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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-925

Filed: 6 February 2018

Edgecombe County, No. 13 CRS 052078-79, 13 CRS 052080-81

STATE OF NORTH CAROLINA,

v.

SYLVESTER RAY ANDREWS, JR. and TRAYVON MARKEL POWELL MOODY, Defendants.

Appeal by defendants from judgments entered on or about 1 October 2015 by Judge W. Russell Duke, Jr. in Superior Court, Edgecombe County. Heard in the Court of Appeals 23 March 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amar Majmundar and Special Deputy Attorney General Olga Vysotskaya de Brito, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant Andrews, Jr.

Jarvis John Edgerton, IV for defendant Moody.

STROUD, Judge.

Defendants Sylvester Ray Andrews, Jr. ("defendant Andrews") and Trayvon Markel Powell Moody ("defendant Moody") appeal from their convictions of first

degree murder. On appeal, defendants argue that the trial court erred when it refused to allow the defense to cross-examine one of the State's witnesses about a similar shooting that occurred 10 days prior to the events in this case. After review, we hold that the trial court did not err in sustaining the State's objection under Rule 404(b), because the prior shooting was not sufficiently similar to the shooting incident at issue in this case.

Facts

The State's case at trial tended to show the following facts. On 8 April 2012, Darryel Hill was hanging out with Gregory Freeman and Randy Elliott at a home on Pender Street in Rocky Mount, North Carolina. Hill, Freeman, and Elliott were smoking marijuana and drinking. Hill was a member of the "Sex-Money-Murder" section of the Bloods gang. Hill testified that at the time, he was having problems on the street with another gang, Eight Tre, which is affiliated with the Crips. At some point that evening, the three men got into a white Cadillac Seville owned by Sharon[1], the mother of Hill's child, and went to get more marijuana. Hill was driving, Elliott was in the front passenger seat, and Freeman was in the back seat behind Elliott.

Afterwards, Hill returned to the Pender Street house and parked the car by the curb, with the driver's side door facing the front door of the house. Hill got out of the car and went in the house to get a "tape deck" so they could play music from

[1] Pseudonyms are used throughout this opinion for ease of reading and to protect the identity of witnesses and other named individuals.

Freeman's phone through the radio. Hill noticed a Honda coming up to a stop sign as he approached the front door of the house. While inside, Hill heard gunshots fired "at a rapid pace." At first, upon hearing the shots, Hill and the other people inside the house dropped to the ground. He then ran outside to grab a rifle that was stored out of the house, and by the time he grabbed it and ran to the front of the house, he saw the same Honda he had noticed earlier speeding off in the opposite direction.

Angela[2] was home that night -- 8 April 2012 -- sitting by a window using her computer on the second floor of her house on Pender Street. She saw brake lights and then all of a sudden "there was gunfire." She told her husband to call 911 because there had been a drive-by shooting. She knew the car was light colored, possibly white or silver, but could not tell the make, how many people were in the car, or who was shooting, other than that the gunfire itself was coming through the passenger-side window.

Elliott was shot in the head and slumped over towards the driver's seat. Freeman was shot several times in the abdomen and was lying down in the backseat. Officers were in close proximity, and after receiving a call from dispatch, they arrived on the scene shortly after shots were fired. Freeman was initially screaming from the backseat that he had been shot; but he eventually became less responsive. Both Freeman and Elliott eventually died from their injuries.

[2] A pseudonym.

On 5 August 2013, defendants were each indicted on two counts of first degree murder for the murders of Gregory Demon Freeman and Randy Lavon Elliott, Jr. The cases were joined and came on for a joint trial on 28 September 2015.

At trial, Timothy Fox testified that on 6 April 2012 -- two days before the shooting in question -- he was sitting with his friend Ernest Sykes in his black Honda Accord in front of Syke's house on Avent Street in Rocky Mount when someone in what he described as a "Silver Cadillac Deville" shot at his car. Neither Fox nor Sykes were hit by gunshots, but Fox testified that they hit the right side passenger door and bumper of his car. Fox did not call police to report the incident, but officers later appeared at his house and took him to the police station after hearing about the incident from third parties.

Fox further testified that he went back to Sykes' house on either 7 or 8 April 2012 and Sykes, his brother Cortez, defendant Andrews, and a "[l]ight-skinned black man" were all present. The light-skinned man that Fox did not know was later identified in court during trial as another State witness, Tremayne Lynch.[3] Fox testified that Lynch was in possession of a gun he described as looking like an "AK." Fox and defendant Andrews went to school together. Fox showed defendant Andrews the damage to his car and told him about the Cadillac in hopes that he might know

[3] Fox identified a person in the courtroom by pointing and describing the person's clothing. The defendants' briefs on appeal indicates that the person who he pointed to later took the stand as Lynch, but the transcript does not clearly identify the person.

who shot at his car. Defendant Andrews responded that "he thought he knew who did it, but wasn't for sure."

James Taylor testified that on 9 April 2012, the day after Easter Sunday, defendant Andrews, defendant Moody, a "light-skinned dude," and a "short, dark skinned guy" came over to his house in a white Honda. He testified that while at his house, defendant Andrews started to brag how "he caught some of them slipping and they blew their luck." Accordingly to Taylor, defendant Andrews said that he "had followed them from Branch Street to where it happened at." Taylor claimed that defendant Andrews told him that "[t]hey followed the car and the dude got out and went in the house. One dude got out and went in the house. They busted a U at the stoplight and came back." Taylor testified that defendant Andrews told him they shot the men because "they were Blood[,]" but he did not tell them who the men were, what they looked like, or on what street the shooting occurred. Taylor did not tell anyone about this conversation until December 2013, when an ATF agent asked if he knew anything about the Pender Street shooting before he was sentenced on a federal firearms charge. Taylor claimed at defendants' trial he did not have any agreement with federal or state prosecutors for his testimony.

Lynch also testified at defendants' trial as a witness for the State. At the time of the trial, Lynch was in state prison serving a sentence for a conviction for assault with a deadly weapon with intent to kill and shooting into an occupied vehicle. Lynch

testified that he was in Nash County jail in February 2013 and was facing federal charges for conspiracy to sell and distribute crack cocaine and using a firearm in furtherance of drug trafficking. In April 2013, while in jail, Lynch had his lawyer arrange a meeting with the Rocky Mount Police Department because he knew he was facing a potentially significant federal sentence and he wanted to see if he could get any help for himself or his girlfriend -- who was also in jail -- by telling police what he knew about a double homicide on Pender Street.

Lynch testified that initially when speaking with police about the double homicide, he was not entirely truthful. Though he later told police that he was the driver of the car from which the shots were fired, Lynch originally claimed to have been in the backseat. After Lynch was sentenced for the federal charges, he met with officers for a second time, and he then changed his story from being a backseat passenger to being the driver of the vehicle. Lynch claimed that he changed his story after he had a plea deal on his federal charges because his lawyers told him he could not be prosecuted for any information he gave to state or federal authorities.

Lynch testified at defendants' trial that he was a member of the Eight Tres "subset" of the Crips gang. Lynch stated that he knew defendant Andrews and defendant Moody because they were members of the Crips as well. Lynch testified that he hung out with defendant Andrews the weekend of 6 April 2012 at his grandmother's house and that defendant Moody was also there that day, along with

around 20 other people. Lynch let someone borrow the car he was driving -- a white Honda Accord -- and eventually they brought it back to the house. Lynch claimed that later that evening he then got into the car with defendants and another guy to get some more marijuana. Lynch was driving, defendant Andrews was in the front passenger seat, defendant Moody was seated in the backseat behind defendant Andrews, and the other guy was sitting in the backseat on the driver's side.

Defendant Andrews started giving Lynch directions, which Lynch followed, thinking he was taking him to "where the weed was at." Lynch testified that he followed defendant Andrews' directions to Pender Street, and as they "rode by" someone said "they ain't there." Lynch then turned the car around and drove back up the same street. After approaching a stop sign, someone yelled "there they go right there." Lynch testified that he made a left turn and turned back around to approach the street yet again. Lynch saw a white Cadillac pulling up next to a house on Pender Street and saw one male get out of what he thought was the front passenger seat. Lynch testified that he thought they were turning around because the Cadillac contained "the weed man." As Lynch approached the Cadillac, he testified that both defendants "started shooting." Lynch testified that defendant Andrews had a small "AK" and defendant Moody had a handgun. Lynch claimed that he did not expect them to start shooting because he "wouldn't do nothing stupid in [his] mother's car" because "it could lead straight back to [him]." Lynch could see two

people in the Cadillac and saw one of them get shot in the head. After the shooting, Lynch "kept driving" because he did not want to be caught in his mother's car. He cleaned up the shell casings in his car and threw them away.

During Lynch's cross-examination, defendant Andrews' trial counsel attempted to question Lynch about his involvement in a shooting that occurred 10 days prior, on 29 March 2012, in Wilson County. The State objected to this line of questioning, and the trial court sustained the State's objection. The following morning, defendant Moody's counsel argued outside the presence of the jury that the defense should have been permitted to cross-examine Lynch regarding his involvement in that shooting under Rule 404(b) because it "goes to his motive, plan, his scheme in this particular case and the jury needs to be aware of that because he is putting before them that he did not have any participation in this particular crime." Counsel thus argued that the evidence should be allowed because it goes to Lynch's "intent and scheme and plan . . . as it involves the incident that occurred on April the 8th of 2012." Defendant Moody's counsel added that the evidence of the prior shooting "is certainly relevant to show the jury that even though . . . Lynch is contending that he did not have anything to do with what happened on April 12th [and claims that he was just riding with someone to buy drugs that day, not knowing there would be a shooting,] just 10 days prior to that he was involved in an incident that is very similar to what we have here." Counsel argued that Lynch "participated in that

[shooting], had a weapon with him at that time. He fired that weapon. He was the first one to fire the weapon. He fired that weapon into a vehicle that was occupied by the people at that particular time."

The State argued that the evidence should not be admitted because the prior shooting was not sufficiently similar to the shooting at issue in this case. Specifically, the State contended that "the only similarity at all is that there is a shooting into a vehicle and that's very generic terms." Defendant Andrews' counsel joined in with the arguments made by defendant Moody's counsel and argued that it would be the defense's contention that it was Lynch who fired the shots in the present case and that evidence of the similar shooting in Wilson County was "relevant and admissible[.]" After hearing arguments on both sides, along with a *voir dire* of Lynch regarding the Wilson County shooting, the trial court once again sustained the State's objection and would not allow the defense to proceed with this line of questioning "on the ground -- on the 404(b) law." The court went a step further and also sustained the objection under Rule 403 as "confusion of the jury."

On 1 October 2015, a jury found both defendants guilty of the murders of Freeman and Elliott. Defendants were each subsequently sentenced to two terms of life imprisonment without the possibility of parole. Defendants timely appealed to this Court.

Discussion

Defendants' sole argument on appeal is that the trial court erred when it refused to allow the defense to cross-examine the State's witness -- Tremayne Lynch -- about a similar shooting he was involved in 10 days prior to the shooting that occurred in this case. The trial court refused to allow this line of cross-examination on the grounds that it was barred by Rule 404(b) as well as Rule 403. Specifically, the trial court stated:

> THE COURT: All right. The objection is sustained. The 404(b) offering is excluded on the ground -- *on the 404(b) law*. And also the Court is considering and recognizes 403 in *confusion of the jury*. All right. Anything before we bring the jury back?

(Emphasis added).

Our Supreme Court has clarified the standard of review in evaluating the admission of evidence under Rule 404(b) and Rule 403:

> We first address the appropriate standard of review for a trial court's decision to admit evidence under Rule 404(b). The Court of Appeals has consistently applied an abuse of discretion standard in evaluating the admission of evidence under Rules 404(b) and 403. 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, as it did here, 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).

Under Rule 404(b),

> [e]vidence 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.

Additionally, Rule 403 clarifies that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The trial court ultimately made two somewhat conflicting conclusions in this case: first, the court sustained the State's objection to the testimony on the grounds of "on the 404(b) law[,]" in essence ruling that the evidence was not relevant. But the court then went a step further and also sustained the objection for "confusion of the jury" under Rule 403, which would mean that it *was* relevant, but that its relevance was outweighed by the danger of causing the jury too much confusion.

We first examine the court's conclusion under Rule 404(b) -- sustaining the State's objection "on the 404(b) law" -- *de novo*. *See Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 158.

> Under Rule 404(b), it is not the case . . . that evidence of other crimes, wrongs or acts by a defendant falls under a "general rule of exclusion" subject to certain "exceptions." It is clear now that, as a careful reading of Rule 404(b) clearly shows, evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused. Relevant evidence means 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.
>
> Recent cases decided by this Court under Rule 404(b) state a clear general 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 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) (citations and quotation marks omitted). Typically, the determination for whether evidence of this type is admissible under Rule 404(b) depends on its similarity and temporal proximity to the incident at issue. *See, e.g., State v. Fink*, __ N.C. App. __, __, 798 S.E.2d 537, 544 (2017) ("Rule 404(b) evidence is relevant and admissible so long as the incidents are sufficiently similar and not too remote in time." (Citation, quotation marks, and brackets omitted)); *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991)

("Under Rule 404(b) 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. However, it is not necessary that the similarities between the two situations rise to the level of the unique and bizarre. Rather, the similarities must tend to support a *reasonable* inference that the same person committed both the earlier and the later acts." (Citations and quotation marks omitted)).

Here, the trial court sustained the State's objection based on Rule 404(b) and did not allow in evidence of the prior shooting -- essentially concluding that it was not relevant -- and made no further findings regarding whether it was sufficiently similar to the incident at issue. But by sustaining the objection, the court arguably must have found that the prior shooting was not sufficiently similar to the shooting incident in this case. After review, we conclude that the evidence at trial supported such a conclusion. The only "similarity" between the two shootings that the trial court heard was that Lynch was present at both. The prior shooting took place in Sharpsburg, North Carolina, while the incident in this case occurred in Rocky Mount. The trial court heard evidence -- through *voir dire* testimony of Lynch -- that Lynch was a *passenger* in a white van at the time of the earlier shooting, but was the driver of a completely different vehicle with entirely different passengers, a white Honda Accord, at the time of the shooting incident in the case at hand. In relation to the previous shooting, Lynch testified that he got out of the van and then started shooting

into the driver's side of a vehicle at an individual who was getting into the passenger side of the vehicle -- and this individual was not either of the victims in this case. The incident in the case at hand involved a drive-by shooting where shots were fired from inside one vehicle into another, at passengers in the other vehicle. Accordingly, we hold that while arguably relevant evidence in the general sense, the trial court did not err when it sustained the State's objection under Rule 404(b), because the prior shooting was not sufficiently similar to the incident at hand.

Although the trial court did not need to do so, after sustaining the State's objection under Rule 404(b), it took an additional step and also sustained the objection under Rule 403 due to concerns about confusing the jury. In doing so, the court essentially found that even if the evidence *was* relevant, the potential unfair prejudice due to jury confusion outweighed its relevancy. As we have concluded that the trial court acted properly in upholding the State's objection under Rule 404(b), we need not address the arguments surrounding Rule 403.

Furthermore, even if we assumed the trial court erred in upholding the State's objection under Rule 404(b), and the evidence would have been admissible under Rule 404, it would have been within the court's discretion to not allow the evidence in under the Rule 403 balancing test. We review a trial court's determination under Rule 403 only for abuse of discretion and may only reverse if we find that the ruling was so arbitrary that it could not have been the result of a reasoned decision. *See*

State v. Hembree, 368 N.C. 2, 13, 770 S.E.2d 77, 85 (2015) ("Once a trial court has weighed the likely probative and prejudicial value of evidence a party has sought to admit over an objection, we review only for abuse of discretion. This standard is deferential, and we will disturb the trial court's decision only when it crosses the line from potentially reasoned to necessarily arbitrary." (Citations omitted)). Under this highly deferential standard, we conclude that the trial court did not abuse its discretion here. The trial court was well within its discretion to exclude the evidence on the basis of potential confusion.

Conclusion

For the reasons stated above, we hold that the trial court did not err in sustaining the State's objection under Rule 404(b).

NO ERROR.

Judge DILLON concurs.

Judge MURPHY concurs as to defendant Andrews and concurs in the result only as to defendant Moody.

Report per Rule 30(e).