IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-347

Filed: 21 November 2017

Orange County, Nos. 14CRS51886, 15CRS14, 16CRS23

STATE OF NORTH CAROLINA

v.

SHENANDOAH FREEMAN, Defendant.

Appeal by defendant from judgment entered 5 July 2016 by Judge James E. Hardin, Jr. in Orange County Superior Court. Heard in the Court of Appeals 1 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Gerald K. Robbins, for the State.

Richard J. Costanza for the defendant.

INMAN, Judge.

Shenandoah Freeman ("Defendant") appeals from a judgment entered following a jury trial finding him guilty of: (1) assault with a deadly weapon with intent to kill inflicting serious injury; (2) attempted first degree murder; (3) discharging a firearm into an occupied conveyance inflicting serious bodily injury; and (4) possession of a firearm by a felon. Defendant argues that the trial court erred

in admitting evidence showing he had previously kidnapped and assaulted the victim and in considering the State's decision to dismiss its habitual felon indictment in arriving at a sentence. After careful review, we hold that Defendant has failed to demonstrate prejudicial error.

I. Facts and Procedural Background

The evidence at trial tended to show the following:

Defendant and Amber Gottschalk ("Ms. Gottschalk") met in February of 2014 when Defendant hired Ms. Gottschalk as a prostitute. From then until May of 2014, Defendant and Ms. Gottschalk continued in an illicit intimate relationship, with Defendant acting as both a pimp and protection for Ms. Gottschalk. In exchange, Defendant collected forty percent of Ms. Gottschalk's earnings from third parties for her services.

In May of 2014, the relationship between Defendant and Ms. Gottschalk soured as the result of a violent altercation (hereinafter the "May Incident"). A few days before 8 May 2014, Ms. Gottschalk called Defendant to get cocaine while she was staying at a motel. Following the call, Defendant entered Ms. Gottschalk's motel room with another man, placed a gun to her head, and then beat her with the gun. Afterwards, Defendant and his accomplice zip-tied Ms. Gottschalk's hands, wrapped her in a blanket, and took her to Defendant's apartment. A few days later, Ms. Gottschalk went to a nearby hotel and called the Durham City Police Department.

When the police arrived, Ms. Gottschalk informed them of what transpired between her and Defendant. The police searched Ms. Gottschalk's motel room, found heroin and drug paraphernalia, and arrested her. Charges were also brought against Defendant but were later dismissed.

Following Ms. Gottschalk's arrest, Defendant posted bail for her release from jail. Ms. Gottschalk continued to work as an escort but, due to her fear stemming from the May Incident, gave Defendant all of her earnings. Ms. Gottschalk eventually fled Defendant in June of 2014 as a result of this fear, depriving him of her income.

Ms. Gottschalk and Defendant next came into contact with each other on 16 July 2014, and the encounter once again devolved into violence against Ms. Gottschalk. On that date, Ms. Gottschalk was waiting at an Exxon to buy heroin from a man named Kenneth Peaks ("Peaks"). After Peaks picked her up in a car, the two drove to a motel in Durham so he could sell her the drugs. When they arrived at their destination, Ms. Gottschalk noticed that Defendant was at the motel. Ms. Gottschalk informed Peaks that Defendant was the individual who had assaulted her two months earlier in the May Incident. Peaks made sure that Gottschalk felt alright staying in the car by herself, and then exited his car to go inside the motel. While Peaks was inside, Defendant approached Ms. Gottschalk and ordered her out of the car. She refused, and Defendant shot her six times.

Defendant was arrested following the shooting and indicted for: (1) assault with a deadly weapon with intent to kill inflicting serious injury; (2) attempted first degree murder; (3) discharge of a firearm into an occupied conveyance causing serious bodily injury; (4) possession of a firearm by a felon; and (5) having attained habitual felon status.

Defendant filed motions in limine seeking to exclude any evidence of the May Incident pursuant to Rules 403 and 404 of the North Carolina Rules of Evidence. The trial court denied the motions, ruling that the evidence of the prior bad acts was admissible for the limited purpose of proving identity, motive, and intent to commit the alleged crimes. At trial, the court gave the jury a limiting instruction concerning evidence of the May Incident consistent with this ruling.

The jury returned a guilty verdict on all of the underlying felony charges. The State then informed the court that it would voluntarily dismiss the charge that Defendant had attained habitual felon status. At sentencing, the court found eight prior record points and stated that it "acknowledge[d] that the State . . . has chosen not to pursue the Defendant as a habitual felon and has taken that into consideration in fashioning this judgment and, as such, has chose[n] not to make specific findings of fact as [to] aggravation or mitigation . . . ." The trial court sentenced Defendant to an active prison term of a minimum of 207 and a maximum of 261 months, within

the presumptive range as calculated by the class of felony and prior record points. Defendant gave oral notice of appeal.

II. Analysis

On appeal, Defendant first contends that the trial court committed prejudicial error in allowing evidence of the May Incident, arguing that the prior acts were not suitably similar to the alleged crimes to be admissible pursuant to Rule 404(b) and that the evidence should be excluded pursuant to Rule 403 because it was not sufficiently probative to outweigh the danger of unfair prejudice. We disagree.

We apply two different standards of review to rulings under Rules 404(b) and 403. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). "We review de novo the legal conclusion that 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." *Id.* at 130, 726 S.E.2d at 159. When reviewing an issue *de novo*, the Court considers the matter anew and may freely substitute its own judgment for that of the trial court. *N.C. Dep't of Envtl. & Nat. Res. v. Carroll,* 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004).

Evidence of a criminal defendant's prior bad 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) (2015). " 'Rule 404(b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that [a] defendant has the propensity or disposition to commit an offense of the nature of the crime charged.' " *State v. Corum*, 176 N.C. App. 150, 156, 625 S.E.2d 889, 893 (2006) (quoting *State v. Berry,* 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002)). In order for evidence to be admissible under the Rule, it "must be offered for a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the danger of unfair prejudice to the defendant, and, if requested, must be coupled with a limiting instruction." *State v. Haskins,* 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991).

Because of the dangerous tendency of evidence of prior bad acts to mislead and raise a legally spurious presumption of guilt, "its admissibility should be subjected to strict scrutiny by the courts." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (citations omitted). However, "the burden is on the defendant to show that there was *no* proper purpose for which the evidence could be admitted." *State v. Willis*, 136 N.C. App. 820, 823, 526 S.E.2d 191, 193 (2000) (citation omitted; emphasis added).

The trial court here allowed evidence of the May Incident to show, in part, Defendant's motive to commit the alleged crimes related to the shooting. While Defendant contends that the facts of the May Incident and the shooting are too

dissimilar to support the admissibility of the former, "[w]hen determining the relevancy of other crimes evidence offered to prove defendant's motive, the degree of similarity between uncharged and charged crimes is considerably less important than when such evidence is offered to prove identity." *Haskins*, 104 N.C. App. at 682, 411 S.E.2d at 382 (citation omitted). The more critical inquiry is whether "the other crimes evidence reveal some motive for the commitment of the crime charged." *Id.* at 682, 411 S.E.2d at 382. Motive is thus revealed if the prior act "pertain[s] to the chain of events explaining the context, motive and set-up of the crime and form[s] an integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury." *Willis,* 136 N.C. App. at 823, 526 S.E.2d at 193 (internal quotation marks and citations omitted).

Recognizing the dissimilarities between the May Incident and the shooting, we nevertheless hold that, given their lower importance in this context, *Haskins* at 682, 411 S.E.2d at 382, the similarities between the two incidents are sufficient to show motive: (1) the alleged victim and perpetrator in both events are identical; (2) the May Incident and the shooting each occurred at area motels and adjacent parking lots in the course of illegal drug activity; and (3) Ms. Gottschalk was assaulted with a silver pistol in both instances. Evidence of the May Incident also tends to show why Ms. Gottschalk feared Defendant, causing her to flee from him and deprive him of her income. Defendant's loss of all income from Ms. Gottschalk's escort service for two

months tended to prove a motive for Defendant to shoot Ms. Gottschalk. Evidence of the events involving Defendant and Ms. Gottschalk preceding the July shooting provided the jury with a more complete picture of their relationship and Defendant's motive to commit the alleged crimes. *See, e.g., State v. Lloyd*, 354 N.C. 76, 90, 552 S.E.2d 596, 609 (2001) (holding evidence of a prior assault by defendant of victim in a murder case was relevant to show motive under Rule 404(b)); *State v. Petrick*, 186 N.C. App. 597, 604, 652 S.E.2d 688, 693 (2007) (holding evidence of prior acts of domestic violence against murder victim by defendant was admissible under Rule 404(b) to show motive). In short, "[o]mission of [the May Incident] evidence would have given the jury an incomplete understanding of the circumstances and connections among the players that led to [Ms. Gottschalk's attempted] murder[,]" and therefore fell within the scope of Rule 404(b). *State v. Hope*, 189 N.C. App. 309, 315, 657 S.E.2d 909, 912 (2008).

This same analysis defeats Defendant's argument that the trial court erred in overruling an objection based on the risk of unfair prejudice resulting from the evidence. The significance and high probative value of the May Incident in showing Defendant's motive to shoot Ms. Gottschalk, the appropriate limiting instruction given to the jury about said evidence, and the findings of fact and conclusions of law in the trial court's order denying Defendant's motion in limine all demonstrate that the court engaged in the proper balancing of probative value against unfair prejudice.

We hold that the trial court did not abuse its discretion in declining to exclude the evidence under Rule 403. *See, e.g., State v. Miller*, 197 N.C. App. 78, 676 S.E.2d 546 (2009) (finding no abuse of discretion in admitting evidence over defendant's Rule 403 objection where an appropriate limiting instruction was given to the jury). Defendant's arguments that the evidence of the May Incident was not admissible pursuant to Rules 404(b) and 403 are overruled.[1]

Defendant next argues that the trial court erred at sentencing in considering the State's decision to abandon habitual felon status as part of its judgment. We disagree.

We review assignments of error contending the trial court considered improper factors at sentencing *de novo*. *State v. Person*, 187 N.C. App. 512, 525-28, 653 S.E.2d 512, 569 (2007), *rev'd on separate grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008); *State v. Gantt*, 161 N.C. App. 265, 271-273, 588 S.E.2d 893, 897 (2008). A sentence that falls within the statutory limits is "presumed regular," though such a presumption is not conclusive. *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "[I]f the judge by his own pronouncement shows clearly that he imposed [the] sentence for a cause not embraced within the indictment and the plea, then the presumption of

[1] Defendant also argues that the evidence was inadmissible to show identity and intent under Rule 404(b). Even if Defendant is correct as to these grounds, he cannot show prejudice in light of our holding as to motive: "[W]here at least one of the [other] purposes for which the prior act evidence was admitted was [proper,] there is no prejudicial error." *State v. Morgan*, 359 N.C. 131, 158, 604 S.E.2d 886, 903 (2004) (internal quotation marks and citation omitted).

regularity is overcome, and his sentence is in violation of the defendant's rights." *State v. Swinney*, 271 N.C. 130, 133, 155 S.E.2d 545, 548 (1967). However, judges are "permitted wide latitude in arriving at the truth and broad discretion in making judgment." *State v. Pope,* 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962).

In sentencing a defendant with prior felony convictions, "there are two independent avenues by which a defendant's sentence may be increased based on the existence of prior convictions." *State v. Bethea*, 122 N.C. App. 623, 626, 471 S.E.2d 430, 432 (1996). These convictions "will either serve to establish a defendant's status as an habitual felon . . . or to increase a defendant's prior record level . . . ." *Id.* at 626, 471 S.E.2d at 432. The convictions may not be used to do both, however. *Id.* at 626, 471 S.E.2d at 432; *see also* N.C. Gen. Stat. § 14-7.6 (2015).

In the present case, the trial judge made the following statements in rendering his sentence:

> The Defendant has been found guilty by this jury of violations, the most serious of which is a Class B2 felony and will be sentenced as such. The Court has reviewed the Defendant's prior record and finds eight (8) prior record level points . . . . He's a level record three and will be sentenced as a Level III violator.
>
> The Court has considered the evidence and mitigation that has been offered by Counsel for the Defendant . . . . The Court acknowledges that the State of North Carolina has chosen not to pursue the Defendant as a habitual felon and has taken that into consideration in fashioning this judgment and, as such, has chose[n] not to make specific findings of fact as [to] aggravation or mitigation; thus, the

> term to be imposed is within the presumptive range of sentences authorized by North Carolina law and in consideration of the mitigation that has been offered.

Taking the above in its complete context and in light of the presumption that sentences within the presumptive range are proper, we construe the trial judge's statement as a simple recognition that the State had declined to pursue its habitual felon indictment and, therefore, Defendant's prior convictions were applicable to calculate his prior record level and combined with the offense class to determine the sentence imposed within the presumptive range defined by statute. The decisions cited by Defendant in support of his argument, *State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983) and *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983), are inapposite, as both of those cases involved sentences in the aggravated range. Here, by contrast, the trial court arrived at a sentence within the presumptive range using factors expressly considered by the General Assembly, including prior offenses that established Defendant's prior record level as a result of the State's decision not to pursue habitual felon status. It was not error for the trial court to consider these prior offenses in arriving at its sentence within the presumptive range. *See, e.g., State v. Oakes*, 219 N.C. App. 490, 497-98, 724 S.E.2d 132, 137 (2012) ("[D]efendant cites no authority—and we know of none—suggesting that a trial court may not take into account . . . the defendant's criminal record in deciding where within a presumptive range a defendant's sentence should fall.").

III. Conclusion

For the foregoing reasons, we hold that the trial court did not err in admitting evidence of Defendant's prior assault, and that the trial court's imposition of a sentence within the presumptive range was proper and valid.

NO ERROR.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).