconsistencies in Ms. Jeffries's testimony. Perhaps most tellingly, Defendant never even asked for a jury instruction on self-defense.

Because the record reveals that Defendant did not rely on a theory of self-defense at trial, his reliance on *Mills* and *Morgan* on appeal is misplaced. The fundamentally different procedural posture of the present case meant that the burden of proving Defendant's intent remained with the State. Our Supreme Court has made clear that, "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). In the present case, Defendant attempts to prevail by raising an entirely new theory—self-defense—that he did not argue before the trial court, which is something this Court will not consider because "[a] defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal." *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519

(1988), *abrogated in part on other grounds by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004).

In light of the fact that Defendant's intent was properly and repeatedly contested at trial, and given the substantial similarities between the 15 September 2012 assault and the alleged 20 March 2013 assault in terms of the parties, location, and manner of assault involved, we conclude that the trial court did not err in admitting evidence of the latter for the limited purposes of showing intent and a common plan or scheme under Rule 404(b).

Defendant argues in the alternative that even if this evidence is relevant under Rule 404(b), the trial court abused its discretion in admitting it because its probative value was substantially outweighed by the risk of unfair prejudice. We disagree.

Rule 403 provides that "[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 (2013). However, as this Court has repeatedly recognized, "[e]vidence is not excluded under [Rule

403] simply because it is probative of the offering party's case and is prejudicial to the opposing party's case. Rather, the evidence must be *unfairly* prejudicial." *State v. Gabriel*, 207 N.C. App. 440, 452, 700 S.E.2d 127, 134 (2010) (citations omitted), *disc. review denied*, 365 N.C. 211, 710 S.E.2d 19 (2011). The balancing of the factors enumerated in Rule 403 is "within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (citation and internal quotation marks omitted), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001).

In support of his argument that admission of the Rule 404(b) evidence at issue here prejudiced him, Defendant cites *State v. Goodwin*, 186 N.C. App. 638, 652 S.E.2d 36 (2007), which is yet another case involving a defendant charged with assault who admitted to stabbing the victim purposefully but claimed it was an act of self-defense. In *Goodwin*, the trial court admitted evidence under Rule 404(b) that on two previous occasions, the defendant had been accused of assault and claimed to have acted in self-defense. *Id.* at 642, 652 S.E.2d at 39. On appeal, this

Court held that the evidence served no proper purpose, was not relevant to any contested issue, and merely tended to show the defendant's propensity for violence. *Id.* Therefore, we granted the defendant a new trial because, in a self-defense case with no outside witnesses, erroneously admitted evidence of other assaults "could certainly have had a significant effect upon the jury's assessments of the defendant's credibility." *Id.* at 644, 652 S.E.2d at 40.

Here again, Defendant's argument ignores the critical fact that because he did not rely on a theory of self-defense at trial, the procedural posture of his case is fundamentally different from *Goodwin*. Moreover, the result in *Goodwin* was rooted in our finding that the trial court's erroneous admission of evidence under Rule 404(b) was prejudicial, whereas in the present case, we do not believe that the trial court erred at all. The record makes clear that the trial court properly held a hearing outside the presence of the jury to review Defendant's motion to exclude, at which both Defendant and the State were given the opportunity to present arguments. The trial court ultimately concluded that the two assaults were sufficiently similar and not too remote in time, and thus ruled that the evidence of the second assault was relevant for the permissible

purposes of establishing Defendant's intent as well as the common plan or scheme behind the attacks. However, the trial court also sustained Defendant's objections to the admission of evidence related to other assaults and additional calls for police assistance to Ms. Jeffries's home. It also provided an appropriate limiting instruction to focus the jury on the proper purposes for which the evidence was admitted.

In sum, we do not believe that the trial court's Rule 403 decision "was manifestly unsupported by reason." See *Hyde*, 352 N.C. at 55, 530 S.E.2d at 293. Accordingly, we hold that the trial court did not abuse its discretion in admitting evidence of Defendant's alleged 20 March 2013 assault against Ms. Jeffries.

NO ERROR.

Chief Judge MCGEE and Judge DIETZ concur.

Report per Rule 30(e).