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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-428

Filed: 5 May 2020

Cumberland County, Nos. 14 CRS 54278-80

STATE OF NORTH CAROLINA

v.

DATORIUS LANE MCCLYMORE, Defendant.

Appeal by defendant from judgments entered 26 July 2018 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Marc X. Sneed, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling P. Rozear, for the defendant-appellant.*

BERGER, Judge.

Datorius Lane McLymore (“Defendant”) was found guilty of first-degree murder, felonious speeding to elude arrest, and robbery with a dangerous weapon. On appeal, Defendant contends that the trial court (1) plainly erred when it admitted

evidence pursuant to Rule 404(b), and (2) erred by instructing the jury that Defendant was not entitled to an instruction on self-defense. We disagree.

Factual and Procedural Background

In April 2014, Defendant was a door-to-door magazine salesman for Millennium Sales (“Millennium”) in Fayetteville, North Carolina. On April 13, 2014, Defendant made a sale for \$62.00 and used the proceeds to purchase laundry detergent and food. Defendant then decided to quit his job with Millennium.

David Washington (“Washington”), Defendant’s supervisor, met Defendant at a local Regency Inn hotel. Washington arrived by car, and the two left the hotel. Washington asked Defendant about the \$62.00 magazine sale, and Defendant told Washington that he “spent it on food and washing powder.” According to Defendant, Washington then punched him in his jaw, grabbed Defendant by the shirt, and pushed him against the window of the vehicle.

Defendant said he thought Washington was “trying to choke [him] out,” so he pulled a gun out from underneath his shirt, “closed [his] eyes[,] and fired two” shots. Washington began bleeding from his neck, and his foot depressed the accelerator pedal of the vehicle causing it to accelerate rapidly. Defendant grabbed the steering wheel and managed to stop the vehicle. Once the vehicle stopped, Defendant exited the vehicle and removed Washington’s body from the driver’s side and laid him on the ground. Defendant subsequently fled in Washington’s vehicle.

At the same time, a witness saw Defendant pull a body out of the driver's seat of the vehicle and place the body on the ground. The witness ran across the street to assist Washington and observed that he was suffering from agonal respiration.

Officer Eddie Ketchum ("Officer Ketchum") was called to the scene and determined from Washington's driver's license that Washington had two vehicles registered to him: a BMW and a Cadillac Deville. Soon after, Officer Ketchum saw a Cadillac drive past the crime scene. The Cadillac was in the center lane and made "erratic gestures with its turn signals before darting into the Regency Inn." Officer Ketchum drove past the Cadillac in the Regency Inn parking lot and confirmed that the vehicle belonged to Washington. Upon confirmation, Officer Ketchum drove into the parking lot and Defendant fled.

Officer Ketchum followed Defendant in a high-speed pursuit for roughly an hour and fifteen minutes. The pursuit ended when Defendant drove into a trailer park. Once in the trailer park, Officer Ketchum and two other officers apprehended Defendant and placed him in custody.

On January 5, 2015, Defendant was indicted for first-degree murder, felonious speeding to elude arrest, and robbery with a dangerous weapon. The matter came on for trial by jury on July 16, 2018.

At trial, the State sought to introduce 404(b) evidence regarding an incident with Andre Womack (“Womack”). This incident occurred at Womack’s residence on March 24, 2014, twenty days before the incident with Washington.

Womack testified that Defendant knocked on his back door and the two walked into the living room. Defendant pointed a gun at Womack and said, “you know what it is, Unc.” Womack believed he was going to be robbed or shot. Defendant asked Womack when his girlfriend would be home and said he was “going [to] wait for that ride.” Womack attempted to escape through the back door, but Defendant shot him in the back. Womack came back into the house and attempted to disarm Defendant before being shot another time in the side. When Defendant’s gun jammed, Womack fled. Defendant cleared the jam and shot Womack two more times in his side. Womack was able to escape to a neighbor’s house and call 911. Later, Womack was presented with a photographic array and identified Defendant as the person who shot him.

Officer Chase Robinson (“Officer Robinson”) of the Fayetteville Police Department testified that he was the first to respond to the Womack crime scene. Officer Robinson testified that Womack identified “Tori” as the suspect. Officer Robinson searched Womack’s house and noticed several bullet holes throughout. He also found multiple shell casings in the kitchen area.

Officer Stig Larson (“Officer Larson”), a former investigator in the aggravated assault/robbery unit of the Fayetteville Police Department, testified that when he entered Womack’s residence, he observed a bullet hole in the door, “blood in the kitchen, [and] a shell casing on the table.” Womack told Officer Larson that Defendant had come to purchase drugs. However, when Womack first encountered Defendant that night, Womack felt as though Defendant was going to rob him. Womack told Officer Larson that he attempted to flee into the kitchen and Defendant shot into the kitchen floor. Defendant and Womack then had a physical struggle and Womack was shot in the chest. Womack attempted to flee again but was shot three more times. Officer Larson testified that Womack described the suspect as a “[b]lack male” with a “medium [a]fro” around “19 to 22 years of age” and “[b]etween 5’ 7” . . . and 5’ 9”.” Womack again identified the suspect as “Tori.”

Sergeant Katharine Hetrich-Nunn (“Sergeant Hetrich-Nunn”) of the Fayetteville Police Department testified that, on April 2, 2014, Officer Larson asked her to conduct a photographic lineup with Womack. Sergeant Hetrich-Nunn administered a photographic lineup without the suspect and then a second lineup with the suspect that Womack described to Officer Larson. Womack identified Defendant in the second lineup.

Sergeant Elizabeth Culver (“Sergeant Culver”), a detective with the Fayetteville Police Department, spoke with Womack at the hospital. Womack told

Sergeant Culver that “Torien” had shot him. Sergeant Culver testified that she forwarded this information to her supervisor and then went to Womack’s house to assist with the home search. While searching the kitchen, she located shell casings and bloody footprints.

On April 7, 2014, Sergeant Culver interviewed Womack again. Womack told Sergeant Culver that “Tori was demanding money from him” and that he was shot “four, maybe three times” while trying to escape. On April 8, 2014, Sergeant Culver took out warrants for Defendant’s arrest.

Eugene Bishop (“Bishop”), a firearms expert, testified that he had reviewed the shell casings and projectiles recovered from the Womack and Washington crime scenes. Bishop testified that the shell casings and projectiles, from both incidents, were discharged from the same firearm.

On July 26, 2018, the jury found Defendant guilty of first-degree murder, felonious speeding to elude arrest, and robbery with a dangerous weapon. Defendant was sentenced to life in prison without the possibility of parole.

On August 7, 2018, Defendant filed written notice of appeal. On appeal, Defendant argues the trial court (1) committed plain error when it admitted testimony regarding the Womack incident under Rule 404(b), and (2) erred when it instructed the jury that Defendant was not entitled to self-defense.

Analysis

I. 404(b) Evidence

On appeal, Defendant first contends that the trial court committed plain error when it admitted the 404(b) testimony. Specifically, Defendant argues that the evidence offered at trial was inadmissible under Rule 404(b) because it was irrelevant, admitted for improper purposes, and unfairly prejudicial. We disagree.

As a preliminary matter, Defendant acknowledges that he failed to object to the admission of the testimony at trial. An unpreserved challenge in a criminal case is reviewed only for plain error. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). To establish plain error, the defendant bears the burden of demonstrating that a fundamental error occurred at trial. *Id.* at 518, 723 S.E.2d at 334 (citation omitted). “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.* at 518, 723 S.E.2d at 334 (citations and quotation marks omitted).

Within the context of Rule 404(b), “[w]hen the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions.” *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). However, “[w]e review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).” *Id.* at 130, 726 S.E.2d at 159. After determining that evidence meets

the requirements for admission under Rule 404(b), we must then examine whether its admission is nonetheless barred by operation of Rule 403. *Id.* at 130, 726 S.E.2d at 159. We review a trial court’s Rule 403 determination for abuse of discretion. *Id.* at 130, 726 S.E.2d at 159.

Under Rule 404(b) of the North Carolina Rules of Evidence,

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) (2019).

Rule 404(b) is “a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant.” *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). “[T]he rule of inclusion described in *Coffey* is 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) (citation omitted). Evidence of a prior bad act is admissible if there is “substantial evidence tending to support a reasonable finding by the jury that the defendant committed the *similar* act.” *Id.* at 155, 567 S.E.2d at 123 (emphasis in original) (citation and quotation marks omitted).

In determining whether evidence was properly admitted under Rule 404(b), we must engage in a three-step inquiry. *State v. Foust*, 220 N.C. App. 63, 69, 724 S.E.2d 154, 159 (2012). First, we must determine whether the evidence is “relevant for some



purpose other than to show that [the] defendant has the propensity for the type of conduct for which he is being tried.” *Id.* at 69, 724 S.E.2d at 159. Second, we must examine if the purpose of the evidence is “relevant to an issue material to the pending case.” *Id.* at 69, 724 S.E.2d at 159. Finally, we must determine if the probative value of the evidence is “substantially outweighed by the danger of unfair prejudice pursuant to Rule 403.” *Id.* at 69, 724 S.E.2d at 159.

Here, the evidence was “relevant for some purpose other than to show that [the] defendant has the propensity for the type of conduct for which he is being tried.” *Id.* at 69, 724 S.E.2d at 159. Defendant concedes in his brief that the 404(b) evidence could be used to prove Defendant’s “possession and control of the weapon involved in [the Washington] shooting, and thus his identity.” Defendant admitted at trial that he kept the gun after he shot Womack. The same firearm he used to shoot Womack was used to kill Washington. Thus, admission of the 404(b) evidence tended to prove Defendant’s identity as the perpetrator of both the Womack and Washington shootings, *i.e.*, Defendant. *See State v. Moses*, 350 N.C. 741, 760, 517 S.E.2d 853, 865 (1999) (finding that evidence which established that the same gun was used for both crimes tended to prove Defendant’s identity under Rule 404(b)).

In addition, evidence of the Womack shooting was also used to show Defendant’s knowledge, motive, intent, and that Defendant acted in accordance with a common plan or scheme. Evidence of prior bad acts is relevant to prove the

“defendant’s knowledge of a given set of circumstances when such a set of circumstances is logically related not only to the crime the defendant is on trial for but also is logically related to the extraneous offense.” *State v. Stager*, 329 N.C. 278, 306-07, 406 S.E.2d 876, 892 (1991) (citation and quotation marks omitted) (finding that 404(b) evidence was properly admitted to show the defendant’s “knowledge and experience with the operation of and the potentially lethal effect of” a firearm). Here, the evidence surrounding the Womack incident is relevant to show Defendant’s knowledge and experience with this particular firearm, and to show that he knew of the potentially dangerous consequences of discharging a firearm at close distances. Therefore, the trial court properly admitted the State’s 404(b) evidence to prove knowledge.

Defendant also argues that the Womack evidence does not show motive. For evidence to be admissible to prove motive, “the prior act must pertain to the chain of events explaining the context, motive and set-up of the crime and form an integral and natural part of an account of the crime necessary to complete the story of the crime for the jury.” *State v. Willis*, 136 N.C. App. 820, 823, 526 S.E.2d 191, 193 (2000) (*purgandum*). For purposes of using 404(b) evidence to prove motive, “our Courts have allowed the State to present evidence of a defendant’s lack of monetary resources in a prosecution for robbery” and “evidence of a defendant’s opportunity to financially benefit from murder in a prosecution for murder.” *State v. Brown*, 211

N.C. App. 427, 433, 710 S.E.2d 265, 270 (2011). Here, Defendant was in search of money and a vehicle in both cases. Defendant demanded money from Womack before Defendant shot him, and Defendant had a disagreement with Washington over \$62.00. Additionally, Defendant sought to obtain a vehicle belonging to Womack's girlfriend, and Defendant did steal Washington's vehicle after he shot Washington and dragged his body from the car. In both incidents, Defendant obtained a financial benefit and procured, or attempted to procure, a vehicle in an effort to leave the scene of a shooting.

In addition, Defendant argues that the Womack evidence has no " 'logical relationship' to whether [Defendant] intended to kill [Washington]." "A person's intent is seldom, if ever, susceptible of proof by direct evidence and must ordinarily be proven by circumstantial evidence from which it may be inferred." *Brown*, 211 N.C. App. at 436, 710 S.E.2d at 272 (*purgandum*). "Circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant." *State v. Lee*, 213 N.C. App. 392, 396, 713 S.E.2d 174, 177 (2011) (*purgandum*). Evidence of a prior bad act which is similar to the crime charged is sufficient to prove the defendant's intent. *See State v. Martin*, 191 N.C. App. 462, 469, 665 S.E.2d 471, 476 (2008) (finding that evidence of the defendant's prior attempted first-degree burglary was relevant to show that the defendant had the intent to commit first-degree burglary six months later). Here, Defendant concedes in his brief that the

similarities between the two acts include: “a murder, a robbery, and fleeing police.” This concession is enough for us to find that the Womack incident was relevant for Rule 404(b). Regardless, the evidence presented at trial tended to show that Defendant attempted to rob Womack at gunpoint and attempted to murder Womack in a dispute over money.

Defendant further argues that the Womack evidence does not show that Defendant “acted pursuant to a common plan or scheme to rob or murder [Washington], because there was no concurrence of common features [such] that the assorted offenses are naturally explained by a general plan.” However, as previously discussed, the two crimes are sufficiently similar, and appear to be part of Defendant’s common plan or scheme to take money that does not belong to him and shoot individuals he knows in the process.

Next, we must examine if the purpose of the evidence is “relevant to an issue material to the pending case.” *Foust*, 220 N.C. App. at 69, 724 S.E.2d at 159. “Evidence of a prior act or offense is admissible provided it is relevant to any fact or issue other than the character of the accused.” *State v. Pulley*, 180 N.C. App. 54, 66, 636 S.E.2d 231, 240 (2006) (citation omitted). Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2019).

“[T]he similarity between a prior crime or act and the charged crime need not rise to the level of the unique and bizarre in order for the evidence to be admitted under Rule 404(b).” *State v. Thomas*, 350 N.C. 315, 356, 514 S.E.2d 486, 511 (1999) (citation and quotation marks omitted). “Rather, the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts.” *State v. Green*, 229 N.C. App. 121, 124, 746 S.E.2d 457, 461 (2013) (emphasis in original) (citation and quotation marks omitted).

Here, the trial court found that there were sufficient similarities between the attempted murder and attempted robbery of Womack and the crimes charged in this case for purposes of Rule 404(b). Specifically, both crimes were armed robberies, occurring less than a mile away from each other, in which Defendant personally knew the victims, used the same firearm to either wound or kill his victims, and attempted to flee the scene by procuring a vehicle. These similarities support a reasonable inference that Defendant committed the Womack incident and the crimes at issue. Therefore, we find that the Womack incident is sufficiently similar to the present case.

Furthermore, the trial court found that the Womack incident and the Washington incident were not remote in time. The State’s evidence tended to show that the Womack incident occurred on March 24, 2014, and the events of the present case occurred on April 13, 2014. Thus, there was a twenty-day period between the

two acts. This short gap in time is not so remote as to preclude admissibility of the State's 404(b) evidence. *See State v. Mangum*, 242 N.C. App. 202, 212, 773 S.E.2d 555, 564 (2015) (holding that fourteen months between the prior bad act and the offense charged was not too remote in time for evidence of a prior bad act to be admissible under Rule 404(b)). Because the Womack incident is sufficiently similar and closely related in time to the crimes charged in the present case, we conclude that evidence of the Womack incident is admissible as a prior bad act for purposes of Rule 404(b).

Finally, we must now determine whether the evidence is unfairly prejudicial under Rule 403. *Foust*, 220 N.C. App. at 69, 724 S.E.2d at 159. Under a Rule 403 analysis, the trial court must consider whether the "probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2019). In determining whether relevant evidence should be excluded under Rule 403, the trial court should review the evidence outside the presence of the jury, consider the similarities of the incidents, and provide a limiting instruction to the jury. *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161.

In the present case, the trial court heard the 404(b) evidence during a *voir dire* hearing and provided the jury with the following instruction concerning the 404(b) evidence:

Evidence has been received tending to show that the  
Defendant . . . shot and attempted to rob Andre Womack

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on March 24, 2014. This evidence was received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed, that the Defendant had a motive for the commission of the crime charged in this case, that the Defendant had the intent, which is a necessary element, of the crime charged in this case, that the Defendant had knowledge, which is a necessary element of the crime charged in this case, that there existed in the mind of the Defendant a plan, scheme, system, or design involving the crime charged in this case, that the Defendant had the opportunity to commit the crime.

If you believe this evidence you may consider it, but only for the limited purpose for which it was received. You may not consider it for any other purpose. There is evidence which tends to show that witness, Andre Womack, testified under a grant of immunity. If you find that the witness testified for this reason in whole or in part, you should examine this testimony with great care and caution. If, after doing so, you believe the testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

Accordingly, the trial court was aware of the prejudicial dangers associated with the 404(b) evidence and instructed the jury properly to mitigate against those dangers. In addition, as discussed earlier, the Womack incident was sufficiently similar to the present case. Because the probative value of the evidence was not outweighed by the prejudicial factors, Defendant was not prejudiced by the trial court's admission of the 404(b) evidence. Furthermore, Defendant has failed to meet his burden of establishing that the evidence admitted pursuant to Rule 404(b) would have probably caused the jury to reach a different result.

Therefore, the trial court did not plainly err when it admitted the Rule 404(b) evidence.

## II. Self-Defense Jury Instructions

Defendant also argues the trial court erred by instructing the jury that Defendant was not entitled to either common law or statutory self-defense pursuant to N.C. Gen. Stat. Section 14-51.4. Specifically, Defendant argues that Section 14-51.4 only applies to statutory self-defense and not common law self-defense. We disagree.

“Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*.” *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010) (citation omitted). “However, an error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation and quotation marks omitted). The burden of showing prejudice is on the defendant. N.C. Gen. Stat. § 15A-1443(a) (2019).

The General Assembly codified exceptions to self-defense in N.C. Gen. Stat. Section 14-51.4, which provides that self-defense “is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony.” N.C. Gen. Stat. § 14-51.4(1) (2019). As our Court



noted in *State v. Crump*, Section 14-51.4(1) “makes manifest that the General Assembly . . . intended to limit the invocation of self-defense in this instance solely to the law-abiding.” *State v. Crump*, 259 N.C. App. 144, 151, 815 S.E.2d 415, 420, *disc. review granted*, 371 N.C. 786, 820 S.E.2d 811 (2018).

In the present case, Defendant had previously been convicted of common law robbery, a Class G felony under N.C. Gen. Stat. Section 14-87.1 (2019). At trial, Defendant testified that he was in possession of the gun that he used to shoot Womack. The State also presented sufficient evidence that the same firearm was used in, both, the Womack incident and the Washington incident. Therefore, when Womack shot Washington, he was committing the offense of possession of a firearm by a felon which is punishable as a Class G felony under N.C. Gen. Stat. Section 14-415.1 (2019). Therefore, Defendant is not entitled to statutory self-defense under Section 14-51.4. *See Crump*, 259 N.C. App. at 151, 815 S.E.2d at 420.

In arguing that Section 14-51.4 does not apply to common law self-defense, Defendant relies on N.C. Gen. Stat. Section 14-51.2(g), which states Section 14-51.2 “is not intended to repeal or limit any other defense that may exist under the common law.” N.C. Gen. Stat. § 14-51.2(g) (2019). Section 14-51.2 codifies self-defense for when “[t]he lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or seriously bodily harm to himself or herself.” N.C. Gen. Stat. § 14-51.2(b). However, Section 14-51.2(g), on its face, only

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applies to Section 14-51.2 and does not apply to Section 14-51.4. *See State v. Gates*, \_\_\_ N.C. App. \_\_\_, 809 S.E.2d 405, *appeal dismissed, review denied*, \_\_\_ N.C. \_\_\_, 814 S.E.2d 107 (2018) (unpublished) (“N.C. Gen. Stat. § 14-51.2(g), provides that ‘[t]his section is not intended to repeal or limit any other defense that may exist under the common law.’ N.C. Gen. Stat. § 14-51.2(g). By its terms, it only applies to N.C. Gen. Stat. § 14-51.2, which defendant has acknowledged does not apply in this case. Had the legislature intended such a provision in N.C. Gen. Stat. §§ 14-51.3 or -51.4, it could have provided it.”).

Contrary to Defendant’s argument, if the General Assembly “as the policy[-]making agency of our government legislates with respect to the subject matter of any common law rule, the statute supplants the common law and becomes the law of the State.” *News & Observer Pub. Co. v. State ex rel. Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984). Therefore, because the General Assembly did not carve out a similar common law exception in Section 14-51.4, common law self-defense is now supplanted by statutory self-defense in situations where (1) the defendant “was attempting to commit, committing, or escaping after the commission of a felony”; (2) the defendant “[i]nitially provokes the use of force against himself or herself” unless he or she was “in imminent danger of death or serious bodily harm”; or (3) “the person who was provoked continues or resumes the use of force” after the defendant withdraws. N.C. Gen. Stat. § 14-51.4. Because the General Assembly intended for

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Section 14-51.4 to supplant common law self-defense, Defendant could only seek relief under statutory self-defense. *See Crump*, 259 N.C. App. at 151, 815 S.E.2d at 420

Therefore, the trial court did not err in instructing the jury that Defendant was not entitled to the benefit of self-defense if he was committing the felony of possession of a firearm by a felon.

Conclusion

For the reasons stated herein, we find the trial court did not plainly err in admitting evidence under Rule 404(b), nor did it err in failing to instruct the jury on either statutory or common law self-defense.

NO ERROR.

Judges ZACHARY and YOUNG concur.

Report per Rule 30(e).