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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-114

Filed: 5 November 2019

Person County, Nos. 16 CRS 52310-11

STATE OF NORTH CAROLINA

v.

MICHAEL ANTONIO MCRAE

Appeal by defendant from judgments entered 24 May 2018 by Judge Stanley L. Allen in Person County Superior Court. Heard in the Court of Appeals 2 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary S. Crawley, for the State.

W. Michael Spivey for defendant.

ARROWOOD, Judge.

Michael Antonio McRae ("defendant") appeals from judgments entered on his convictions for discharging a weapon into an occupied vehicle inflicting serious bodily injury, assault with a deadly weapon inflicting serious injury, assault with a deadly weapon with intent to kill, and possession of a firearm by a felon. Defendant contends

the trial court erred by admitting testimony of a prior bad act under N.C. Gen. Stat. § 8C-1, Rule 404(b). For the following reasons, we find no error.

I. Background

On 13 March 2017, a grand jury indicted defendant for attempted first-degree murder, possession of a firearm by a felon, discharging a firearm into an occupied vehicle inflicting serious bodily injury, and two counts of assault with a deadly weapon with intent to kill inflicting serious bodily injury.

On 21 May 2018, defendant was tried by a jury in Person County Superior Court. The State's evidence at trial tended to show the following. On the evening of 27 December 2016, Leon Smith ("Smith") picked up his friend Mariah Parrish ("Parrish") after seeing her walking down the road. Parrish asked Smith to drive her to the apartments on Burch Avenue in Roxboro, because she wanted to retrieve a food stamp card she had left there. Smith drove to Burch Avenue and then waited in his truck while Parrish got out and walked over to a Dodge Charger parked nearby.

Parrish spoke to the driver of the Charger, Clifton Holloway ("Holloway"), who she also knew as "Moe Moe," about her food stamp card. Parrish noticed three other people in the car, one in the front passenger seat and two others in the back, to whom she did not pay much attention. Holloway's door was open, and Parrish could see he had a gun in the front seat and was cooking cocaine. Parrish remained at the car for approximately five minutes, at which point Holloway passed the gun to someone in

the backseat. Holloway told Parrish she should leave because there were people in the car who did not like her. Parrish then saw defendant, whom she knew as "Mike Mike," step out from the back seat of the car. She ran back towards Smith's truck, with defendant chasing after her.

Smith heard Parrish screaming for help, and turned to see her running from a man he later identified as defendant, who was trying to grab her. Smith got out of his truck, and Parrish jumped inside. Smith cursed at defendant and asked him why he was chasing Parrish. Defendant then pulled out a gun, and Smith reached out to grab his hand. When defendant started shooting, Smith let go and got back into his truck. Defendant continued shooting into the truck, hitting Smith in the leg and Parrish in the foot. Afterwards, defendant took off running, and Smith drove himself and Parrish to the hospital. As he pulled out of the parking lot, someone shot into the back window of Smith's truck.

At the hospital, Parrish told the detective who interviewed her that "Mike Mike" shot her, but that she could not remember his real name. She also told the detective defendant's brother, Holloway, was driving the Charger and had handed defendant the gun. On or around 30 December 2016, Smith called the police and told them defendant's name was Michael McRae, and that defendant was the shooter. The same day, Parrish picked defendant out of a photo line-up and identified him as the shooter. Over defendant's objection, Parrish testified she knew defendant

because they committed armed robberies together in 2011. During one of the robberies, defendant put a gun to Parrish's head. Parrish provided law enforcement with information of defendant's involvement in the robberies, and she pled guilty to common law robbery. The shooting on Burch Avenue was the first time Parrish had seen defendant since 2011.

Defendant's evidence at trial tended to show the following. Defendant stipulated he pled guilty on 7 June 2012 to a felony offense he committed on 9 September 2011. He moved to exclude any evidence of prior convictions, but the trial court denied his motion. Defendant testified he was seventeen years old when he was convicted of the robberies he committed with Parrish. He had not had any contact with Parrish since the 2011 robberies. Defendant knew Parrish told law enforcement he was involved in the armed robberies, and assisted them with one of the robbery cases against him. After serving five years for the robbery, he was released on parole on 8 May 2016. After his release, he lived with his mother in Durham and found a job there. He could not recall where he was on 27 December 2016, but denied he was in Roxboro, or anywhere near Burch Avenue. He further denied he possessed a firearm and shot Parrish and Smith.

Defendant was found guilty of discharging a weapon into an occupied vehicle inflicting serious bodily injury, assault with a deadly weapon inflicting serious injury, assault with a deadly weapon with intent to kill, and possession of a firearm by a

felon. He was sentenced to a term of a minimum of 80 months to a maximum of 108 months imprisonment, and a term of a minimum of 30 months to a maximum of 48 months, to run consecutively. The trial court arrested judgment on the conviction of assault with a deadly weapon inflicting serious bodily injury. Defendant gave oral notice of appeal.

II. Discussion

Defendant's sole argument on appeal is that the trial court erred by admitting Parrish's testimony that defendant committed armed robberies and held a gun to her head in 2011, because the evidence was unfairly prejudicial.

We review for plain error because defendant failed to preserve this argument below. Even if defendant had timely objected to the admission of Parrish's testimony regarding his 2011 conduct, defendant subsequently waived that objection when the State later cross-examined him about the prior bad act with no objection from defendant. "This Court has long held that when, as here, evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984). Thus, our review is limited to whether there was plain error.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723

S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

In the superior court, defendant filed a pretrial motion *in limine* to exclude evidence of his prior criminal record, arguing it would be unfairly prejudicial. Specifically, defendant sought to exclude evidence of his involvement in an armed robbery he and Parrish committed in 2011, in which he held a gun to Parrish's head to force her to go through with their plan. The State argued the evidence should be admitted for purposes of proving identity, similarity, and also to explain why Parrish was fearful and initially reluctant to tell police defendant was the person who shot her. The trial court, finding the probative value would outweigh any prejudice, denied defendant's motion, and allowed the evidence to come in.

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

> 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. Gen. Stat. § 8C-1, Rule 404(b) (2017). The list of purposes for which evidence of prior acts may be admitted under Rule 404(b) "is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's

propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995) (citation omitted). Even where relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2017).

This Court has on several occasions held evidence establishing how a witness was able to identify the defendant admissible under Rule 404(b). In *State v. Reid*, the shooting victim identified the defendant as one of the people who assaulted him. 175 N.C. App. 613, 616, 625 S.E.2d 575, 580 (2006). The trial court admitted testimony the victim knew the defendant because they had "sold drugs together." *Id.* at 624, 625 S.E.2d at 584. There, we held that evidence was "properly admitted for the purpose of establishing how [the witness] could identify [the] defendant." *Id.* Similarly, in *State v. Matthews*, this Court held "[the witness'] testimony that he had seen defendant in an altercation establishes how [the witness] was able to identify [the] defendant[,]" not the defendant's propensity to commit the crime charged. 175 N.C. App. 550, 555, 623 S.E.2d 815, 819 (2006). Finally, in *State v. Thompson*, this Court held the trial court did not plainly err by admitting testimony suggesting the defendant intimidated the victim because such testimony was relevant as to why the victim did not want to identify the shooter. __ N.C. App. __, __, 827 S.E.2d 556, 561 (2019).

Here, Parrish testified she knew defendant because they had committed robberies together in the past, including one incident in which he put a gun to her head. Similar to *Reid* and *Matthews*, Parrish's testimony established how she was able to recognize defendant, and was thus properly admitted for the purpose of proving identity. In addition, her testimony was also relevant as to why she was initially hesitant to identify defendant to law enforcement.

Defendant contends any probative value of the evidence is outweighed by its prejudicial effect because it "served only to paint [defendant] as a 'bad man' . . . likely to be the type of person [who] would shoot someone." To be sure, our jurisprudence has established "evidence must be excluded 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. Weldon*, __ N.C. App. __, __, 811 S.E.2d 683, 689-90 (2018) (emphasis in original). However, that was not the case here, where Parrish's testimony served to lay the foundation for how she was able to identify defendant as the shooter—a material fact in this case. Therefore, her testimony was relevant for a purpose other than to show defendant's propensity to commit the crime. Accordingly, defendant has failed to show a fundamental error occurred below. We therefore find no error.

III. Conclusion

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

NO ERROR.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).