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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-379

No. COA20-310

Filed 20 July 2021

Mecklenburg County, No. 17 CRS 200245

STATE OF NORTH CAROLINA

v.

MICHAEL JOSEPH BOONE, Defendant.

Appeal by Defendant from judgment entered 17 September 2019 by Judge George Cooper Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 October 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.*

*Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for defendant-appellant.*

MURPHY, Judge.

¶ 1 When a defendant claims an evidentiary error occurred, he must demonstrate prejudice to be entitled to relief. Here, even assuming, without deciding, that Rule 404(b) evidence was erroneously admitted, Defendant has not demonstrated prejudice where there was overwhelming circumstantial evidence of guilt.

¶ 2 Further, a motion to dismiss should be denied if, in the light most favorable to

the State, there is substantial evidence of each offense. Here, the circumstantial evidence constitutes substantial evidence of each element of attempted rape, satisfying the underlying felony requirement for Defendant's charge of first-degree murder under the theory of felony murder.

### **BACKGROUND**

¶ 3

Defendant Michael Boone was indicted for first-degree murder and tried under the theories of felony murder, with the underlying felony of attempted rape, and premeditated, deliberate murder. Before trial, Defendant filed a motion in limine to exclude Rule 404(b) evidence related to Defendant's aggressive conduct toward a third party earlier on the night of the murder. The trial court ultimately ruled:

THE COURT: All right. The Court is going to, under Rule 404(b), is going to allow the testimony to come in under the identity and certainly the Court will make the ruling that the probative value substantially outweighs any unfair prejudice. Certainly, [Defense Counsel], if you want to make an objection for the [R]ecord, please do that.

And if you'd like to limiting instructions to the jury [sic], sometimes it kind draws more awareness to the jury, like, "Hey, look over here." That's up to you and [Defendant] what you want to do [sic].

[DEFENSE COUNSEL]: Your Honor, in talking to [Defendant], I'll make the appropriate objection at the time, but we're not going to be asking for a limiting instruction.

¶ 4

The trial court subsequently entered an order with findings of fact and conclusions of law underlying the decision on the motion in limine. The evidence at

trial revealed the following chain of events.

¶ 5 On 2 January 2017, Ms. Shanika Simpson and Domonique Gantt, who were in a relationship of three years, were staying on the floor of Defendant’s room in a boarding house for a third night in exchange for \$10.00 a night or marijuana. That night they saw Defendant beat and bully his housemate, Demarcus Barber, by punching Barber repeatedly in the ribcage while calling him a snitch and saying that he should kill Barber. Defendant threatened to shank Barber with knives that Defendant kept in his room. After witnessing this, Ms. Simpson and Gantt left because Ms. Simpson did not want to see it anymore. Travis Vick was also at the boarding house and witnessed the altercation.

¶ 6 Gantt attempted to sell drugs so he and Ms. Simpson could have enough money to stay in a hotel overnight, rather than go back to stay on Defendant’s floor. However, since it was raining, Ms. Simpson wanted to go back to Defendant’s room in the boarding house before they could gather enough money. Gantt warned her not to go because Defendant had been drinking and was acting crazy, but she ultimately decided to go back without Gantt.

¶ 7 Around this time, Barber awoke to a loud boom that he testified sounded “like a smothering” or sounded like someone “hitting the floor.” He later heard a man ask, “where’s my girlfriend?” and the police arrived shortly thereafter.

¶ 8 Another housemate, Darren Taylor, also awoke to booming noises coming from

Defendant's room, like someone was struggling or fighting, and a woman, who sounded terrified and almost like she was crying, saying "[p]lease, please, please." He heard sounds like someone was fighting and of someone hitting the floor, along with muffled voices and sounds like Defendant was trying to shush someone, all coming from Defendant's room over the course of approximately ten seconds. Then, five to ten minutes later, Taylor heard someone ask, "is my girlfriend there?" Defendant initially responded no, then stated the woman had been at the boarding home, but had left. Taylor testified he knew she hadn't left because he never heard the door open for her to leave. This caused Taylor to look out his door, where he saw Defendant walking past in a hurry, without stopping to talk, as was typical for him, wearing only pants and looking nervous and "like he just had hurried to put them on or something. Like he didn't have on any drawers. Like, it was almost coming down."

¶ 9

After Ms. Simpson had not returned to Gantt for some time, which was atypical for her to do, he went to the boarding house to check on her. When he attempted to enter the house through the side door, he discovered that, unlike before, it was locked. Gantt knocked on the door for several minutes, during which time Vick saw him and did not let him in, and instead returned to Defendant's room. A few minutes later, Vick came back to the door, left the building, and closed the door behind him and started speaking with Gantt. After a brief conversation, Vick left, and Gantt entered the building through the now unlocked door. Gantt tried to open the door to

Defendant's room, but it too was locked, for the first time since Gantt had been there, so he knocked on Defendant's bedroom door. Defendant angrily opened the door, saw Gantt, "looked like he was scared" or "was surprised," and immediately slammed the door shut. During this brief opening, Gantt saw a bloody body on the floor of Defendant's room, and Defendant kneeled between the legs of the body. Gantt then went to leave, and Defendant, from his room, yelled out to Gantt to ask where he was going. Gantt responded that he was looking for Ms. Simpson and asked if Defendant had seen Ms. Simpson because he was looking for her. Defendant denied having seen her twice, then, in the same conversation, stated "matter of fact, she came by here, she was looking for you, but she left." Gantt testified that Defendant sounded worried in his responses. Gantt then left, called 911, and police arrived at the home.

¶ 10 Police were let into the home by one of the housemates and found Defendant, sweating profusely, wearing pants covered in a pinkish-red substance with two knife handles in his front pockets, wearing socks, work gloves, and no shirt. One officer believed that Defendant might have just been in a fight. When he was told to not pull out the knives on his person, he pulled them out, but ultimately dropped them once police raised their weapons. Police then found the body of Ms. Simpson in Defendant's room, with twenty-four knife wounds. Her shirt and bra were around her neck and she had no other clothing on, besides socks. There were two sealed condoms found near her body, a pair of jeans intertwined with leggings turned inside

out, and a glove beneath her body. Blood samples taken from Defendant's sock, gloves, and knives were matches to Ms. Simpson's DNA.

¶ 11 At the conclusion of the State's evidence, Defendant moved to dismiss the charge of first-degree murder, alleging "each and every element [was] lacking[,]” which the trial court denied. Defendant did not present any evidence and renewed his motion to dismiss at the conclusion of all evidence, which was also denied.

¶ 12 When instructing the jury, the trial court stated:

Evidence has been received tending to show that [] [D]efendant and Demarcus Barber engaged in a physical and verbal altercation on the night of the murder. The evidence was received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed. If you believe the 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.

¶ 13 The jury found Defendant guilty of first-degree murder under the theory of felony murder with the underlying felony of attempted rape and he was sentenced to life imprisonment without parole. Defendant timely appeals.

### ANALYSIS

¶ 14 On appeal, Defendant contends the trial court erred by admitting Rule 404(b) evidence of Defendant's threat to stab his housemate earlier in the night. Additionally, Defendant argues his motion to dismiss the felony murder charge should have been granted as there was insufficient evidence of the underlying felony

of attempted rape.

### **A. Evidence of a Prior Act**

¶ 15 Defendant challenges the admission of evidence under Rule 404(b) to show identity that earlier in the evening of the murder, he had threatened his housemate, Barber, with knives. Defendant argues he was prejudiced by the improper admission of the Rule 404(b) evidence, as the evidence was only introduced to show his propensity for violence—an improper purpose. Defendant also argues the trial court wrongly found the evidence to be admissible to show identity where the acts were not sufficiently similar, and that, even if the acts were sufficiently similar, the Rule 404(b) evidence should have been excluded under Rule 403.

¶ 16 Our Supreme Court has held:

When the trial court has made findings of fact and conclusions of law to support its [Rule] 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). According to Rule 404(b):

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.G.S. § 8C-1, Rule 404(b) (2019). For the purposes of this appeal, we assume, without deciding, that the trial court's admission under Rule 404(b) of Defendant's threats against his housemate earlier in the night of the murder was error, and address whether Defendant was prejudiced by this assumed error.

The improper admission of a defendant's prior conviction is not, however, reversible per se. Rather, [the] defendant has the burden under [N.C.G.S. § 15A-1443(a)] of demonstrating that but for the erroneous admission of this evidence in violation of Rule 404(b), there is a reasonable possibility that the jury would have reached a verdict of not guilty.

*State v. Badgett*, 361 N.C. 234, 247-48, 644 S.E.2d 206, 214 (citations and marks omitted), *cert. denied*, 552 U.S. 997, 169 L. Ed. 2d 351 (2007); *see also State v. McKoy*, 317 N.C. 519, 529, 347 S.E.2d 374, 380 (1986) (citing N.C.G.S. § 15A-1443(a)) ("The defendant . . . has failed to show that there is a reasonable possibility that a different result would have been reached at trial had [a witness's] testimony concerning [the defendant's] involvement in the other break-in been excluded."). Defendant has not demonstrated a reasonable possibility of a different result but for the assumed erroneous admission of Rule 404(b) evidence.

¶ 17 At trial, there was overwhelming circumstantial evidence of Defendant's guilt, including: multiple witnesses heard sounds from Defendant's room that sounded like a fight; along with muffled talking, Taylor heard a woman say "please" repeatedly in



a terrified voice; multiple witnesses testified that Defendant was acting worried, or strangely; Gantt saw a body, later identified as Ms. Simpson, on the floor of Defendant's room surrounded by blood before Defendant quickly slammed the door shut; Defendant was seen wearing only pants, with no underwear, looking like he had quickly put them on; when police entered the boarding house several minutes later they saw Defendant covered in Ms. Simpson's blood, wearing bloody work gloves, with knives on his person, sweating profusely, and looking like he had just been in a fight; and Ms. Simpson was found naked, with twenty-four knife wounds, in Defendant's room with condoms next to her body. The overwhelming circumstantial evidence in this case, excluding the 404(b) evidence, indicates it was not reasonably possible the jury would have arrived at a different verdict. Even assuming the trial court erred by admitting the 404(b) evidence, Defendant was not prejudiced by this assumed error.

### **B. Motion to Dismiss**

¶ 18

The trial court denied Defendant's motion for dismissal of the first-degree murder charge at the close of the State's evidence and his renewed motion at the close of all evidence. On appeal, Defendant challenges the evidence of the underlying felony of attempted rape primarily based on a lack of an overt act.

The question that must be answered when presented with a motion to dismiss a charge at the close of all the evidence is whether, upon consideration of all the evidence in the

light most favorable to the State, there is substantial evidence that the crime charged in the bill of indictment was committed and that [the] defendant was the perpetrator. Substantial evidence is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. In order to overcome a motion to dismiss, the evidence does not have to rule out every hypothesis of innocence. Furthermore, contradictions and inconsistencies do not warrant dismissal; the trial court is not to be concerned with the weight of the evidence. Ultimately, the question for the court is whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances.

*State v. Williams*, 355 N.C. 501, 578-79, 565 S.E.2d 609, 654 (2002) (citations and marks omitted), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

¶ 19 Our Supreme Court has described the elements required to prove attempted first-degree rape, as follows:

The elements of attempted first-degree rape are: (1) specific intent to rape the victim, and (2) completion of an overt act done for that purpose that goes beyond mere preparation but falls short of the actual commission of the rape. *State v. Bell*, 311 N.C. 131, 140, 316 S.E.2d 611, 616 (1984). Rape can be defined as vaginal intercourse carried out against the will of another person and facilitated by force, during which the offender employed or displayed a dangerous weapon or inflicted serious personal injury upon the victim. N.C.G.S. § 14-27.2 (2003).

*State v. Garcia*, 358 N.C. 382, 413, 597 S.E.2d 724, 746-47 (2004), *cert. denied*, 543

U.S. 1156, 161 L. Ed. 2d 122 (2005).

¶ 20 “The element of intent as to the offense of attempted rape is established if the evidence shows that [the] defendant, at any time during the incident, had an intent to gratify his passion upon the victim, notwithstanding any resistance on her part.” *State v. Schultz*, 88 N.C. App. 197, 200, 362 S.E.2d 853, 855-56 (1987), *aff’d per curiam*, 322 N.C. 467, 368 S.E.2d 386 (1988). “Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred.” *Id.* at 200, 362 S.E.2d at 856.

¶ 21 Viewed in the light most favorable to the State, a reasonable mind might accept the evidence as adequate to prove Defendant’s intent to engage in vaginal intercourse against Ms. Simpson’s will, based on the evidence that Ms. Simpson’s body was found naked in Defendant’s room with twenty-four stab wounds and her top pulled up to her neck and her pants inside out and pulled off of her, two condoms were found near Ms. Simpson’s body, Gantt saw Defendant kneeled between Ms. Simpson’s legs on the floor, and Defendant looked like he had quickly put on pants with no underwear. This circumstantial evidence constitutes substantial evidence that Defendant intended to have vaginal intercourse with Ms. Simpson “to gratify his passion[.]” *Id.*; see *State v. Robinson*, 97 N.C. App. 597, 602, 389 S.E.2d 417, 420, *disc. rev. denied and appeal dismissed*, 326 N.C. 804, 393 S.E.2d 904 (1990) (“In the instant case there

was evidence that [the] defendant struggled with [the victim] and tore her underpants. This is substantial evidence from which the jury could reasonably conclude that [the] defendant intended to rape [the victim].”).

¶ 22 This same circumstantial evidence establishes an overt act, beyond mere preparation, done with the specific intent to rape, as, in the light most favorable to the State, a reasonable mind might accept as adequate this circumstantial evidence to prove an overt act. A reasonable mind could accept from this evidence the inference that Defendant pulled Ms. Simpson’s clothes off, took off his own clothes, struggled or fought with her, set out condoms, and moved in between her legs in an attempt to engage in vaginal intercourse. *See State v. Bauguss*, 265 N.C. App. 33, 39, 827 S.E.2d 127, 132 (2019) (finding evidence of the “defendant’s act of trying to reach up [the victim’s] skirt is an overt act that exceeded mere preparation”); *In re D.W.*, 171 N.C. App. 496, 500-01, 615 S.E.2d 90, 93 (2005) (finding sufficient evidence of attempted rape when “[the] defendant pulled down [the victim’s] pants” and “[the] [d]efendant then pulled down his own pants and touched [the victim’s] vagina with his penis”).

¶ 23 Viewed in the light most favorable to the State, there is substantial evidence that a reasonable mind might accept as adequate to prove Defendant’s specific intent to rape Ms. Simpson and completion of an overt act done for that purpose. The trial court did not commit error in denying Defendant’s motion to dismiss.

### **CONCLUSION**

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*Opinion of the Court*

¶ 24 Assuming, without deciding, that the trial court erroneously admitted the Rule 404(b) evidence of Defendant's assault upon and threatening of his housemate, Defendant has failed to show there was a reasonable possibility of a different outcome if it had been omitted. Defendant's motion to dismiss was properly denied where substantial evidence existed of his specific intent to rape Ms. Simpson and of completion of an overt act done for that purpose.

NO ERROR.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).