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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-820

Filed: 20 October 2020

Davidson County No. 16 CRS 1704, 16 CRS 50958, 16 CRS 50960, 17 CRS 1950,  
STATE OF NORTH CAROLINA

v.

KENNETH JERMAINE ELLIS, Defendant.

Appeal by Defendant from judgments entered 6 March 2019 by Judge Beecher R. Gray in Davidson County Superior Court. Heard in the Court of Appeals 10 September 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Melissa H. Taylor, for the State.*

*Grace, Tisdale & Clifton, P.A., by Christopher R. Clifton, Michael B. Grace, and Greer B. Taylor, for defendant-appellant.*

MURPHY, Judge.

The trial court did not err in allowing Rule 404(b) evidence of Defendant's prior fleeing of a police stop when the State presented the testimonial evidence to prove motive, the evidence was relevant to prove Defendant's motive, and the two situations were factually similar and temporally proximate. The trial court did not abuse its

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discretion under Rule 403 in admitting the Rule 404(b) evidence here when it undertook a review of the witness's testimony outside of the presence of the jury, heard arguments from the attorneys, ruled on the admissibility while considering whether the probative value outweighed the prejudicial effect, and gave a limiting instruction to the jury about its consideration of the Rule 404(b) evidence.

Defendant did not preserve for appeal his challenge of a pretrial motion to suppress or arguments the North Carolina checkpoint statute violated both his right to travel and the Equal Protection Clause. Those issues are dismissed.

**BACKGROUND**

On 19 and 20 February 2016, the Lexington Police Department established a traffic checkpoint at West 5<sup>th</sup> Avenue and Murphy Drive near Business Highway 85/29-70. According to the Lexington Police Department form authorizing the checkpoint, the “[d]irections for [the checkpoint were to c]heck the [drivers] of the vehicles entering the [checkpoint] from all directions for motor vehicle violations. Justification[:] Compliance with motor vehicle laws.” Officer Ronnie Best (“Best”) signed the form authorizing the checkpoint and corroborated the purpose of the checkpoint. Officers conducted the checkpoint according to the Lexington Police Department’s Checkpoint Policy and Procedure Manual, which required the checkpoint authorization form. The checkpoint authorization form also included “Briefing Time[:] 11:00 P.M. . . . Starting Date/Time[:] 11:23 P.M. . . . Ending

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Date/Time[:] 01:25 A.M. . . . [and] Primary Location[:] W. 5<sup>th</sup> Avenue/Murphy Drive.” Best testified the times on the checkpoint authorization form were correct and testified he “ha[d] the blue lights running [on his police car] the entire time” the checkpoint was being conducted. The checkpoint location was chosen due to numerous cars speeding on that road, which was “a highly traveled area.” According to Best, traffic continued approaching the checkpoint at 1:25 a.m. on 20 February 2016, causing him to extend the duration of the checkpoint, and multiple vehicles were stopped when Best saw Kenneth Jermaine Ellis (“Defendant”) approach the checkpoint.

Defendant approached the checkpoint at approximately 1:39 a.m. After giving Best his driver’s license, Defendant refused to place his car in park when officers instructed him to do so and fled the scene. During the chase, Defendant swerved into the oncoming lane, then back into the right lane. Officers pursued Defendant, stopped his vehicle, and arrested him. When officers searched the vehicle, they found marijuana, and an officer retracing the path of pursuit discovered a Glock 21 handgun, clip, and holster in the area where Defendant had swerved into the oncoming lane.

Defendant was indicted for eluding arrest with greater than three aggravating factors, possession of marijuana up to one-half ounce, possession of marijuana paraphernalia, possession of firearm by a felon, and habitual felon status.

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Before trial, on 15 May 2018, Defendant moved to suppress evidence resulting from the checkpoint and the corresponding search. Specifically, the motion requested suppression of: (1) evidence from the search of Defendant's person, vehicle, and route traveled; (2) Defendant's statements made after he was detained; and (3) "any and all evidence seized in his case on [20 February 2016]." After conducting an evidentiary hearing on 20 July 2018, the trial court denied the motion to suppress on 26 July 2018.

Immediately prior to the 4-5 March 2019 trial, Defendant argued no DNA evidence linked him to the handgun and made a pretrial motion to dismiss the charge of possession of firearm by a felon, which the trial court denied. However, Defendant did not object at trial to the denial of his motion to suppress or object to the admission of the evidence referenced in the motion to suppress.

At trial, the State offered evidence of a prior similar incident, occurring on 10 February 2011 (the "2011 incident"), where Defendant fled a police officer after being stopped and officers subsequently found drug paraphernalia and a handgun in that vehicle. During voir dire, Officer Carter's ("Carter") testimony regarding the 2011 traffic stop, pursuit, and arrest, included Defendant admitting he fled because he was afraid the handgun in the car would be discovered. The 2011 incident resulted in Defendant's incarceration until 5 December 2014, approximately 14.5 months before the 20 February 2016 arrest (the "2016 incident"). The State argued Carter's

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testimony was admissible to show Defendant's motive in "react[ing] to a particular set of circumstances" and the 2011 incident was factually similar and proximate in time to the stop at issue.

Over Defendant's objection, the trial court found the 2011 incident sufficiently similar and close in temporal proximity and allowed the testimony to show motive. When the jury returned, the trial court immediately gave the following limiting instruction regarding:

[e]vidence . . . tending to show that [Defendant] committed the offense of speeding to elude arrest on [10 February 2011] in Sampson county. This evidence was received solely – will be received by you for the purpose – solely for the purpose of showing that [Defendant] had a *motive* for the commission of the crime charged in this case. If you believe this evidence, you may consider it, but *only for the limited purpose for which it was received*. *You may not consider it for any other purpose.*

(Emphasis added). Carter then testified concerning the 2011 incident to the jury.

After the State rested, Defendant again argued there was no DNA evidence linking him to the handgun and moved to dismiss all charges. The trial court denied the motion and Defendant did not present any evidence. Defendant renewed his motion to dismiss, which the trial court denied. Defendant was convicted of all charges and pleaded guilty to having attained habitual felon status.

On appeal, Defendant argues the trial court erred in allowing testimony regarding the 2011 incident, due to lack of factual similarity and temporal proximity, and in denying the motion to suppress, as the checkpoint was not appropriately

tailored or reasonable. Defendant also argues our checkpoint statute, N.C.G.S. § 20-16.3A, is unconstitutional because it violates the fundamental right to travel and Equal Protection Clause. Defendant did not make the right to travel or Equal Protection Clause arguments prior to this appeal.

The State argues Defendant does not have standing to challenge the constitutionality of the checkpoint because he fled the checkpoint.

### **ANALYSIS**

#### **A. 404(b) Evidence**

“Rule 404(b) provides that evidence of other crimes, wrongs, or acts . . . [may be admissible] as proof of motive, opportunity, intent, preparation, plan, knowledge, identity[, or absence of mistake, entrapment, or accident.]” *State v. Thomas*, 834 S.E.2d 654, 664 (N.C. Ct. App. 2019), *rev. denied* 374 N.C. 434, 841 S.E.2d 531 (2020) (internal marks omitted); *see* N.C.G.S. § 8C-1, Rule 404(b) (2019).

When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . 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).

As part of this *de novo* 404(b) review, we also review whether the evidence “is relevant under Rule 401.” *Thomas*, 834 S.E.2d at 663. “In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the

case being litigated.” *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (quotation marks omitted); see N.C.G.S. § 8C-1, Rule 401 (2019).

Rule 404(b) is a “general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant,” but the evidence must be excluded “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). “Though it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity.” *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (internal marks omitted); see N.C.G.S. § 8C-1, Rule 404(b) (2019).

A prior crime is sufficiently similar to the current one “if there are some unusual facts present in both crimes” indicating the identity of the perpetrator. *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991) (internal marks omitted). However, to be sufficiently similar, the acts need not “rise to the level of the unique and bizarre.” *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988). Even though the results of the prior crime and the crime charged may be different, we have found similarities in a defendant’s response to a confrontation to be acceptable 404(b) evidence to show motive. *State v. Mangum*, 242 N.C. App. 202, 211, 773 S.E.2d 555, 563 (2015) (holding that evidence of the defendant’s prior threat to stab former

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boyfriend during disagreement was sufficiently similar to the defendant's stabbing of a subsequent boyfriend during an argument to show motive in a murder trial).

In our consideration of whether the temporal proximity of a prior act is sufficient,

a seven year gap between prior acts and the charged acts [has] rendered 404(b) evidence inadmissible[, while t]here are cases . . . [where] this Court has allowed the evidence [despite a lapse of eight years between incidents.] These varied results simply affirm the point that remoteness for purposes of 404(b) must be considered in light of the specific facts of each case.

*Beckelheimer*, 366 N.C. at 132, 726 S.E.2d at 160 (internal marks and citations omitted). Further, “[i]t is proper to exclude time [the] defendant spent in prison when determining whether prior acts are too remote” in our 404(b) analysis. *State v. Stevenson*, 169 N.C. App. 797, 801, 611 S.E.2d 206, 210 (2005) (quoting *State v. Berry*, 143 N.C. App. 187, 198, 546 S.E.2d 145, 154, *disc. review denied*, 353 N.C. 729, 551 S.E.2d 439 (2001)).

We examine the Record to determine whether the trial court admitted evidence of the 2011 incident for a proper and relevant purpose. The trial court admitted the 404(b) testimony for purposes of motive and instructed the jury not to consider the testimony for any other purpose. Such an instruction prohibited any improper consideration of the prior crime as evidence of propensity to commit the crime charged. *See Coffey*, 326 N.C. at 278–79, 389 S.E.2d at 54; *see also* N.C.G.S. § 8C-1, Rule 404(b) (2019). In light of Defendant's statement to Carter on 10 February 2011



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that he fled due to fear of the gun in his car being discovered, the trial court's admission of this prior incident allowed the jury to consider evidence concerning Defendant's motive for fleeing the stop at issue here—fear of the discovery of a gun in his car in both instances. Further, Carter's testimony regarding the 2011 incident had a logical tendency to prove Defendant's reason for fleeing the police on 20 February 2016 and was relevant as to motive. *See* N.C.G.S. § 8C-1, Rule 401 (2019).

In further considering the propriety of the evidence under Rule 404(b), the 2011 and 2016 incidents also contain key factual similarities. In 2011, Defendant fled when a police officer, Carter, approached his vehicle. Carter gave chase, stopped Defendant, smelled marijuana in the vehicle, and discovered a handgun. Defendant admitted he was afraid Carter would discover the gun in his car and “was charged with felony fleeing to elude, as well as the possession of a firearm by a felon.” Similarly, Defendant fled officers at the checkpoint on 20 February 2016, officers gave chase, stopped Defendant, smelled marijuana in the car, and discovered a handgun thrown from the car, which had been in the car at the time of the checkpoint stop. The minor differences between the 2011 and 2016 incidents—the location of the handgun and drugs found after the stop of Defendant, as well as the type of police stop of Defendant—are not more disparate than the facts in *Mangum*, and the two crimes are factually similar for purposes of Rule 404(b). *See Mangum*, 242 N.C. App. at 211, 773 S.E.2d at 563.

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Further, the temporal proximity between the prior act and the 2016 incident was not too remote. Here, Defendant was released from the North Carolina Department of Corrections on 5 December 2014, and “reoffended on [20 February 2016,] a mere 14 and a half months” after his release from incarceration for the 2011 incident. Instead of a lapse of approximately five years between incidents, we disregard Defendant’s period of incarceration between incidents and treat the temporal proximity for 404(b) purposes between the 2011 incident and 2016 incident as 14.5 months. *See Stevenson*, 169 N.C. App. at 801, 611 S.E.2d at 210.

Upon review of the Record, testimony regarding the incident was relevant evidence concerning Defendant’s motive, and the facts of the 2011 and 2016 incidents were sufficiently similar and temporally proximate. Carter’s testimony regarding the 2011 incident was relevant under Rule 401 and proper 404(b) evidence.

We next examine the admission of the 2011 incident into evidence for abuse of discretion under Rule 403. In reviewing “the [R]ecord[, we examine whether] the trial court was aware of the potential danger of unfair prejudice to [the] defendant and [whether the trial court] was careful to give a proper limiting instruction to the jury.” *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999). In analyzing the trial court’s exercise of its discretion in a 403 balancing of 404(b) evidence, our Supreme Court has considered whether the trial court reviewed the witness’s testimony outside of the jury, considered arguments

from the attorneys, ruled on the admissibility while considering whether the probative value outweighed the prejudicial effect, and gave a limiting instruction. *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160-61. Here, the trial court undertook such a review of the witness's testimony outside of the presence of the jury, heard arguments from the attorneys, ruled on the admissibility after concluding the probative value outweighed the prejudicial effect, and gave a limiting instruction. The trial court did not abuse its discretion under Rule 403.

## **B. Preservation**

Defendant did not make an objection during trial to the evidence referenced in the motion to suppress. Further, Defendant did not make any arguments below concerning the unconstitutionality of N.C.G.S. § 20-16.3A due to violations of his right to travel and the Equal Protection Clause. Defendant did not preserve any of these issues for appeal.

### **1. Motion to Suppress**

“The law in this State is now well settled that ‘a trial court’s evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.’” *State v. Hargett*, 241 N.C. App. 121, 124, 772 S.E.2d 115, 119 (2015) (quoting *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007)).

Defendant's pretrial motion to suppress claimed "[t]he evidence was obtained in violation of federal and state Constitutional rights to be free from unlawful arrest and unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 20, of the North Carolina Constitution[.]" The motion to suppress asked for the suppression of: (1) evidence from the search of his person, vehicle, and route traveled; (2) his statements made after he was detained; and (3) "any and all evidence seized in his case on [20 February 2016]." On appeal, Defendant argues the trial court erred in denying his motion to suppress. However, Defendant did not object at trial to the evidence referenced in the motion to suppress and his pretrial motion was not sufficient to preserve his challenge of the related evidence for appeal. We dismiss all issues related to suppression. Accordingly, the State's contention that Defendant lacks standing to challenge the constitutionality of the checkpoint is moot.

## **2. Right to Travel and Equal Protection Constitutional Challenges**

While already subject to dismissal in accordance with Section B-1, above, Defendant's constitutional claims were not even raised below. "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court. Even alleged errors arising under the Constitution of the United States are waived if [the] defendant does not raise them in the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003) (internal citations and quotation marks

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omitted); *see State v. Golphin*, 352 N.C. 364, 411, 533 S.E.2d 168, 202 (2000) (“Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.”); *see also State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (“[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.”).

Defendant was required to raise his claims of error arising under the Constitution at trial. However, at trial, Defendant did not raise claims his right to travel and the Equal Protection Clause were violated, and the trial court did not rule upon such arguments. The right to travel and Equal Protection Clause issues were not preserved for appeal and are dismissed.

**CONCLUSION**

The trial court did not err in allowing Rule 404(b) evidence of Defendant’s 10 February 2011 fleeing a police stop when the State presented testimonial evidence to prove motive, the evidence was relevant to prove Defendant’s motive, and the 2011 and 2016 incidents were factually similar and temporally proximate. The trial court did not abuse its discretion under Rule 403 in admitting the testimony regarding Defendant’s 10 February 2011 fleeing a police stop when it undertook a review of the witness’s testimony outside the presence of the jury, heard arguments from the attorneys, ruled on the admissibility after concluding the probative value outweighed

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the prejudicial effect, and gave a limiting instruction to the jury about its consideration of the Rule 404(b) evidence.

Defendant did not object at trial to the admission of evidence referenced in his pretrial motion to suppress and did not reference the right to travel or the Equal Protection Clause at trial. Defendant's challenges to the motion to suppress and the constitutionality of N.C.G.S. § 20-16.3A are not preserved for appeal and are dismissed.

NO ERROR IN PART; DISMISSED IN PART.

Judges COLLINS and YOUNG concur.

Report per Rule 30(e).