

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-25

Filed: 15 October 2019

Columbus County, Nos. 06 CRS 6250-51, 6257-59, 6261-62, 6254-67

STATE OF NORTH CAROLINA

v.

DANNY LAMONT THOMAS

Appeal by defendant from judgments entered 30 August 2017 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 19 September 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan P. Babb, for the State.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for defendant.

ARROWOOD, Judge.

Danny Lamont Thomas (“defendant”) appeals from judgments sentencing him to four consecutive life sentences without parole and additional sentences totaling a minimum of 385 months to a maximum of 623 months in prison. On appeal, defendant contends the trial court erred in denying his motion to suppress, motion to dismiss, and in admitting certain evidence under N.C. Gen. Stat. § 8C-1, Rule 404(b). After careful review, we affirm.

I. Background

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Defendant was originally tried and convicted of a number of crimes on 5 May 2011. *State v. Thomas*, 230 N.C. 127, 748 S.E.2d 620 (2013). On appeal, we reversed and remanded for a new trial upon concluding defendant was denied his right to remove a juror with a peremptory challenge. *Id.* at 133, 748 S.E.2d at 624. Defendant was re-tried and then convicted on 30 August 2017 of four counts of first-degree murder, one count of attempted first-degree murder, one count of robbery with a firearm, one count of attempted robbery with a dangerous weapon, three counts of second-degree kidnapping, one count of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of first-degree burglary for a string of offenses committed on 20 August 2005, 10 September 2005, and 5 November 2005.

The State's evidence at trial tended to show the following facts. The Durham Police Department issued an arrest warrant for defendant in connection with a homicide committed in Durham in July 2005. After noticing similarities between the Durham homicide and three homicides committed in Columbus County, the Columbus County Sheriff's Office and North Carolina SBI agents also began searching for defendant. U.S. Marshals assisted Durham police officers in tracking a phone number associated with defendant that was listed under the name "Markeeta Crutchfield." On 8 December 2005, Deputy Steven Warden of the El Paso County Sheriff's Office in Colorado went to 2305 Lexington Village Lane in Colorado Springs to assist the U.S. Marshals in apprehending a fugitive from North Carolina. Deputy

Warden and other law enforcement set up surveillance of the residence, which was owned by Yvette Jurnett (“Jurnett”). When Jurnett arrived home, the deputies asked if they could speak to her and she agreed. They showed her a picture of defendant and asked if he was in her home. She told them it looks like the man staying in her house but she knew him as “Santana.” Jurnett gave Deputy Warden consent to search her house, adding “[i]f this person is inside of my home, I want them out.” Jurnett also told the officers no one other than defendant was in her home, and she had not seen any weapons.

Deputy Warden and other deputies entered the residence through a garage to locate defendant. Upon reaching a stairwell that led down to a basement, they heard a male voice speak in the basement. The deputies announced their presence and ordered the man to come out. Those commands were repeated a few times, with no response. Deputy Warden then called defendant by name, to which defendant responded he was not coming out. Deputy Warden exited the residence and requested the Colorado Springs Police Department Tactical Unit be sent to the scene. Sergeant Jason Hess, still standing in the hallway near the basement, used a mirror to look into the basement and saw defendant holding a rifle. Defendant then yelled, “Back the f*** up; Don’t come down here; It’s going to be a bloodbath if you guys try to come get me.” He also informed the deputies he was loaded with ammunition. The Tactical Unit later arrived to relieve the Sheriff’s Office and was able to apprehend defendant.

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Despite having the homeowner's consent to search the premises, the officers sought and obtained a search warrant. Upon searching the basement, officers found an SKS rifle, a .45 caliber Ruger handgun, loose bullets, and a backpack which contained 9mm and other bullets, two rolls of duct tape, and a two-way radio. In a bedroom on the second floor of the home, the officers found a duffel bag containing a black stocking cap, a blue-and-white bandana, a red-and-white bandana, and a white-red-and-black foam hockey mask. In addition, they also found a North Carolina driver's license with defendant's name on it in a suitcase.

Defendant was arrested and charged with a string of crimes committed in Columbus County. These included the attempted murder of Terrence Rowell ("Rowell") on 20 August 2005; the murder of Craig Williams ("Williams") and kidnapping of Centia McLeod ("McLeod") on 10 September 2005; and the murders of Dennis Inman, Regina Inman (collectively, "Inman"), and Anthony Martin ("Martin") on 5 November 2005. Testimony about the Rowell and Williams crimes revealed one of the perpetrators was a black man wearing a Jason-style hockey mask with holes in it, similar to the one seized from defendant in Colorado. The man in the hockey mask who attacked Rowell and Williams had a TEC-9 gun with holes in it. Police officers who investigated the Rowell scene found a fired, 9mm Luger shell casing, which was similar to a live round seized in Colorado. Jacqueline Battle testified

defendant visited her house on 3 September 2005, and was carrying a gun with holes in it.

Forensic examination showed some 9mm shell casings from the Rowell, Williams, and Inman shootings were all fired from the same gun. The .45 shell casings from the Inman murders also matched a .45 cartridge found near Williams. In addition, Rowell and Martin were both bound with duct tape similar to the duct tape seized in Colorado. The DNA profile generated from a bloody impression on the roll of duct tape seized in Colorado matched the DNA profile of the bloodstain of Martin. Expert testimony revealed a profile from bloodstain cuttings from the hockey mask seized in Colorado matched the DNA profile from Williams.

Over defendant's timely objection, evidence of two other crimes believed to be committed by defendant on 26 December 2004 and 15 July 2005 was also presented at trial for purposes of proving identity. Testimony about the incidents revealed they were committed by a man in a white Jason mask with holes in it, and that bullets from the two crime scenes were fired from the same .45-caliber gun.

On 1 August 2017, defendant filed a motion to suppress all the evidence seized in Colorado as a result of the installation and use of a pen register device on the cell phone he was using. On 14 August 2017, the court orally denied the motion and signed a detailed written order *nunc pro tunc* on 5 October 2017. Defendant presented no evidence at trial, but moved to dismiss all the charges at the close of all

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the evidence. The jury found defendant guilty of all charges. He was sentenced to four consecutive life sentences without parole for the four murders; 127 months to 162 months for assault with a deadly weapon with intent to kill inflicting serious injury and second-degree kidnapping; 117 months to 150 months for first-degree burglary and second-degree kidnapping; and 251 months to 311 months for attempted murder, robbery with a dangerous weapon, and first-degree kidnapping. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant argues the trial court erred by: (1) denying the motion to suppress evidence seized pursuant to an unconstitutional search based on cell phone information showing defendant's location that was obtained without a warrant; (2) denying the motion to dismiss the charge of kidnapping McLeod where the evidence did not show she was confined or removed beyond that necessary to rob her with a dangerous weapon; and (3) admitting evidence about a prior, violent incident for purposes of proving his identity, absent any proof of the defendant's involvement. We address each argument in turn below.

A. Motion to Suppress

Defendant first argues the trial court erred in denying the motion to suppress evidence seized pursuant to an unconstitutional search based on cell phone

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information showing defendant's location that was obtained without a warrant. For the following reasons, we reject defendant's contentions.

"Our review of a trial court's denial of a motion to suppress is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Jordan*, 242 N.C. App. 464, 469, 776 S.E.2d 515, 519 (2015) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

On 1 August 2017, defendant filed a motion to suppress all evidence obtained from the installation and use of a pen register device on defendant's cell phone without a warrant. He argued the warrantless location tracking constituted an unreasonable search in violation of the Fourth Amendment of the U.S. Constitution. On 5 October 2017, the trial court entered an order *nunc pro tunc* to 14 August 2017 denying defendant's motion to suppress. Defendant now contends the trial court erred in denying his motion.

Defendant was a prime suspect in an investigation of a string of murders that occurred in Columbus County, and there was a warrant for his arrest in connection with a Durham Police investigation of the murder of Ralph Joseph. In order to

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apprehend defendant, officers sought four court orders compelling telephone companies to provide them with transactional records associated with phone numbers they believed defendant was using. Specifically, they sought permission to install and use a pen register to gather information about phone activity and also requested the companies provide cell site location information (“CSLI”) in order to locate defendant. The requested CSLI was to span a time period from 5 November 2005 to sixty days after the issuance of the orders.

The requests stated “responsible grounds exist to suspect that [defendant] shot Ralph Joseph” and “the information sought is relevant and material to an ongoing criminal investigation” and could assist in the apprehension of a fugitive. Instead of seeking a warrant, law enforcement sought and obtained this information under N.C. Gen. Stat. § 15A-262, which only required a certification the information sought was “relevant” to an ongoing criminal investigation. N.C. Gen. Stat. § 15A-262 (2017). On 5 December 2005, a court order issued pursuant to N.C. Gen. Stat. § 15A-262 directed T-Mobile to provide the transactional records for cellular telephone number (571) 331-****, which was listed under the name “Markeeta Crutchfield.” Officers were able to locate defendant through the tracking of that cell phone at 2305 Lexington Village Lane in Colorado Springs, Colorado. There, they arrested defendant and seized evidence tying him to the crimes he was charged with.

In support of his argument the trial court erred in denying his motion to suppress the evidence seized in Colorado, defendant primarily relies on the Supreme Court’s decision in *Carpenter v. United States*, __ U.S. __, 201 L. Ed. 2d 507 (2018). There, the Court was presented with the issue of whether orders compelling the production of 7-127 days’ worth of historical CSLI constituted a search, thereby triggering the warrant requirement. *Id.* at __, 201 L. Ed. 2d 516. In that case, officers investigating a string of thefts sought and obtained court orders compelling phone companies to hand over historical CSLI records for the defendant, seeking evidence the defendant was present at the robberies. *Id.* at __, 201 L. Ed. 2d at 516. The officers did not have a warrant, but acted pursuant to the federal Stored Communications Act, 18 U.S.C. § 2703(d), which required the government to show “reasonable grounds” for believing the information was relevant and material to an ongoing investigation. *Id.* at __, 201 L. Ed. 2d at 516.

In a narrow ruling, the Court concluded the government needed to first obtain a warrant before accessing a phone company’s historical CSLI on its customers. However, the *Carpenter* Court emphasized “[w]e do not express a view on matters not before us: real-time CSLI or ‘tower dumps’” *Id.* at __, 201 L. Ed. 2d at 525. Thus, *Carpenter* only established the government must obtain a warrant before it can access a phone company’s *historical* CSLI; it did not extend its holding to the issue of government acquisition of real-time or *prospective* CSLI.

In the present case, law enforcement requested both historical and prospective CSLI for the phone numbers associated with defendant. Because *Carpenter* was decided only with respect to historical CSLI, it is dispositive on that issue only.¹ Additionally, we decline to extend the holding in *Carpenter* to real-time or prospective CSLI. Though unclear from the Record whether it was the real-time or historical CSLI which allowed law enforcement to obtain defendant's location, it is not necessary for us to make a distinction in this case. Without reaching the question of whether an individual has a reasonable expectation of privacy in his real-time or prospective CSLI, we affirm the trial court's denial of defendant's motion to suppress because of the attenuation doctrine.

In its order denying defendant's motion to suppress, the trial court made the following findings of fact:

3. On 5 December 2005, Sgt. David Nobles applied for, and received, an order allowing for the installation and use of a pen register pursuant to [N.C. Gen. Stat.] § 15A-262, however, the State of North Carolina never sought or obtained a search warrant for this information.

. . . .

¹ The State argues *Carpenter* is not applicable here because it was decided thirteen years after law enforcement obtained orders for the historical CSLI under a then-valid statute. However, the Supreme Court has held "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661 (1987). Because this case was pending on direct appeal when the rule in *Carpenter* was issued, *Carpenter* is binding precedent.

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5. That the order dated 5 December 2005 does not state the defendant's name and does state that the information sought is relevant and material to an ongoing criminal investigation to locate a fugitive, wanted in connection with violation of North Carolina Criminal Law 14-17 –see defendant's "Exhibit D".
6. The order directed T-Mobile to furnish agents with transactional records pertaining to cellular/wireless phone number 531-331-[****], all for the time period from 5 November 2005 to present to include sixty days from the order – see defendant's "Exhibit D".

....

8. The defendant, Danny Thomas, was located through the tracking of that cell phone at 2305 Lexington Village in Colorado Springs, Colorado. It is unclear whether the information received was historical or real time.

....

14. Officers of the Regional Fugitive Task Force already had determined that the public utilities account for that residence was in the name of Yvette Jurnett, and that a Volkswagon automobile was registered with the Colorado Department of Motor Vehicles to Yvette Jurnett at that address.

....

20. The officers [] showed [Ms. Jurnett] an old arrest photograph of defendant from the State of New York. Ms. Jurnett stated that person in the photograph appeared to be the man who had been staying with her and that he probably was in the residence at that time. The officers told her that defendant was wanted for murder and asked her for consent to search the residence for defendant.

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21. Ms. Jurnett replied that she did not want anyone who was charged with murder in her home and gave the officers verbal consent to search the residence.

....

24. Upon entering the residence, [Sherriff's] deputies heard a male voice coming from the basement of the townhome. They heard the male say, "Baby, they're coming in now." Deputy Hess announced, "El Paso Sheriff's Department, come out!" The man replied, "If you come down, I'll shoot you."

....

27. Inside the residence, Deputy Donels removed a mirror from the wall and employed it to look down the stairwell leading to the basement. In the mirror's reflection, the deputies could see the defendant at the bottom of the stairwell pointing a rifle in their direction.

....

30. At 9:07 pm, Colorado Springs Police Officer Steven Jensen obtained a search warrant (State's Exhibit 5) from the Honorable David L. Shakes, El Paso County District Judge, authorizing officers to enter and search the townhouse for the purposes of arresting defendant [] and seizing firearms, ammunition, and "items of indicia as proof of occupancy for 2305 Lexington Village Lane."
31. Shortly after the arrival of that search warrant on the scene, Sgt. Rigdon ordered [] defendant to exit the basement. When defendant did not comply, officers introduced chemical agents into the basement. After he fired three rifle shots up the stairway, defendant

emerged and the officers immediately apprehended him.

Based on its findings of fact, the trial court concluded:

1. That the court finds by at least a preponderance of the evidence that there has not been a Fourth Amendment violation of the United States Constitution.
2. That even if there has been such a violation, the court finds that through the attenuation doctrine, the evidence discovered was admissible.

As an initial matter, we note the State contests whether defendant has standing to raise this argument because the telephone number used to track his location was listed under someone else's name. However, the State failed to raise this argument at trial, and is therefore precluded from raising it on appeal. *State v. Phillips*, 151 N.C. App. 185, 187-88, 565 S.E.2d 697, 700 (2002) (citing *Steagald v. United States*, 451 U.S. 204, 208-209, 68 L. Ed. 2d 38, 43-44 (1981)).

Assuming, *arguendo*, the CSLI search of the phone defendant was using was unconstitutional, we agree with the trial court's conclusion that the evidence seized in Colorado was nevertheless admissible under the attenuation doctrine.

"[E]vidence discovered as a result of an illegal search or seizure is generally excluded at trial." *State v. Hester*, __ N.C. App __, __, 803 S.E.2d 8, 14 (2017) (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455 (1963)). "[T]he exclusionary rule encompasses both the 'primary evidence obtained as a direct result

of an illegal search or seizure’ and, relevant ‘here, evidence later discovered and found to be derivative of an illegality,’ the so-called ‘fruit of the poisonous tree.’” *Utah v. Strieff*, __ U.S. __, __, 195 L. Ed. 2d 400, 407 (2016) (quoting *Segura v. United States*, 468 U.S. 796, 804, 82 L. Ed. 2d 599, 608 (1984)). Because the exclusionary rule was adopted for the sole purpose of deterring police misconduct, the Supreme Court carved out several exceptions to the rule, including the attenuation doctrine. *Id.* at __, 195 L. Ed. 2d at 407.

Under the attenuation doctrine, “[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that ‘the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.’” *Id.* at __, 195 L. Ed. 2d at 407 (quoting *Hudson v. Michigan*, 547 U.S. 586, 593, 165 L. Ed. 2d 56, 65 (2006)). In essence, “[t]he attenuation doctrine evaluates the causal link between the government’s unlawful act and the discovery of evidence[.]” *Id.* at __, 195 L. Ed. 2d at 408. The Supreme Court has identified three factors to aid in determining whether there was a sufficient intervening event to break the causal link between the government’s unlawful act and the discovery of evidence: (1) the “temporal proximity” of the unconstitutional conduct and discovery of evidence, (2) “the presence of intervening circumstances,” and (3) “particularly, the purpose and flagrancy of the official misconduct.” *Brown v.*

Illinois, 422 U.S. 590, 603-604, 45 L. Ed. 2d 416, 427 (1975) (internal citations and footnote omitted).

Here, the first factor, which favors attenuation only when “substantial time” has passed, arguably weighs in favor of excluding the evidence. *Strieff*, at ___, 195 L. Ed. 2d at 408 (citing *Kaupp v. Texas*, 538 U.S. 626, 633, 155 L. Ed. 2d 814, 822 (2003)). Just three days after law enforcement obtained CSLI for the phone number associated with defendant, they were able to locate defendant and seize the evidence in Colorado. While three days is more than mere minutes or hours, we think it does not amount to a substantial amount of time in light of the time and resources needed to apprehend defendant in another state.

The second factor, however, weighs in favor of attenuation, as a number of events here constitute intervening circumstances. In *Hester*, this Court considered a defendant’s motion to suppress evidence discovered after an unlawful stop by a police officer. __ N.C. App. at ___, 803 S.E.2d at 14. There, we held the defendant’s separate crime of pointing a loaded gun at an officer and pulling the trigger constituted an intervening circumstance under the attenuation doctrine. *Id.* at ___, 803 S.E.2d at 14-15. Here, defendant possessed of a number of firearms and ammunition, pointed his gun at officers and threatened to shoot, and then did shoot at officers when they attempted to apprehend him. Similar to *Hester*, this constituted an intervening circumstance sufficient to attenuate the connection between any unconstitutional

police conduct and the discovery of evidence. Moreover, although the CSLI allowed law enforcement to locate defendant, it did not provide a basis for which they could search the house defendant was staying in. Ultimately, officers discovered the contested evidence only after obtaining both the consent of the owner of the house and a valid search warrant. All of these facts weigh heavily in the State's favor for finding attenuation.

The third factor, which emphasizes the deterrence function of the exclusionary rule by requiring us to consider the purpose and flagrancy of the official misconduct at issue, also strongly favors attenuation. Here, the misconduct was neither purposeful nor flagrant. In fact, at the time of the CSLI search, it was not considered misconduct at all – it was the law. North Carolina law enforcement acted pursuant to a North Carolina law valid at the time—and which remained valid until thirteen years later—which they had no reason to suspect was unconstitutional. We are unable to imagine how any deterrent function is served by excluding evidence discovered through lawful conduct.

Weighing these factors as a whole, we conclude the trial court did not err in denying defendant's motion to suppress because the CSLI search was too attenuated from the discovery of evidence. *See Strieff*, at ___, 195 L. Ed. 2d at 410 (holding attenuation found where two out of three factors supported that conclusion).

B. Motion to Dismiss

Defendant next argues the trial court erred in denying his motion to dismiss the charge of kidnapping McLeod, where the evidence did not show she was confined or removed beyond that necessary to rob her with a dangerous weapon. We disagree.

We review a trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime." *State v. Cody*, 135 N.C. App. 722, 727, 522 S.E.2d 777, 780 (1999) (citation and internal quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

Kidnapping is the unlawful confinement, restraint, or removal "from one place to another, any other person 16 years of age or over without the consent of such person" for the purpose of "[f]acilitating the commission of any felony." N.C. Gen. Stat. § 14-39(a) (2017). We have recognized that some crimes, such as armed robbery, cannot be committed without some restraint or removal of the victim. *State v. Fulcher*, 294 N.C. 503, 523-24, 243 S.E.2d 338, 351-52 (1978). Thus "a conviction for kidnapping requires restraint or removal more than that which is an inherent, inevitable part of the commission of another felony." *State v. Warren*, 122 N.C. App.

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738, 740, 471 S.E.2d 667, 668 (1996) (citing *State v. Irwin*, 304 N.C. 93, 102-103, 282 S.E.2d 439, 446 (1981)). Whether a restraint was more than that which is an inherent or inevitable part of another felony depends on “whether the victim is exposed to greater danger than that inherent in the armed robbery itself.” *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994).

North Carolina courts have on several occasions distinguished when a victim was restrained or removed to an extent beyond that inherent in an armed robbery. In *State v. Stokes*, the defendant completed a robbery and then ordered the victim at gunpoint to go to the back of the store and into a car waiting outside. 367 N.C. 474, 482, 756 S.E.2d 32, 37 (2014). Because the defendant was removing the victim in an attempt to flee, not to facilitate a robbery, the *Stokes* court held the removal could not be considered inherent to the armed robbery. *Id.*; see also *State v. Thompson*, 129 N.C. App. 13, 19-20, 497 S.E.2d 126, 130 (1998) (holding defendant’s removal of her victims to another room after she already robbed them was not an inherent and integral part of the armed robbery because none of the property she stole was kept in that room). In addition, by ordering the victim to get into the car after the robbery, “defendant attempted to place [the victim] in danger greater than that inherent in the underlying felony.” *Id.*

In *State v. Beatty*, the robbery victim’s hands were bound with duct tape and he was kicked in the back twice. 347 N.C. 555, 559, 495 S.E.2d 367, 370 (1998). Our

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Supreme Court held “[b]ecause the binding and kicking were not inherent, inevitable parts of the robbery, these forms of restraint ‘exposed [the victim to a] greater danger than that inherent in the armed robbery itself.’” *Id.* (quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446). It further noted the defendant “increased the victim’s helplessness and vulnerability beyond what was necessary to enable him and his comrades to rob the [victim].” *Id.*

Here, the evidence, viewed in the light most favorable to the State, shows defendant continued to restrain and remove McLeod beyond what was necessary to rob her. After robbing, beating, and murdering her boyfriend Craig Williams in front of her, defendant forced McLeod at gunpoint to walk through her house into a bedroom where she told him she had placed her car keys. After she gave him the keys, they walked back through the house to the living room, where her children were located. Before leaving, defendant pointed his gun at her head and pulled the trigger twice, but the gun jammed both times. His partner yelled that they needed to leave. Defendant told McLeod not to call anyone, and then drove away in her car. We hold defendant’s removal of McLeod from the bedroom to the living room after stealing her car keys constituted restraint and removal “not inherent and integral to” the underlying armed robbery. Once defendant obtained McLeod’s car keys, the robbery was complete. Similar to *Stokes*, defendant’s continued restraint and removal of

McLeod was for the purpose of allowing him to flee the scene, not to facilitate the robbery. Thus, it was not inherent in the robbery.

In addition, defendant “exposed [McLeod] to greater danger than that inherent in the armed robbery itself” when he attempted to murder her after completing the robbery. McLeod complied with every direction defendant gave her to enable him to take her car keys. Yet, after getting the car keys, defendant sought to end McLeod’s life. Although some restraint and removal was necessary to force McLeod to give her keys to defendant, shooting her point-blank in front of her young children afterwards was not. Similar to the victim in *Beatty*, defendant’s use of force here increased McLeod’s vulnerability and helplessness beyond what was necessary to enable defendant to rob her. Accordingly, the trial court did not err in denying defendant’s motion to dismiss because there is substantial evidence to establish each essential element of the kidnapping charge, separate and apart from the armed robbery.

C. Admission of Evidence Under Rule 404(b)

Finally, defendant argues the trial court erred in admitting evidence about a prior, violent incident in order to prove his identity, without any proof he was the perpetrator in that incident. Specifically, defendant contends “the evidence ran afoul of Rules [of Evidence] 401 and 404 because it did not tend to make [defendant’s] identity in the charged crimes more probable.” We disagree.

This Court reviews *de novo* the trial court's legal conclusions that evidence was offered for a proper purpose under Rule 404(b) and is relevant under Rule 401. *State v. Adams*, 220 N.C. App. 319, 323, 727 S.E.2d 577, 581 (2012). We then "determine whether the trial court abused its discretion in balancing the probative value of the evidence under Rule 403." *Id.* (quoting *State v. Martin*, 191 N.C. App. 462, 467, 665 S.E.2d 471, 474 (2008)).

Rule 404(b) provides that "[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" N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017). "[I]n order to be admissible under Rule 404(b) on the issue of identity, '[t]he other crime may be offered on the issue of [the] defendant's identity as the perpetrator when the *modus operandi* of that crime and the crime for which [the] defendant is being tried are similar enough to make it likely that the same person committed both crimes.'" *State v. Moses*, 350 N.C. 741, 759, 517 S.E.2d 853, 865 (1999) (quoting *State v. Carter*, 338 N.C. 569, 588, 451 S.E.2d 157, 167 (1994)). Evidence offered under Rule 404(b) must also be relevant to a material issue in the case. *State v. Hanif*, 228 N.C. App. 207, 213-14, 743 S.E.2d 690, 694-95 (2013). Pursuant to Rule 401, evidence is relevant if it has "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. Gen. Stat. § 8C-1, Rule 401 (2017).

Here, evidence of a prior bad act for which defendant was never formally charged was offered at trial for purposes of proving defendant’s identity. Shevika Young (“Young”) testified at trial that on the night of 26 December 2004, a man in “a white mask with holes in it, kind of like a Jason mask,” entered her home with a gun. He and another man fired shots into the home, injuring Young’s mother, Shelvia Hastings. They were there looking for Young’s boyfriend, Antonio McFadden, who is a suspected drug dealer. They threatened to kill her if he did not come out. The men left upon realizing McFadden escaped through a bedroom window.

Defendant argues there is no evidence he participated in this incident and that it amounts to impermissible character evidence. In support of his argument this incident is irrelevant to proving his identity, he cites to *State v. Carpenter*, 361 N.C. 382, 646 S.E.2d 105 (2007). There, evidence of a prior sale of cocaine by the defendant was held inadmissible under Rule 404(b) because of generic and insufficient similarities between the prior sale and the one for which he was charged. *Id.* at 389, 646 S.E.2d at 110. The *Carpenter* court noted “[w]hen the State’s efforts to show similarities between crimes establish no more than ‘characteristics inherent to most’ crimes of that type, the State has ‘failed to show . . . that sufficient similarities existed’ ” for the purposes of Rule 404(b). *Id.* at 390, 646 S.E.2d at 111 (quoting *State*

v. Al-Bayyinah, 356 N.C. 150, 155, 567 S.E.2d 120, 123 (2002)). Unlike in *Carpenter*, however, more than mere generic similarities are present here. More instructive, we think, is our Supreme Court's decision in *Moses*.

In *Moses*, the *modus operandi* of two murders was held similar enough to make it likely the same person committed the two murders where the evidence showed: the victims were associates of the defendant in the drug trade, they were killed in the same manner and locale within two months, they were killed at their homes, they were shot with the same gun, and the gun belonged to the defendant. 350 N.C. at 759, 517 S.E.2d at 865. Similarly, in the present case, the District Attorney pointed out the common elements of the Young incident with the incidents defendant was being charged with: (1) the perpetrator wore a Jason-style white hockey mask with holes in it, similar to the one seized from defendant in Colorado; (2) the targets were all suspected drug dealers or living with suspected drug dealers; (3) the attacks all took place at night at the victims' homes; (4) defendant had an accomplice; and (5) the incidents had both temporal and geographic proximity, most of them taking place within a month or two of each other, and within the same city. In addition, forensic evidence revealed that the cartridge cases found in Young's home matched the .45-caliber gun seized from defendant in Colorado. All of this evidence supports a reasoned conclusion defendant was the perpetrator in this incident, and the common *modus operandi* helps establish his identity in the crimes he was charged with.

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Opinion of the Court

We hold the evidence was properly admitted under Rules 404(b) and 401 for purposes of proving defendant's identity. In addition, the trial court did not abuse its discretion in admitting the evidence under Rule 403. Pursuant to Rule 403, evidence deemed admissible under Rule 404(b) may still be excluded if the trial court finds its probative value is substantially outweighed by the danger of undue prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (2017). We will overrule a trial court's admission of evidence under Rule 403 only if the trial court abused its discretion such that its ruling was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006) (quoting *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985)). Due to the similarities between the incidents and relatively short time periods between them, we hold the trial court did not abuse its discretion. *See id.* at 25, 628 S.E.2d at 782 (holding the similarities between two incidents combined with the short time period in which they occurred "support a finding that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.").

III. Conclusion

For the foregoing reasons, we hold defendant had a fair trial free from error.

NO ERROR.

Judges ZACHARY and HAMPSON concur.