IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1180

Filed: 5 May 2015

Duplin County, No. 12 CRS 51582

STATE OF NORTH CAROLINA, Plaintiff,

v.

CHRISTOPHER FITZGERALD BRANCH, Defendant.

Appeal by defendant from judgment entered 3 June 2014 by Judge W. Douglas Parsons in Duplin County Superior Court. Heard in the Court of Appeals 8 April 2015.

Attorney General Roy Cooper by Assistant Attorney General Thomas J. Campbell for the State.

Mark L. Hayes for defendant-appellant.

STEELMAN, Judge.

Assuming, *arguendo*, that the trial court erred by admitting evidence under North Carolina Rule of Evidence 404(b), any error was not prejudicial.

I. Factual and Procedural Background

This appeal arises from a fight between Michael Branch (Michael) and his brother Christopher Branch (defendant), occurring on 4 July 2012, in which defendant admittedly cut Michael with a knife. On 3 December 2012 defendant was

indicted for one count of assault with a deadly weapon inflicting serious injury, and one count of assault inflicting serious bodily injury. Prior to trial, defendant filed a notice of intent to rely on the defense of self-defense. The charges against defendant came on for trial at the 2 June 2014 session of criminal superior court for Duplin County.

A. State's Evidence

In July 2012 Michael Branch and his stepfather, George Bowden, lived at a home in Mount Olive. Michael had three brothers: Lawonna Durrell Branch (Durrell), Gregory Keith Branch (Keith), and defendant. Durrell lived "down the road a quarter of a mile" and in July 2012 defendant was staying at Durrell's house. On 4 July 2012 Michael, Durrell, and Mr. Bowden cleared brush in Michael's yard, after which Michael called his cousin, Demetrius Harding, and organized a holiday cookout. Mr. Harding, another friend, and their wives came to Michael's house. They were joined by Keith, who had not been invited. Keith was angry and threatened the others with a gun, but left when Michael told him to leave.

After Keith left, Michael received phone calls and text messages from defendant's stepson, Christopher Robinson, who threatened to "shoot up" Michael's house. In response to the threatening messages and texts from Mr. Robinson, Michael drove to Durrell's house, and went inside intending "to straighten this mess up" in order to avoid gun violence. When Michael walked into the house, unarmed, he saw

Mr. Robinson, who explained that his threatening messages had been intended as a joke. Michael warned his nephew not to make threatening calls again. At that point, defendant pushed Mr. Robinson out of the way and he and Michael exchanged words. Michael indicated that if defendant wanted to fight, it would have to be outside, then turned and left the house. As Michael started down the front stairs, defendant pushed Michael from behind. In response, Michael hit defendant and the two grappled briefly, during which time defendant cut Michael in his abdomen. The others who were present broke up the fight within ten seconds, but defendant threatened to kill Michael "next time." Michael was treated in the hospital for the knife wound, which required surgery and more than 100 stitches.

The State also offered evidence pursuant to North Carolina Rule of Evidence 404(b), concerning an incident in February 2006, in which defendant cut his former girlfriend, Ms. Shani DeVaughn. On 5 February 2006 defendant came to the Waffle House in Goldsboro, where Ms. DeVaughn was working. Defendant was angry that Ms. DeVaughn did not want to speak with him, and Ms. DeVaughn grabbed a steak knife for protection. However, defendant hit her, causing the knife to fall, then picked up the knife and cut Ms. DeVaughn a number of times. When Ms. DeVaughn fell to the floor he punched and kicked her. Ms. DeVaughn suffered cuts to her abdomen and head, black eyes and bruises, and required surgery to "reconnect [her] ear," and staples to close the abdominal wound. Sergeant Doug Bethea of the Goldsboro Police

Department was dispatched to the Waffle House on 5 February 2006, observed Ms. DeVaughn's injuries, and testified concerning these injuries. On cross-examination, Sergeant Bethea testified defendant had pled guilty to charges arising from this incident. The jury was shown photographs of Ms. DeVaughn's injuries from the assault. The trial court instructed the jury that the Rule 404(b) evidence was admitted to show defendant's intent, knowledge, and the absence of accident, mistake, or self-defense.

B. Defendant's Evidence

Durrell testified that on 4 July 2012 he did yard work with Michael and then returned to his house. After resting at home, Durrell briefly attended the cookout at Michael's house, but then returned home. Defendant, who was living with him at that time, had injured his hand earlier that day, requiring treatment at the hospital and a bandage. That night Durrell and defendant were at home when Mr. Robinson arrived, joking about having angered Michael with threatening calls and texts. Mr. Bowden came to the house, ascertained that Mr. Robinson did not have a firearm, and scolded him for making the threatening calls. Shortly thereafter, Michael entered the house, and cursed at those present. Durrell told the men not to fight inside his house, and Michael and defendant went outside. Durrell followed and saw Michael and defendant argue on the porch and in the yard. Durrell returned inside briefly and

when he came back outside, the fight was over. Durrell did not see who struck the first blow or the circumstances in which Michael was cut.

C. State's Rebuttal Evidence

Detective Clarke Baringer with the Duplin County Sheriff's Department interviewed defendant and Durrell. During the interview, Durrell had told the officer that defendant was on top of Michael when he separated them.

At the close of all the evidence, the State dismissed the charge of assault inflicting serious bodily injury. The trial court's instructions to the jury included defendant's requested instruction on self-defense. On 3 June 2014 the jury returned a verdict finding defendant guilty of assault with a deadly weapon inflicting serious injury. The trial court determined that defendant had a prior offense level of IV, and defendant stipulated to the aggravating factor that he had violated a term of probation during the ten years prior to commission of the offense. The trial court sentenced defendant to a term of imprisonment for 44 to 65 months.

Defendant appeals.

II. Admission of Evidence under Rule 404(b)

In his first argument, defendant contends that the trial court committed reversible error by allowing the State to introduce, pursuant to North Carolina Rule of Evidence 404(b), evidence of his assault on Ms. DeVaughn in 2006. Defendant argues that the evidence was improperly admitted "for the sole purpose of

establishing [defendant's] propensity for aggression." We conclude that the admission of the 404(b) evidence, even if erroneous, did not prejudice defendant.

A. Standard of Review

N.C. Gen. Stat. § 8C-1, 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. 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." "Rule 404(b) is 'a clear general rule of inclusion.' . . . [Rule 404(b) evidence] 'is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime.' " *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (quoting *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990), and *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995)). However, even "if the trial court concludes the evidence is relevant to something other than the defendant's propensity to commit the crime, 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 that admission of the evidence would result in unfair prejudice, confusion of the issues, or would mislead the jury. N.C. Gen. Stat. § 8C-1, Rule 403." *State v. Noble*, __ N.C. App. __, __ , 741 S.E.2d 473, 480, *disc. review denied*, 367 N.C. 251, 749 S.E.2d 853 (2013).

In addition, "assuming, *arguendo*, that defendant is correct that the evidence . . . [was] insufficient for the trial court to allow the admission of the evidence pursuant to Rule 404(b), defendant bears the burden of showing that any error by the trial court was prejudicial." *State v. Green*, __ N.C. App. __, __, 746 S.E.2d 457, 462 (2013) (citing *State v. LePage*, 204 N.C. App. 37, 43, 693 S.E.2d 157, 162 (2010)). Under N.C. Gen. Stat. § 15A-1443(a), "[a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when 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 the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." Thus, where there is "overwhelming evidence of the defendant's guilt, this Court has held that the 'defendant [could] not show prejudice in the trial court's admission of the challenged evidence as it would have no probable impact on the jury's decision.' " *Id.* (quoting *State v. Zinkand*, 190 N.C. App. 765, 771, 661 S.E.2d 290, 293 (2008) (internal citation omitted)).

B. Discussion

On appeal, defendant argues that, because he admitted intentionally cutting Michael and relied on the defense of self-defense, the 404(b) evidence was not admissible to show intent or absence of accident. "Assuming *arguendo* that such evidence was improperly admitted in the present case, we conclude that the

defendant has failed to carry his burden under N.C.G.S. § 15A-1443(a) to establish any resulting prejudice by showing a reasonable possibility that a different result would have been reached at trial had the error not been committed." *State v. Groves*, 324 N.C. 360, 371, 378 S.E.2d 763, 770 (1989).

" 'The elements of a charge under G.S. § 14-32(b) are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death.' " *State v. Ryder*, 196 N.C. App. 56, 66, 674 S.E.2d 805, 812 (2009) (quoting *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990)). In this case, defendant admitted to using a deadly weapon to inflict serious injury on Michael, but relied on a defense of self-defense. As a result, the only factual issue for the jury's determination was whether defendant stabbed Michael in self-defense.

Defendant argues that the admission of the 404(b) evidence compromised his ability to assert self-defense against the charge of assault with a deadly weapon inflicting serious injury. "The theory of self-defense entitles an individual to use 'such force as is necessary or apparently necessary to save himself from death or great bodily harm. . . . A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief.' Whether or not the belief was reasonable is a matter to be determined by the jury 'from the facts and circumstances as they appeared to the accused at the time.' " *State v. Moore*, 111 N.C. App. 649, 653, 432 S.E.2d 887, 889 (1993) (quoting *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745,

747 (1977)). "The right of self-defense is only available, however, to 'a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so.' " *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998) (quoting *Marsh*, 293 N.C. at 354, 237 S.E.2d at 747).

In this case the State presented overwhelming and uncontradicted evidence that: (1) Michael was unarmed when he went to Durrell's house; (2) Michael left Durrell's house first and defendant followed him outside; (3) during a fight lasting only a few seconds, defendant cut Michael in his abdomen, and; (4) when bystanders separated defendant and Michael, defendant threatened to kill Michael "next time" and threatened those around him. Defendant argues that there was evidence that his hand was injured on the day of the fight, and that there was conflicting evidence regarding who struck the first blow in the fight, and whether the two men engaged in a verbal dispute before fighting. However, there was no evidence presented from which a reasonable juror might infer that Michael was armed, that defendant believed the use of deadly force was necessary to save himself from death or serious bodily injury, or that such a belief would have been reasonable. Thus, even if the jury found that defendant's hand was bandaged or that after he and Michael argued, Michael struck defendant with his hand, there was still no evidence tending to show

that defendant acted in self-defense. We conclude that there is no reasonable possibility that the admission of the 404(b) evidence affected the outcome of the trial. This argument lacks merit.

Because we hold that admission of the 404(b) evidence did not prejudice defendant, we do not reach the issues of whether the evidence should have been excluded under North Carolina Rule of Evidence 403, or whether the trial court's instructions allowed the jury to consider the 404(b) evidence as proof of issues that were not in dispute.

III. Conclusion

We hold that, even assuming, *arguendo*, that the trial court erred by admitting the challenged evidence under North Carolina Rule of Evidence 404(b), defendant has failed to establish the requisite prejudice from admission of the evidence.

NO ERROR.

Judges STEPHENS and McCULLOUGH concur.

Report per Rule 30(e).