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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-712

Filed: 2 January 2018

Wayne County, Nos. 15 CRS 54431, 4049, 4085, 4086, 4097

STATE OF NORTH CAROLINA

v.

JAVON THOMAS YOUNG

Appeal by defendant from judgments entered 21 April 2016 by Judge Thomas H. Lock in Wayne County Superior Court. Heard in the Court of Appeals 13 December 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Wood, for the State.

Kimberly P. Hoppin, for defendant-appellant.

CALABRIA, Judge.

Where evidence of defendant's prior threat against his alleged victim was offered for a proper purpose, was relevant, and its admission was not an abuse of discretion, we hold that the trial court did not err in admitting the evidence. Where the State, in its closing argument, did not improperly comment regarding defendant's right to remain silent, but instead noted that the State's witness was not contested

or impeached, the trial court did not abuse its discretion in overruling defendant's objection to the State's closing argument.

I. Factual and Procedural Background

Javon Thomas Young ("defendant") and Temmeka Hobbs ("Hobbs") started a romantic relationship in 2010. They moved in together in April of 2011. Hobbs described the relationship as "[c]haotic" and "[u]nhealthy[,]" and on 18 January 2015, defendant left their shared home at Hobbs' request. Hobbs went to her mother, Janice Jones ("Jones"), and Jones went to take defendant away from the home. Hobbs then received a call from Jones, telling her that Jones would be calling the police. When Hobbs arrived, defendant was gone.

On 5 October 2015, Hobbs was at home and heard the doorbell ring. When she opened the door, Hobbs was attacked, "getting punches to the upper part of [her] body." At first she thought it was a random act, until she heard defendant's voice, saying "something to the extent of you thought it was over." During the attack, which started at Hobbs' door and continued to her vehicle, defendant put both of his hands around Hobbs' neck, squeezing tightly. He also bent Hobbs' right thumb backwards. The struggle continued, and he choked Hobbs a second time. He also struck her repeatedly about the face, and bit her multiple times. During the conflict, he told Hobbs that he had come to kill her. The struggle returned to the front steps, and

defendant fell, striking her head. When she came to, defendant was gone, and she called Jones.

Jones received the call from Hobbs. Hobbs told Jones, "he's trying to kill me. Call 911." Jones called 911, while her husband took his gun and drove to Hobbs' house. Jones then got into her own vehicle and drove to Hobbs' house. When she arrived, she saw her husband holding Hobbs, who stated that defendant had tried to kill her. Law enforcement arrived shortly thereafter.

Defendant was indicted for one count of assault by strangulation; one count of communicating a threat; one count of injury to personal property, with respect to Hobbs' vehicle; one count of assault inflicting serious bodily injury, with respect to Hobbs' thumb; one count of felony assault on a female; one count of felony assault inflicting serious injury, with respect to Hobbs striking her head on the steps; and one count of assault with a deadly weapon with intent to kill inflicting serious injury, with respect to defendant pummeling Hobbs with his fists. The State gave notice that it would be producing evidence of prior statements made by defendant, as well as prior convictions.

Defendant subsequently pleaded guilty to the charge of injury to personal property. Defendant also admitted to having two prior convictions for assault within the preceding 15 years. Defendant declined to testify or present any evidence at trial.

The jury returned verdicts finding defendant guilty of assault inflicting injury by strangulation and communicating a threat. The jury found defendant not guilty of assault inflicting serious injury, but guilty of the lesser offense of simple assault. The jury also found defendant guilty of felony assault on a female, but not guilty of felony assault inflicting serious injury. Lastly, the jury found defendant not guilty of assault with a deadly weapon, but guilty of the lesser offense of simple assault. The jury further returned a verdict finding defendant guilty of attaining habitual felon status.

The trial court sentenced defendant to a minimum of 60 and a maximum of 84 months for assault by strangulation, a minimum of 60 and a maximum of 84 months for felony assault on a female, to run consecutively, as well as 60 days for simple assault and communicating threats, and 60 days for injury to personal property, in the custody of the North Carolina Department of Adult Correction. The court arrested judgment on the second count of simple assault.

Defendant appeals.

II. Admission of Evidence

In his first argument, defendant contends that the trial court erred in allowing, over objection, the admission of evidence of a prior threat allegedly communicated by defendant. We disagree.

A. Standard of Review

> Though this Court has not used the term de novo to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of probative value and unfair prejudice under Rule 403. For the purpose of clarity, we now explicitly hold that when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. 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, 158-59 (2012) (citations omitted).

B. Analysis

At trial, over defendant's objection, the State sought to present testimony on *voir dire* of prior threats by defendant. Hobbs testified that defendant had previously threatened her. Specifically, she testified that, in January of 2015, after they had broken up, Hobbs went to her mother's home, and while she was gone defendant damaged windows, walls, and furniture. She testified that she knew he did this, because he told her over the phone that he would, and she could hear him doing it. Hobbs filed a criminal complaint against defendant over the property damage, and he threatened to burn her house down if she testified. As a result, she did not testify, and the State dismissed the case.

The matter of whether the jury could hear this testimony was then discussed. After some colloquy, the trial court held that the State could ask Hobbs about defendant's threats to burn her house down, in order to show motive and mental state for the crime committed in the instant case. Additionally, the trial court gave a limiting instruction with respect to the testimony. Defendant again objected to the testimony, and subject to the limiting instruction, that objection was overruled. On appeal, defendant contends that the trial court erred in admitting this testimony.

Rule 404(b) of the North Carolina Rules of Evidence provides that:

> 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.R. Evid. 404(b). In conducting our review of Rule 404(b) evidence, this Court "must first determine whether the evidence was offered for a proper purpose under Rule 404(b), then determine whether the evidence is relevant under Rule 401, and finally determine whether the trial court abused its discretion in balancing the probative value of the evidence under Rule 403." *State v. Martin*, 191 N.C. App. 462, 467, 665 S.E.2d 471, 474 (2008).

On the first point, whether the evidence was offered for a proper purpose, we first note that Rule 404(b) "is a clear rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its

exclusion if its only probative value is to show that the defendant had the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Adams*, 220 N.C. App. 319, 322, 727 S.E.2d 577, 580 (2012) (quoting *State v. Kennedy*, 130 N.C. App. 399, 403, 503 S.E.2d 133, 135 (1998)). In other words, evidence of other crimes or wrongs committed by a defendant is admissible, even if it may show a propensity to act in conformity therewith, "so long as it also 'is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried.' " *State v. Bagley*, 321 N.C. 201, 206-07, 362 S.E.2d 244, 247 (1987) (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986)).

The question, then, is the purpose for which the evidence was offered. At *voir dire*, the State argued that the evidence was being offered for two purposes:

> For that issue, to go to his motive, state of mind into going into October as to this incident that occurred, and also sort of just sort of a res gestae, if that's the right wording, as to why these folks did some of ... believed that while -- it goes to her belief of the threat that he would kill her, because he has made that kind of -- he has made a threat to her before, and also feeding into why she would leave her home, be fearful, and the stepfather would stay there to perhaps try to make some protection of her property.

The trial court agreed, and admitted the evidence, making explicit that the evidence was to be admitted "solely for the purpose of showing that the Defendant had motive to, [sic] for the commission of the crime charged in this case, or that there existed in the mind of the Defendant a plan, scheme, system or design involving the crime

charged in this case[.]" Further, the trial court gave a limiting instruction on this point, not once, but twice – once prior to the introduction of the testimony, and once during the jury's instructions at the close of trial. It is worth noting that defendant did not object to these instructions. It is therefore clear that the evidence was offered for a proper purpose, namely to illustrate defendant's motivation and mindset in the October attack.

The second question is whether the evidence was relevant. According to Rule 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. The issue is whether defendant's threat to "burn down" Hobbs' house made any fact of consequence more or less probable. This Court has previously held that a prior threat is relevant, in cases of assault, to show intent. *State v. Hammonds*, 45 N.C. App. 495, 499, 263 S.E.2d 326, 328 (1980). Accordingly, we hold that defendant's prior threat to Hobbs, to burn her house down, was evidence that was relevant to the offenses, which included assault.

The third and final point is whether the trial court abused its discretion in admitting the evidence. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527

(1988). In the instant case, the trial court engaged in *voir dire* and colloquy to determine the admissibility of this evidence. It is clear, upon review of the record, that both sides were afforded the opportunity to offer arguments, and that the trial court carefully considered its decision. This is further supported by the fact that the trial court gave two limiting instructions, recognizing the need to exercise caution when introducing this evidence. We therefore hold that the trial court did not abuse its discretion in admitting the evidence of defendant's prior threat. We further hold, overall, that the trial court did not err in admitting this evidence.

III. Closing Arguments

In his second argument, defendant contends that the trial court erred in overruling defendant's objections to the State's closing arguments, or alternatively in failing to cure the State's improper remarks. We disagree.

A. Standard of Review

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection. In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations and quotation marks omitted).

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2015).

B. Analysis

The State, in its closing argument, made the following observation:

> In opening statement Mr. Webster said this is a he said/she said case. No, it's not. This is a she said case.

Defendant objected, arguing that this was improper commentary on defendant's assertion of his right to remain silent. The trial court overruled this objection. On appeal, defendant contends that this was error.

After reviewing the State's closing argument as a whole, we disagree. After the trial court overruled defendant's objection, the State continued:

> The uncontradicted evidence in this case of the Defendant as the perpetrator of this crime and as to the actions of the Defendant on October 5th of 2015, what you heard about was from Ms. Hobbs from this witness stand. The Defense Attorney had every opportunity in cross-examination, if he wanted to say she's not telling the truth, if he wanted to say she's mistaken about her identification, if he wanted to say didn't somebody else really do this crime? That's what cross-examination is all about. And he didn't do it. He questioned her about well, really, how long did you stay in that splint? How long did -- how many times did you see the doctor? Nothing that went to her credibility. Nothing that indicated, as he said in opening statement, she's just trying to make this up against [defendant].

It is clear that the State was not remarking upon defendant's decision to remain silent, but upon the failure of defense counsel to contradict or impeach Hobbs' testimony with respect to the events of 5 October 2015. In using the term "he said/she said," the State was not referring to the fact that Hobbs testified and defendant did not, but to the fact that Hobbs' narrative went effectively unchallenged.

Our Supreme Court has held:

> A criminal defendant may not be compelled to testify, and any reference by the prosecutor to a defendant's failure to testify violates the defendant's constitutional right to remain silent. *State v. Baymon,* 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994). A prosecutor may, however, properly argue the failure of the defendant to produce evidence. *State v. Richardson,* 342 N.C. at 785-86, 467 S.E.2d at 693; *State v. Young,* 317 N.C. 396, 415, 346 S.E.2d 626, 637 (1986). In this case the prosecutor's remarks were directed toward defendant's failure to offer evidence to rebut the State's case, not at defendant's failure to take the stand himself. The comments are not comparable to comments that have been held improper by this Court and the United States Supreme Court.

State v. Fletcher, 348 N.C. 292, 322, 500 S.E.2d 668, 685 (1998). In the instant case, as in *Fletcher*, the State's remarks went to defendant's failure to contradict Hobbs' testimony, and not to defendant's refusal to testify.

We note that defendant properly preserved a constitutional objection. If the State had improperly commented on defendant's right to remain silent, our analysis on appeal would be different; the State would have the burden of showing that any error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b).

However, in the instant case, the State's argument was not an improper commentary upon defendant's right to remain silent, and thus did not implicate defendant's right to remain silent. Our review is therefore limited to an abuse of discretion.

On review, it is clear that the State was remarking upon the evidence, a legitimate argument to make at closing, per *Fletcher*. We hold that the trial court did not abuse its discretion in overruling defendant's objection to this argument.

NO ERROR.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).