

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-549

No. COA20-801

Filed 5 October 2021

Mecklenburg County, No. 18 CRS 236708

STATE OF NORTH CAROLINA,

v.

LOUIS BLACKMON, Defendant.

Appeal by defendant from judgment entered on 7 November 2019 by Judge Casey M. Viser in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 August 2021.

*Attorney General Joshua H. Stein, by Assistant Attorney General Wendy J. Lindberg, for the State.*

*Jason Christopher Yoder for Defendant-Appellant.*

CARPENTER, Judge.

¶ 1

Louis Blackmon (“Defendant”) appeals pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat. § 15A-1444(a) (2019) from judgment after a jury found him guilty of one count of assault with a deadly weapon with intent to kill inflicting serious injury under N.C. Gen. Stat. § 14-32(a). Defendant argues on appeal the trial court erred in admitting a prior incident involving a flare gun because it was not

probative as to motive or identity. Furthermore, he contends that even if the incident were admissible for a proper purpose, its probative value was substantially outweighed by the danger of unfair prejudice. Finally, Defendant asserts he received ineffective assistance of counsel because his lawyer failed to renew his objection to the flare gun incident at trial and failed to request a limiting instruction on the incident. Because we hold the flare gun incident was relevant to show Defendant's motive and ill will towards the victim, we find no error and do not consider Defendant's remaining arguments.

### **I. Factual and Procedural Background**

¶ 2

The evidence at trial tended to show the following: for nearly fifteen years prior to 15 October 2018, Defendant lived with and dated Priscilla Moore ("Moore"), the mother of victim, Ceano White ("White"). In early 2018, White and Moore kicked Defendant out of their house. On 15 October 2018, White was returning home from a friend's house when he encountered Defendant on the street in White's neighborhood. Defendant threatened to shoot White and eventually did so five times; four bullets hit White directly and one bullet struck White, went through his hand, ricocheted off the concrete, and hit him again in the mouth. Before Defendant left the scene of the incident, he said he "ran out of bullets" and was going to get some more. White walked across the street and passed out. Officer Wallace was later

called to the scene of the shooting where a man in the neighboring yard, who had witnessed the shooting, told Officer Wallace that “a male had been shot.” Officer Wallace approached the victim who identified himself as Ceano White. White told Officer Wallace he had been shot by Defendant. On 16 October 2018, a warrant for Defendant’s arrest was issued and alleged Defendant committed an assault with a deadly weapon with the intent to kill and inflict serious injury upon White.

¶ 3

At trial on 7 November 2019, White testified that on at least two occasions since 2014, Defendant had threatened to kill White or had shot White. The first incident was on 2 September 2018 when Defendant returned to Moore’s house to gather the rest of his belongings. During this interaction, Defendant pointed at White, as if holding a gun, and said, “pow, pop goes the weasel.” A few days later, Defendant saw White at a store, and Defendant stated, “I’m going to shoot you in front of your mama. I’m going to kill you in front of your mama.”

¶ 4

The second occasion occurred on 29 August 2014 and involved Defendant firing a flare gun at White (“the flare gun incident”). White’s testimony regarding the flare gun incident was admitted at trial. White testified Defendant had taken Moore’s car for a drive that day. White called Defendant and told him to bring Moore’s car back. When Defendant returned, White heard Moore and Defendant arguing. As White stepped in the room, Defendant shot White in the neck with a flare gun. The shot from the flare gun injured White’s neck and started a small fire on the carpet of

White's bedroom, which the fire department had to extinguish. Officer Steward responded to this incident and arrested Defendant, but the charges against Defendant were dropped because neither White nor Moore appeared in court to testify regarding the incident.

¶ 5 Prior to the 6 November 2019 trial, the State filed a motion to introduce 404(b) evidence, which was inclusive of evidence of the flare gun incident and Defendant's prior threatening statements on the basis the evidence of the bad acts was offered for a proper purpose, such as identity, motive, intent, or lack of accident. At a pre-trial hearing on the matter, the State asserted the evidence of the prior acts was offered to prove identity and motive, "that the defendant had threatened to kill him, had shot him before, and made good on his threats that night to try and kill him . . . ." Defense counsel objected to the introduction of the 404(b) evidence. Despite the objection, the trial court allowed the evidence to be introduced, but did not specify for which purpose. Defense counsel did not renew the objection to the 404(b) evidence at trial. Further, defense counsel did not request a limiting jury instruction in relation to this evidence.

¶ 6 The jury found Defendant guilty of one count of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was sentenced to a minimum term of 67 months and a maximum term of 93 months of imprisonment in the custody

of the North Carolina Department of Adult Corrections. Immediately after sentencing on 7 November 2019, Defendant entered his notice of appeal in open court.

## **II. Issues**

¶ 7 The issues presented on appeal are whether: (1) the trial court erred by admitting the 404(b) evidence of the flare gun incident as probative of identity or motive; and (2) Defendant received ineffective assistance of counsel when his lawyer failed to renew the objection to the flare gun incident and failed to request a limiting instruction on the same.

## **III. Jurisdiction**

¶ 8 Appeal lies in this Court as a matter of right pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat. § 15A-1444(a) (2019).

## **IV. Admission of 404(b) Evidence**

¶ 9 On appeal, Defendant argues that the trial court erred in admitting the evidence of the flare gun incident because the evidence was not probative to motive or identity. He further contends that the flare gun incident was “not similar at all” in nature to the incident at issue, and its occurrence is too remote in time to be probative. We disagree.

### **A. Standard of Review**

¶ 10 “We review *de novo* the legal conclusion that . . . evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court’s Rule 403 determination

for abuse of discretion.” *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (emphasis added). An abuse of discretion occurs when the decision of the trial court is “manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992) (citations and internal quotations omitted). “Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.” *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (citation omitted), *disc. rev. denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

## B. Analysis

### 1. *Admissibility of Flare Gun Incident to Prove Motive*

¶ 11

Rule 404(b) of the North Carolina Rules of Evidence states

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). Our Supreme Court has held “the ultimate test for determining whether . . . evidence [of motive] is admissible is whether the [other] incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of [N.C. Gen. Stat.] § 8C-1, Rule

403.” *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988) (citation omitted).

¶ 12 North Carolina Courts have consistently held that prior assaults are admissible to show motive or ill will. *See State v. Lloyd*, 354 N.C. 76, 90–91, 552 S.E.2d 596, 609 (2001) (holding evidence of a prior assault on a different person was relevant to show motive because in both shootings there was strong evidence suggesting the defendant acted out of jealousy); *see also State v. White*, 349 N.C. 535, 552–53, 508 S.E.2d 253, 265 (1998) (holding evidence that the defendant went to the victims’ house two years before, pointed a gun at one victim, and threatened to kill him was “relevant to show the ill will between them [and] probative of defendant’s motive . . . in committing the murders . . .”), *cert. denied*, 527 U.S. 1026, 119 S. Ct. 2376, 144 L. Ed. 2d 779 (1999); *State v. Enoch*, 261 N.C. App. 474, 491–92, 820 S.E.2d 543, 556 (2018) (stating there was a reasonable inference that the defendant’s anger, control, and conflict—which had previously led to the defendant committing assaults—motivated the defendant to murder the victim), *disc. rev. denied*, 372 N.C. 105, 824 S.E.2d 422 (2019).

¶ 13 Here, the flare gun incident is sufficiently similar to the shooting at issue in this case because the record tends to show both incidents transpired between Defendant and White and occurred immediately after Defendant came into contact with White. Additionally, Defendant was the perpetrator in both incidents and used a type of gun to discharge a projectile directly at White. Although the flare gun

incident took place approximately four years before Defendant shot White with a pistol, the remoteness in time does not make the flare gun incident inadmissible. *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991) (“[R]emoteness in time is less significant when the prior conduct is used to show . . . motive[;] remoteness in time generally affects only the weight to be given such evidence, not its admissibility.”).

¶ 14 The evidence of the flare gun incident was relevant for a purpose other than propensity because it demonstrated the ill will between Defendant and White, which is probative of Defendant’s motive in shooting White in October of 2018. *See White*, 349 N.C. at 552–53, 508 S.E.2d at 265 (holding evidence that defendant had previously pointed a gun at the victim was relevant to motive because it showed the ill will between them). Defendant does not challenge White’s testimony concerning the 2 September 2018 incident, in which Defendant threatened White by saying, “I’m going to shoot you in front of your mama. I’m going to kill you in front of your mama.” The uncontested threat, which occurred just one month before the shooting in the instant case, is further evidence tending to show Defendant’s ill will and hostility towards White, as well as his motive to shoot at and attempt to kill White. Given that the evidence of the flare gun incident was admissible as to motive, we need not address whether it was admissible as to identity.

*2. Substantially More Probative than Prejudicial*



¶ 15 Defendant alternatively argues that even if the flare gun incident “was probative of a legitimate purpose, the probative value was minimal and was substantially outweighed by the danger of unfair prejudice in violation of Rule 403.”

¶ 16 When

evidence is admissible according to Rule 404(b), it must also be scrutinized under Rule 403, which provides for the exclusion of otherwise admissible evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

*State v. Mangum*, 242 N.C. App. 202, 207, 773 S.E.2d 555, 561 (citations and internal quotations omitted), *disc. rev. denied*, 368 N.C. 601, 780 S.E.2d 564 (2015); *see also* N.C. Gen. Stat. § 8C-1, Rule 403 (2019). “The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court.” *State v. Alston*, 341 N.C. 198, 237, 461 S.E.2d 687, 708 (1995) (citation omitted), *cert. denied*, 516 U.S. 1148, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996).

¶ 17 Defendant specifically contends the central issue in this case concerns the credibility of White as a witness rather than the identity or motive of the alleged perpetrator. As a result, Defendant argues he was prejudiced by the admission of White’s testimony, which included evidence relative to Defendant’s character. Defendant further asserts the State used the flare gun incident as propensity evidence to show Defendant was more likely to shoot White in the instant case. As

discussed in greater detail above, the evidence of the flare gun incident was relevant to show Defendant's motive and ill will towards White. Although the evidence undoubtedly prejudiced Defendant, its probative value outweighed any prejudicial effect. *See State v. Mercer*, 317 N.C. 87, 93–94, 343 S.E.2d 885, 889 (1986) (“Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree.”).

¶ 18 Here, the trial transcript reflects that the trial court did consider the probative value versus the prejudicial effect prior to making its decision. At the pre-trial hearing on the issue of the 404(b) evidence, the trial court asked follow-up questions regarding any charges that resulted from the flare gun incident. Additionally, the trial court briefly discussed the fact that charges did not result from the flare gun incident was a “good fact[ ] to be elicited on cross-examination.” Finally, when discussion of the State's motion to introduce 404(b) evidence concluded, the trial court stated, “[l]et me think about it . . . .” These actions taken together show that the decision to admit the 404(b) evidence was not an arbitrary one; rather, the trial court made the decision after careful and deliberate consideration. Therefore, we hold the trial court did not abuse its discretion by admitting the flare gun incident. *See Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 158.

## V. Ineffective Assistance of Counsel

¶ 19 Defendant contends that at trial he received ineffective assistance of counsel

when his lawyer failed to renew his objection to the flare gun incident and failed to request a limiting instruction on the flare gun incident. Defendant further asserts that since he was prejudiced by the admission of the flare gun incident, a new trial should be ordered.

A. Standard of Review

¶ 20 “On appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*.” *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (emphasis added).

B. Analysis

¶ 21 The North Carolina Supreme Court has adopted the two-part test enunciated in the United States Supreme Court case of *Strickland v. Washington*:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)).

¶ 22 Importantly, however, “claims of ineffective assistance of counsel should

[generally] be considered through motions for appropriate relief and not on direct appeal.” *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citation omitted). A motion for appropriate relief is the preferable mechanism to raise such a claim because “[t]o defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant’s thoughts, concerns, and demeanor.” *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000). “[S]hould the reviewing court determine that [the ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent [motion for appropriate relief] proceeding.” *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (citation omitted).

¶ 23 In this case, we cannot properly assess the ineffective assistance of counsel issue on direct appeal because an evidentiary hearing on this issue has not been held and the “cold record” is not dispositive. *See Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citations omitted) (Ineffective assistance of counsel “claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.”); *State v. House*, 340 N.C. 187, 196–97, 456 S.E.2d 292, 297 (1995) (declining to adjudicate ineffective assistance of counsel claim where record was silent as to

whether defendant consented to his counsel's argument regarding his guilt and determining that said issue was appropriately deferred for consideration in a motion for appropriate relief). Therefore, we dismiss Defendant's claim for ineffective assistance of counsel without prejudice to his right to file a motion for appropriate relief in the trial court.

¶ 24 Should this issue be raised below in a motion for appropriate relief, the trial court "should take evidence, make findings of fact and conclusions of law, and order review of all files and oral thought patterns of trial counsel and client that are determined to be relevant to defendant's allegations of ineffective assistance of counsel." *Buckner*, 351 N.C. at 412, 527 S.E.2d at 314.

## **VI. Conclusion**

¶ 25 The trial court did not err in admitting the evidence of the flare gun incident because it was probative of motive. This Court dismisses Defendant's claim for ineffective assistance of counsel without prejudice. Defendant may exercise his right to file a motion for appropriate relief in the trial court.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges TYSON and GRIFFIN concur.

Report per Rule 30(e).