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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-410

Filed: 17 March 2020

Wake County, Nos. 14CRS217792-93

THE STATE OF NORTH CAROLINA

v.

DONAVAN RICHARDSON, Defendant.

Appeal by Defendant from judgment entered 24 January 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 4 February 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary Carla Babb, for the State-Appellee.*

*Glover and Petersen, P.A., by Ann B. Petersen and James R. Glover, for Defendant-Appellant.*

COLLINS, Judge.

Defendant Donovan Richardson appeals from judgment entered upon jury verdicts of guilty of, inter alia, first-degree murder, first-degree burglary, and conspiracy to commit first-degree burglary. Defendant argues that the trial court

erred in admitting evidence of Defendant's alleged participation in a prior burglary.

We discern no error.

### **I. Procedural History**

Defendant was tried for (1) first-degree murder of Arthur Lee Brown ("Brown"); (2) first-degree murder of David Eugene McKoy ("McKoy"); (3) first-degree burglary of Brown's home at 236 Howard Road, Fuquay-Varina; (4) robbery with a dangerous weapon; (5) conspiring with Gregory Crawford ("Crawford") and Kevin Britt ("Britt") to commit first-degree burglary; and (6) conspiring with Crawford and Britt to commit robbery with a dangerous weapon. The murder charges were prosecuted capitally. The jury returned verdicts of guilty on all charges.

Based upon the jury's recommendation after a capital sentencing hearing, the trial court sentenced Defendant for the first-degree murder convictions to two consecutive terms of life imprisonment. The trial court arrested judgment on Defendant's convictions for first-degree burglary and armed robbery, and consolidated Defendant's two conspiracy convictions for judgment with the first-degree murder judgments. Defendant noticed appeal to this Court in open court.

### **II. Factual Background**

At trial, the evidence tended to show the following: In July 2014, Defendant was living part time at his mother's house and part time at Jamilla Gilliam's ("Gilliam") apartment in Angier, about a fifteen-minute drive from Fuquay-Varina.

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Defendant's girlfriend, Tykeiyah Alexander ("Alexander"), who was pregnant with the couple's son at the time, sometimes stayed at Gilliam's apartment as well.

Also living at Gilliam's apartment was Britt. Defendant and Britt met when both were in high school, after Britt moved to North Carolina from New Jersey. The two remained close friends and did almost everything together. Defendant and Britt were also friends with Crawford, with whom they went to high school.

In the early morning hours of 3 July 2014, Britt drove Defendant and Crawford in his silver Toyota Echo to a house at 1221 Wagstaff Road near Fuquay-Varina. Everyone was wearing black. Britt drove by the house, turned around, and then parked a short distance from the house. Britt stayed in the car while Defendant and Crawford went inside the house.

Inside the house, Justin Sneed was asleep and unaware the Defendant and Crawford had intruded. Sneed's roommate, Kevin Kizer, was out of town. Sneed testified that he was awakened when one of the intruders pointed a gun at his face. The other intruder told Sneed that if he moved, he would be killed. One of the intruders asked Sneed, "[W]here [is] all of Kevin's money[?]" Kizer had received money from an accident settlement and recently posted pictures on a social media site of a car and guns he had purchased. According to Sneed, both intruders had long guns and wore ski masks.

Defendant and Crawford ransacked Sneed's and Kizer's bedrooms. They took an AK-47, an AR-15, a .45 caliber long rifle, cellular telephones, cash, shoes, clothing, a gaming system and games, and Kizer's grey pit bull puppy, Polo. Sometime later, Britt and Defendant sold one of those guns to someone in Raleigh.

Britt testified that shortly after the intrusion and robbery at the Wagstaff Road house, he drove with Defendant and Crawford to meet Gary McKoy ("Gary"). Gary testified that he met with Crawford to discuss the possibility of purchasing an assault rifle from Crawford. Gary testified that he did not know the other two men with Crawford, but that the driver said he was from New Jersey and that the front-seat passenger was wearing a red bandana covering all but his eyes and forehead. According to Britt, Defendant was the person sitting in the front passenger seat.

Gary further testified that he told Crawford that on one occasion, a man named A.L. Brown showed him a revolver and that Brown might want to buy the assault rifle. Gary testified that he later received a call from Crawford during which they talked about Brown's house or truck. Gary acknowledged he had some awareness about where Brown lived, knew Brown lived in a pink house in Fuquay-Varina, and knew Brown drove a white truck with the words "A.L. Brown" on the side. Gary also testified that Crawford had sold his cousin a male pit bull puppy.

Sometime after talking with Gary, Britt drove Defendant and Crawford to Brown's home at night to figure out exactly where the house was located and to look

at it. Brown's home was located near the dead end of Howard Road, and at the opposite end of where Howard Road intersects with Wagstaff Road. After finding Brown's home, Britt drove by it, turned around, and parked his Echo a couple of houses down from the home. Once again, Britt stayed in the car while Defendant and Crawford got out of the car. Defendant and Crawford returned after approximately fifteen minutes. The men did not take anything from Brown's home that night.

A couple of nights later, around 17 July 2014, Britt, again, drove Defendant and Crawford in his Echo to Brown's house. Britt drove by Brown's house, turned around, and parked a couple of houses down from Brown's house. Defendant and Crawford got out of the car, while Britt again stayed in the car. Defendant and Crawford were dressed in all black. Although Crawford was unarmed, Defendant was carrying what Britt described at trial as an "[a]utomatic" pistol that he had seen Defendant with previously. Evidence at trial revealed that a Hi-Point nine-millimeter handgun is a semiautomatic firearm. Defendant and Crawford were gone for approximately forty-five minutes, during which time Britt attempted to call both of them. Britt's cellular telephone records reflected someone using the device made calls to Defendant's and Crawford's phones around midnight on 17 July 2014. Historic cell site data showed someone using Britt's phone was within the service area of the cell tower and sector for Brown's residence between 11:37 p.m. on 17 July and 1:34 a.m. on 18 July 2014.

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When Defendant and Crawford returned to Britt's car, Crawford was carrying two long guns, one of which was Brown's Tommy gun,<sup>1</sup> and a revolver. After leaving Brown's residence, Britt drove the men first to Crawford's house and then to Gilliam's apartment, where they spent the night. During the drive, Crawford asked Britt if he heard any gunshots or any dogs barking outside Brown's house and told Britt he shot someone in the house. Later, while at Gilliam's, Defendant told Britt he thought he shot someone but did not know if he killed the person. Defendant also said he "thought the guy was going to shoot him first." According to Britt's testimony, the Tommy gun and revolver that were taken from Brown's house were both later sold.

In July 2014, Brown's wife was recovering from back surgery at her sister's home in Durham. McKoy, one of Brown's employees, was living with Brown at the time. Around midnight on Thursday, 17 July 2014, neighbor Vernon Elliot was awakened by his wife, Brown's niece Teresa, when the couple's dog was "having a fit in the back of the house."

On Saturday, 19 July 2014, Brown's neighboring family members, including his nephew Karl Diggs, discovered Brown and McKoy, dead inside Brown's home in their respective bedrooms. Brown sustained two gunshot wounds through his chest, either of which would have been fatal. Brown also sustained graze gunshot wounds to three fingers on his right hand, which was his dominant hand. Brown's position

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<sup>1</sup> The firearm referred to at trial only as a "Tommy gun" was a "Thompson Machine Gun," as reflected in Defendant's armed robbery indictment.

on the bed—face down on top of the bedcovers, with his feet on the floor—indicated he was sitting up on the side of the bed when he was shot.

McKoy's position—lying facing the wall, wrapped in blankets—indicated he was asleep when he was shot. McKoy sustained a single gunshot wound to his face, with the entry wound located slightly to the left of his nose. The projectile causing McKoy's death fractured upon entry. During McKoy's autopsy, the projectile's copper jacket and largest lead fragment were recovered from the base of his skull.

Law enforcement recovered multiple projectiles from Brown's bedroom, including two projectiles embedded in the bedroom wall behind the headboard, and another projectile from inside the bed's mattress. There were three nine-millimeter casings on the floor around Brown's bedroom doorway.

Expert firearm analysis revealed that the projectile recovered from the mattress and one of the projectiles from the wall had rifling characteristics consistent with projectiles fired from a nine-millimeter Hi-Point pistol. It could not be determined, however, whether those two projectiles were fired from the same weapon. Expert firearm analysis revealed the projectile fragments found at the base of McKoy's skull were from a .38 or .357 caliber projectile which could have been fired from a revolver.

Missing from Brown's bedroom was a .38 caliber revolver. Missing from a gun cabinet located just outside Brown's bedroom, was Brown's Tommy gun. The key to

the gun cabinet, which Brown kept on top of the cabinet, was missing. A long gun and Brown's wallet containing cash were also missing. Brown's bedroom and other parts of the house had been ransacked, with several cabinets opened and certain items out of place.

Law enforcement collected a blue bandana located on the floor outside McKoy's bedroom. Forensic analysis of DNA derived from the bandana revealed it constituted a mixture, the major contributing profile for which matched the known profile for Crawford.

An anonymous source led law enforcement to a man named Cory Haire ("Haire"). Haire showed officers a picture on his cell phone of a Tommy gun, and Haire told the officer who sent the picture. At trial, Brown's son Kenneth identified the Tommy gun in the image sent to Haire as Brown's Tommy gun. Before and at trial, Alexander identified Defendant's hands and arms as those holding the gun shown in the picture.

Crawford was arrested first, later pled guilty to two counts of first-degree murder, and received a life sentence. Britt was arrested next, and later pled guilty to accessory after the fact to first-degree murder and conspiracy to commit first-degree burglary and armed robbery. The State dismissed other charges against Britt, including two first-degree murder charges. Britt's sentencing was continued, and as



a part of his plea agreement, he agreed to give truthful testimony against Defendant and Crawford.

Defendant turned himself in and voluntarily gave a statement to law enforcement on 3 August 2014. Defendant noted Britt was one of his closest friends and that Crawford was also a friend. When questioned about the murders at Brown's home, Defendant suggested that Brown's nephew Karl Diggs committed the murders and that Brown's wife solicited his murder for insurance proceeds. Law enforcement found no evidence to support Defendant's assertions.

Although Defendant initially denied knowing Haire, he later acknowledged that he knew him. Defendant initially said he did not know anything about the picture of the Tommy gun, denied the picture depicted his hands, and denied ever holding a gun like the one in the picture. Defendant eventually admitted that he was the person holding the Tommy gun in the picture. According to Defendant, it was his idea to take the picture because he thought he knew someone who would buy it.

Defendant said that Britt picked him up around 1:30 a.m. on 18 July 2014 and took him to Crawford's house to look at the gun. Defendant stated the image of the gun was taken at Crawford's house on Friday, 18 July 2014, at 2:00 to 3:00 a.m., despite earlier saying that he had never been to Crawford's house and that he did not think he left Angier on 17, 18, and 19 July 2014. Defendant eventually gave several different answers about his whereabouts during that time.

While investigating the Howard Road crimes, law enforcement discovered on Britt's and Crawford's phones images of a distinctly marked pit bull puppy. Sneed and Kizer identified the dog in the pictures as Kizer's puppy, Polo. They also identified images of other items found on the phones as being, looking like, or resembling items taken during the break-in on Wagstaff Road, including the stolen firearms.

There was an image on Britt's phone of Britt and Defendant taken on 17 July 2014 at around 2:00 a.m. at Gilliam's house; Britt had posted this to his own Twitter account. Law enforcement took screen shots of messages on Britt's phone from Defendant's Facebook Messenger account, in which the account user noted he had a male pit bull for sale for \$100. Included with the messages was a picture of Polo.

Other screenshots from Britt's phone showed several messages from Defendant's Facebook Messenger account in which the user was either offering firearms for sale, or the person with whom the user was messaging was inquiring about purchasing firearms. The messages about firearms included one in which the user noted, "I got some straps on the market, an AK and a .45 chopper," and another in which the user asked, "You know anybody looking at [an] assault rifle, a nine-millimeter?" In an exchange of messages with Alexander, the Facebook Messenger user gave her the phone number identified at trial as being Defendant's. The user also noted in a message to Alexander, "Our baby boy going to be rough."

Among items recovered in the search of Britt's Toyota Echo were ten nine-millimeter bullets in the Echo's front passenger-side door pocket. Expert firearm analysis revealed that two of the ten bullets had been "worked through" the same firearm as the three fired casings found around Brown's bedroom door. Identifiable fingerprints taken from the Echo belonged to Britt.

On 16 May 2016, Defendant called Gilliam from jail and asked her "to be his alibi." Gilliam testified at trial, however, that Defendant was not with her between 8:00 p.m. on 17 July and 2:00 a.m. on 18 July 2014. Two days before Gilliam testified, on 9 January 2018, she received a call from an associate of Defendant's, Damieon Jacobs. Jacobs called Gilliam at the direction of a person named "Shooter," who called Jacobs from a jail line, gave Jacobs Gilliam's phone number, and told Jacobs to call Gilliam and tell her that she should not come to court and to "take the Fifth." During the call, Jacobs also talked with Defendant, who asked Jacobs "to handle that for me." When Jacobs called Gilliam, he did as Shooter directed. Defendant called Jacobs again the next day to ensure that he had called Gilliam.

### **III. Discussion**

Defendant's sole argument on appeal is that the trial court's admission of evidence of Defendant's alleged participation in the burglary on Wagstaff Road was reversible error because its sole purpose was to prove Defendant's bad character.

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.” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). Such evidence “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.” *Id.* Rule 404(b) is “a clear general rule of *inclusion*.” *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990). Although the rule lists numerous purposes for which evidence of prior acts may be admitted, this list “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).

At the hearing on Defendant’s motion to exclude in this case, the State articulated the purposes for the admission of the evidence as showing “[i]ntent, motive, opportunity, plan, [and] absence of mistake or accident”—purposes specifically recognized by the statute as permissible.

Though Rule 404(b) is a rule of inclusion, it is still “constrained by the requirements of similarity and temporal proximity.” *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted). Prior acts are sufficiently similar “if there are some unusual facts present in both crimes” that would indicate that the same person committed them. *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d

876, 890-91 (1991) (citations and internal quotation marks omitted). “We do not require that the similarities rise to the level of the unique and bizarre.” *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012) (internal quotation marks and citation omitted).

The trial court concluded there was sufficient temporal proximity and sufficiently similar facts between the Wagstaff Road burglary and the Howard Road crimes charged and allowed the evidence of the Wagstaff Road burglary under 404(b). Although the trial court commented at the hearing about some of the similarities—specifically mentioning that both crimes happened at night, involved threats made to individuals lying in bed, and involved the use of firearms—the trial court made no findings of fact. We thus review de novo the trial court’s legal conclusion that the evidence was within the coverage of Rule 404(b). *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159.

At trial, the evidence tended to show the following: the Wagstaff Road burglary took place two weeks before the Howard Road crimes. The Wagstaff Road burglary and the Howard Road crimes occurred 1.6 miles apart, in the same neighborhood. The same three individuals—Defendant, Crawford, and Britt—perpetrated the Wagstaff Road burglary and the Howard Road crimes. In both instances, Britt drove Defendant and Crawford in his Echo and parked it some distance from the target home. Britt stayed in the car while Defendant and Crawford, both dressed in all

black, approached the target home. In both instances, Defendant and Crawford broke into the target home at nighttime, confronted the victims in their beds, and ransacked the home. Defendant and Crawford used guns in each break-in and stole guns from each home. The perpetrators targeted the Wagstaff Road and Howard Road homes because they believed there were large sums of cash in the homes.

This evidence supported the trial court's conclusion that there were sufficiently similar facts between the Wagstaff Road burglary and the Howard Road crimes to render the Wagstaff Road evidence admissible under Rule 404(b). *See State v. Morgan*, 183 N.C. App 160, 169-70, 645 S.E.2d. 93, 101 (2007) (evidence of other robberies occurring within fifteen days was admissible under Rule 404(b) where, in each robbery involved, "one of the perpetrators brandished a gun at the victims at public establishments, demanded money, fired a shot, stole property of others, and fled the scene"); *State v. Hagans*, 177 N.C. App. 17, 24, 628 S.E.2d 776, 782 (2006) (evidence of another robbery was admissible under 404(b) where it showed: "(1) the same three men participated in the earlier robbery; (2) the men wore dark clothing and covered their faces; (3) the same .38 revolver was used; (4) the same Cadillac was used; and (5) one man stayed behind in the car while the other two men robbed the store"). Indeed, the trial court mused in this case, "Well, I'm scratching my head to think how much more similar do they need to be."

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As the evidence supported the trial court's conclusion that there was sufficient temporal proximity and sufficiently similar facts between the Wagstaff Road burglary and the Howard Road crimes, the trial court did not err by allowing the evidence of the Wagstaff Road burglary under Rule 404(b).

NO ERROR.

Judges BRYANT and HAMPSON concur.

Report per Rule 30(e).