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NO. COA02-422

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v.

GERMAN ERNESTO NORIEGA

Buncombe County
Nos. 00 CRS 008262-65,
008268 and 008271

Appeal by defendant from judgments dated 29 March 2001 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 30 December 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel F. McLawhorn, for the State.

German Ernesto Noriega, defendant appellant, pro se.

GREENE, Judge.

German Ernesto Noriega (Defendant) appeals judgments dated 29 March 2001 entered consistent with a jury verdict finding him guilty of robbery with a firearm, conspiracy to commit robbery with a dangerous weapon, possession of a handgun by a felon, assault with a deadly weapon inflicting serious injury, first-degree kidnapping, and conspiracy to commit first-degree kidnapping.

At trial, the State presented evidence tending to show that, on 5 February 2000, the Advance Auto Parts store at 905 Patton Avenue in Asheville, North Carolina, had just closed for the day when two men wearing ski masks entered the store through the back

door. The store manager, Sean Gunn (Gunn), and an employee, Khristopher Malay (Malay), were the only persons present in the store at that time. One of the masked men placed the barrel of a gun to the back of Gunn's head and ordered him to get on the floor. The man struck Gunn on the back of the head two or three times with the gun. He then instructed Gunn to lock the back door. After Gunn locked the door, the men took the keys from Gunn and dragged Gunn across the store to the safe. Gunn opened the safe for the two men. Subsequently, the men dragged Gunn to the bathroom, tied his hands and feet, and closed the door. The men took Gunn's wallet, truck keys, and his truck.

Malay testified Defendant identified himself and "Tony" as the robbers when Defendant dragged Malay to the women's bathroom and closed the door to a crack. Malay's fiancée, Ethel Noriega (Noriega), who is also Defendant's sister, came to the store while the robbery was in progress. When Malay let her into the store, the two robbers tied her up as well. After the robbers had left the store, Malay and Noriega first untied each other and then Gunn. A day or two later, Defendant gave Malay a portion of the money taken in the robbery.

Noriega testified she recognized one of the robbers as Defendant based on the shoes he was wearing and the way he walked. In addition, Luis Antonio Mejias (Mejias) testified he was one of the two men who had robbed the store. Mejias had met Defendant at a designated location on 5 February 2000. Defendant planned to rob the Advance Auto Parts store later that day. Defendant told Mejias

only two people would be in the store and he and Mejias would use tie straps to restrain them. Defendant further explained he and Mejias would put the employees in the bathroom and take the money and the manager's truck. Mejias and Defendant subsequently executed this plan, waiting behind the store until after it closed at approximately 9:00 p.m. Defendant handed Mejias a ski mask, latex gloves, and a nine-millimeter pistol. Because the manager knew Defendant, Defendant directed Mejias to handle the manager.

In accordance with the plan, Mejias ran to Gunn and placed a gun to the back of his head. Defendant grabbed Malay and dragged him to the back of the store. Mejias struck Gunn on the head with the gun, drawing blood. Mejias ordered Gunn to the back of the store where Gunn opened the safe. Mejias and Defendant then moved Gunn to the bathroom and tied his hands and legs. While they were helping themselves to the store merchandise, Noriega came to the door of the store and was let in by Malay. Mejias started Gunn's truck and brought it to the back of the store, where Defendant began loading it. Mejias drove the truck to the back of a hotel where they unloaded the stolen goods into Defendant's automobile and subsequently abandoned the truck.

Mejias further testified that, on 15 December 1999, he and Defendant stole a van in preparation for a robbery of the Ingles Supermarket on Haywood Road in Asheville. He and Defendant were seated in the van when they observed two employees walk out of the Ingles store carrying a bank deposit bag. Defendant, wearing a mask, jumped out of the van, pointed a gun at the employees, and

demanded their money. Defendant took the money and jumped back into the van. Mejias then drove the van to a park, where they abandoned it.

Sometime thereafter, Mejias received a bag containing items taken from the Advance Auto Parts store. Mejias buried the bag in a hole near the Blue Ridge Parkway. After his arrest, Mejias led officers to the bag, which also contained materials taken or used in the robbery of the Ingles Supermarket located on Haywood Road. Defendant was subsequently arrested at a storage warehouse on 8 March 2000. A stolen vehicle found in Defendant's possession was searched and a pistol was found under the driver's seat. Blood found on the pistol matched Gunn's blood sample.

Finally, Christopher Lawing (Lawing) testified Defendant, who dated Lawing's sister at the time, solicited Lawing to participate in the robbery of an Ingles Supermarket employee making the store's bank deposit on 15 July 1998. Defendant robbed the employee and took the employee's automobile. Defendant abandoned the employee's automobile at a prearranged location, where Lawing met Defendant.

Prior to trial, Defendant moved the trial court to exclude evidence of the robberies of the Ingles Supermarket employees on 15 July 1998 and 15 December 1999. The trial court denied the motion, noting the robberies occurred under similar circumstances and under similar preparation and perpetration as the Advance Auto Parts robbery.

The issues are whether: (I) admission of the testimony of the

Ingles Supermarket robberies constituted prejudicial error and (II) Defendant was denied effective assistance of counsel when his counsel failed to renew his objection to the admission of this evidence at the time it was received at trial.

I

Defendant contends the trial court erred by admitting evidence of the Ingles Supermarket robberies on 15 July 1998 and 15 December 1999. Defendant argues these robberies were too dissimilar and too remote in time to have any significant probative value.

Although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show the person acted in conformity with that character, it is admissible for other purposes, such as to prove motive, intent, preparation, plan, knowledge, or identity. N.C.G.S. § 8C-1, 404(b) (2001). The test for admitting evidence of other crimes, wrongs, or acts "is whether the incident in question is 'sufficiently similar' to the event for which the defendant is presently on trial and 'not too remote in time so as to be more probative than prejudicial under the balancing test of G.S. 8C-1, Rule 403.'" *State v. Allred*, 131 N.C. App. 11, 18, 505 S.E.2d 153, 157 (1998) (citation omitted). "[A] prior act or crime is 'similar' if there are "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both."" *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991) (quoting *State v. Green*, 321 N.C. 594, 603, 365 S.E.2d 587, 593 (1988)). "Evidence may be admitted even though remote in time, if its

'signature' value is high." *State v. Wortham*, 80 N.C. App. 54, 62, 341 S.E.2d 76, 81 (1986), *rev'd on other grounds*, 318 N.C. 669, 351 S.E.2d 294 (1987). The decision to exclude admissible evidence of prior crimes under Rule 403 is a matter left to the trial court's discretion. *Allred*, 131 N.C. App. at 18, 505 S.E.2d at 158.

Assuming without deciding that the trial court abused its discretion in admitting evidence of the prior robberies, Defendant was not prejudiced by this error. Both the testimony of Malay and Noriega served to identify Defendant as the robber and blood on Defendant's gun was found to be a match with Gunn's blood sample. Accordingly, this assignment of error is overruled.

II

Defendant also argues he was denied effective assistance of counsel because his counsel did not renew his objection to the admission of evidence of other crimes at the time this evidence was received. See *State v. Grooms*, 353 N.C. 50, 65, 540 S.E.2d 713, 723 (2000) ("a motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial"). To prove a claim of ineffective assistance of counsel, a defendant must show: (1) counsel made errors, and (2) counsel's errors were so serious as to deprive the defendant of a fair trial. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). In reviewing such a claim, the trial court does not need to determine whether counsel made errors if the record does not show a reasonable probability that a different verdict would have been

reached in the absence of counsel's deficient performance. *Id.* at 563, 324 S.E.2d at 248-49.

In this case, assuming counsel failed to preserve the right to appeal the admissibility of the evidence, the error was harmless in light of the remaining evidence of Defendant's guilt. Accordingly, there is no reasonable probability a different verdict would have been reached had Defendant's counsel objected and the inadmissible evidence of the two prior robberies been excluded. As such, Defendant was not prejudiced by his counsel's failure to renew the objection.

No error.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).