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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-789

Filed 15 August 2023

Mecklenburg County, Nos. 19 CRS 231598-99, 19 CRS 28353

STATE OF NORTH CAROLINA

v.

JAMAAL CONNELLY, Defendant.

Appeal by defendant from judgment entered 6 April 2022 by Judge Hunt Gwyn in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 June 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Lynne Weaver, for the State of North Carolina.

Sean P. Vitrano, for the Defendant.

DILLON, Judge.

On 6 April 2022, Defendant Jamaal Connelly was found guilty of felony breaking or entering and larceny after breaking or entering in connection with the theft of cash and gift cards in the office of Shea Group Services, LLC, d/b/a Shea Homes (“Shea Homes”) in Charlotte after the office had closed for the day.

I. Background

The evidence at trial tended to show the following: On at least two occasions

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in early November or December 2017, petty cash was stolen or missing from the office of Shea Homes, including from the locked desk of a Shea Homes' employee. After the November break-in, Shea Homes employees set up hidden cameras in an effort to determine who was taking the items that had gone missing.

On the evening of 22 December 2017, after Shea Homes was closed for business, the cameras picked up an individual moving within the office, during which more cash and gift cards went missing.

During the trial, the trial court allowed the State to introduce evidence of other break-ins Defendant was involved with, as well as evidence of Defendant's presence at Shea Homes during the time of the break-in.

First, the State introduced evidence that Defendant had broken into the offices of Queens College, also in Charlotte, under similar circumstances as was present in the Shea Homes break-ins. The Queens College break-in occurred in March 2018, three months after the Shea Homes break-ins. During that break-in, an officer discovered Defendant inside the president's office after hours. Defendant was nicely dressed and entered the office with a key. Since Defendant could not provide employee identification, the officer brought him to the campus police station. One of the other officers was wearing a body camera and recorded some of the encounter.

At trial, the trial court admitted into evidence the surveillance video from the Shea Homes break-in, video footage to explain the testimony of the Queens University officer, and two photographs of Defendant from the body camera footage

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taken at Queens University. In both the surveillance video and the photographs, the intruder wore business casual clothes and gloves. He appeared clean-shaven, with a distinctive haircut, thick black eyeglasses, and a green beaded bracelet.

The trial court also allowed the State to introduce certain evidence from Defendant's Facebook account. This evidence included photographs of Defendant from December 2017, around the time of the Shea Homes break-in, showing him with a similar appearance as the intruder shown in the surveillance videos. This evidence also included certain messages from Defendant to a friend describing how he had gained access to an office after hours to steal items.

Defendant's counsel objected to the admission of both the Queens University March 2018 break-in and Defendant's Facebook information. The trial court ruled that both were admissible.

Defendant was found guilty of larceny after breaking or entering and felony breaking or entering and sentenced to imprisonment for 128-166 months. Defendant timely appealed.

II. Analysis

Defendant makes two arguments on appeal, which we address in turn.

A. Evidence Admitted Under Rule 404(b) and 403

Defendant first contends the trial court erred by admitting evidence of Defendant's involvement in the Queens University break-in and his Facebook messages under Rules 404(b) and 403 because (1) the other acts were not sufficiently

similar to the offenses charged and (2) the risk of unfair prejudice outweighed the probative value of the evidence.

We “review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)” and we “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). “A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Cagle*, 346 N.C. 497, 506-507, 488 S.E.2d 535, 542 (1997).

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). It states 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, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 404(b) (2021). 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.” *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (citation omitted). Although a rule of inclusion, Rule 404(b) 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).

The trial court held that the evidence of both the Queens University break-in

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and Defendant's Facebook account records showed a common scheme or plan and the State could "elicit such evidence for that limited purpose." We hold that the trial court's admission of both pieces of evidence was proper.

The ultimate test of admissibility is whether the incidents are "sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). "Prior acts are sufficiently similar 'if there are some unusual facts present in both crimes' that would indicate that the same person committed them." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159. However, the similarities do not have to "rise to the level of the unique and bizarre." *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988).

Our Court has instructed that "[w]hen reviewing the similarity requirement in a Rule 404(b) analysis, we must not focus on the differences between the prior and current incidents," but rather "review the similarities noted by the trial court." *State v. Jones*, __ N.C. App. __, __, 884 S.E. 2d 782, 791 (2023). In *Jones*, the defendant attempted to break into a homeowner's storage shed and was caught on security video. The security footage alerted the homeowner and prompted him to call 911. The defendant got away but was later apprehended and had box cutters on his person. At trial, the State introduced a video of a prior breaking and entering by the defendant two years earlier. In that instance, he had broken into a residential shed with a knife. The Court rejected the defendant's argument that the similarities

between the incidents were generic features of breaking and entering because “[t]he bar for similarities in cases where houses are broken into, such as a breaking and entering case[s], [are] relatively low.” *Id.* at ___, 884 S.E.2d at 790.

The Court noted that in both incidents, the defendant broke into a residential storage shed shortly after midnight. Additionally, the “[d]efendant had a similar instrument with him each time, a knife in the prior incident and a box cutter in the [following] case.” *Id.* This Court thus concluded that the incident was sufficiently similar to permit the admission of the earlier act. *Id.*

In an earlier case, we concluded that evidence that a defendant charged with burglary for entering a home through a window had broken into a home and committed larceny two years earlier, that the defendant had possessed marijuana days before the alleged burglary, and that the defendant had broken into another home through a window was admissible and none of them were “too remote in time to show motive and intent. *State v. Martin*, 191 N.C. App. 462, 468, 665 S.E.2d 471, 475 (2008).

Here, in Defendant’s Facebook posts sent within two months of the Shea Homes break-in for which Defendant was charged, Defendant admitted to his friend that he would commit larceny within an office building by waiting until everyone left the building, disguising himself to blend in, and then remain after hours unnoticed to commit his thefts. He wrote the following as the theft was in progress:

Going for 10k today . . . Or more . . . I’ve been wanting to

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get to this spot for a while . . . Damn I wish you were here right now . . . We'd take this whole building . . . TV, Furniture, etc. . . . I haven't fully got to work yet because this b**** a** housekeeper won't leave . . . I've had to move around a bit . . . I'll be here till midnight probably.

Defendant's friend then asked, "What kind of building?" and Defendant responded:

Office/Company . . . 2 Floors . . . really nice & no security . . . Or camera . . . Just waiting to fully dive in . . . I told you Sometime [sic] I have to be completely patient & wait everyone out . . . I got here @ 5 . . . I've blended in @ times just so I wasn't hidden the whole time but damn I need the housekeeper & these last 2 workers to leave.

For the same reasoning described above, with respect to the Queens University break-in, we conclude the trial court did not err in determining the break-in, as described in Defendant's Facebook post, to be admissible under Rule 404(b). Like the Queens University break-in, the Facebook description, and the facts of the Shea Homes office break-in each involved (1) breaking and entering occurring at commercial office buildings after hours, (2) an intruder wearing business attire and glasses to blend in (3) damaged doors in an effort to open them, and (4) break-ins occurring during the winter of 2017-18.

Rule 403 states that "[a]lthough relevant, evidence may be excluded 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." N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 403 (2021).

We conclude that the trial court did not err under Rule 403 by admitting the evidence from the Queens University break-in and from Defendant's Facebook account.

B. Constructive Breaking Jury Instruction

Defendant next argues the trial court erred by instructing the jury that it could convict him of breaking and entering based on a theory of constructive breaking, contending the instruction was not supported by the evidence. We disagree.

Arguments on appeal challenging the trial court's decision regarding jury instructions are reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). There must be sufficient evidence to support an instruction. *Id.*

A constructive breaking occurs where a defendant gains entry by trickery, such as under the guise of needing something, rather than by force. *State v. Thomas*, 350 N.C. 315, 345-346, 514 S.E.2d 486, 505 (1999).

We conclude there was sufficient evidence from which the jury could infer that Defendant committed a constructive breaking, specifically that Defendant entered the Shea Homes office by some sort of pretext or deception. Although there was no evidence of key fob entry, it could be inferred from the evidence that Defendant impermissibly entered the building around 5:00 p.m. as office employees were leaving for the day, in an effort blend in and, therefore, go unnoticed. As it could be inferred that Defendant may have entered Shea Homes by some sort of pretext, the trial court did not err in including an explanation of constructive breaking in its charge to the

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jury. *See State v. Woods*, 345 N.C. 294, 305, 480 S.E.2d 647, 651 (1997) (holding that there was sufficient evidence from which a reasonable juror could find that defendant used some pretext or threat of harm to gain entry, where there was no evidence of forcible entry, thereby evidencing a constructive breaking).

III. Conclusion

We conclude that Defendant received a fair trial, free of prejudicial error.

NO ERROR.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).