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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-484

Filed 6 February 2024

New Hanover County, No. 19 CRS 059260

STATE OF NORTH CAROLINA

v.

ANDREW WEBSTER BOYNTON, Defendant.

Appeal by Defendant from judgment entered 5 October 2022 by Judge Richard Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 15 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan R. Marx, for the State.

Marilyn G. Ozer for Defendant.

GRIFFIN, Judge.

Defendant Andrew Webster Boynton appeals from a judgment entered after a jury found him guilty of first-degree murder. Defendant argues the trial court erred in admitting certain evidence under Rule 404(b) and instructing the jury to consider the evidence as proof of intent. Defendant also contends he had ineffective assistance of counsel. We find no error.

I. Factual and Procedural Background

Kimberly Bland worked as a housecleaner in the Wilmington area. Defendant often helped Bland with her cleaning services and intermittently lived with her. In early November 2019, friends of Bland became worried about her welfare after she missed multiple cleaning appointments. On 7 November 2019, Wilmington Police Officers entered Bland's apartment and noticed the smell of human decomposition emanating from duct-taped trash bags rolled up in a carpet behind a couch, despite the thermostat being set to an abnormally low temperature. Thereafter, a search warrant was issued for Bland's apartment. Officers found a duffle bag that had Defendant's name on it; unused black trash bags which matched the ones rolled up in the carpet; and multiple rolls of duct tape.

Bland's body was found within the trash bags. Bland was stabbed all over her body. In total, Bland was stabbed more than twenty times. A medical examiner determined that she ultimately died from the wounds to her chest and torso.

Evidence at trial tended to show that in the days after Bland's death, Defendant utilized Bland's debit card to withdraw money and to make a purchase at a Wilmington area Walmart. The purchase consisted of the area rug and trash bags which contained Bland's body. Investigators recovered Defendant's DNA from the rug, duct tape, and trash bags. Defendant fled to Richmond, Virginia, where he was arrested. Defendant provided officers with a false name, false date of birth, and false social security number.

On 16 December 2019, Defendant was indicted for first-degree murder. On 26 September 2022, Defendant's case came on for trial by jury in New Hanover County Superior Court. During trial, the State called Bland's former neighbor, Brian Driscoll, to testify. The court conducted a *voir dire* hearing, during which the State forecasted Mr. Driscoll's testimony. Mr. Driscoll's testimony was admitted over Defendant's objection. On 5 October 2022, the jury returned a verdict finding Defendant guilty of first-degree murder. Defendant entered timely notice of appeal in open court.

II. Analysis

Defendant argues the trial court erred in allowing the admission of Rule 404(b) evidence and committed plain error by instructing the jury that 404(b) evidence could be used as evidence of Defendant's intent. Defendant also contends he had ineffective assistance of counsel. We disagree.

A. Admission of 404(b) Evidence

Defendant argues the trial court erred by allowing the admission of Rule 404(b) evidence to show intent. Specifically, Defendant argues "Brian Driscoll's testimony concerning his memories of what Kim Bland said to him ten years earlier lacked the required factors of similarity and temporal proximity to the incident on trial."

We review the trial court's decision to admit evidence under Rule 404(b) *de novo*. *State v. Beckelheimer*, 366 N.C. 127, 130, 762 S.E.2d 156, 159 (2012). If the trial court makes findings of fact and conclusions of law, "we look to whether the

evidence supports the findings and whether the findings support the conclusions.” *Id.* Then, “[w]e review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).” *Id.* Last, “[w]e then review the trial court’s Rule 403 determination for abuse of discretion.” *Id.* Abuse of discretion occurs when the trial court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. *State v. Robinson*, 383 N.C. 512, 521, 881 S.E.2d 260, 266 (2022). “[I]f an appellate court reviewing a trial court’s 404(b) ruling determines in accordance with these guiding principles that the admission of the Rule 404(b) testimony was erroneous, it must then determine whether that error was prejudicial.” *State v. Pabon*, 380 N.C. 241, 260, 867 S.E.2d 632, 645 (2022) (citation omitted). Prejudicial error occurs when “there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial.” *Id.* The burden of showing prejudicial error is on the defendant. N.C. Gen. Stat. § 15A-1443 (2023).

1. Rule 404(b)

Rule 404(b) provides, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. It may however be admissible for other purposes such as proof of motive, opportunity, [or] intent[.]” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). “Such evidence is not offensive to the general prohibition against character evidence because it is admitted not to prove [the] defendant acted in conformity with conduct on another

occasion but rather as circumstantial proof of [the] defendant's state of mind." *State v. Jones*, 322 N.C. 585, 588, 369 S.E.2d 822, 823 (1988) (citation omitted).

"It is well established in North Carolina that a murder victim's statements that she fears the defendant and fears that the defendant might kill her are statements of the victim's then-existing state of mind and are highly relevant to show the status of the victim's relationship to the defendant." *State v. Thibodeaux*, 352 N.C. 570, 578, 532 S.E.2d 797, 804 (2000) (citations and quotation marks omitted). Rule 404(b) evidence is "constrained by the requirements of similarity and temporal proximity." *State v. Pickens*, 385 N.C. 351, 356, 893 S.E.2d 194, 198 (2023) (quoting *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 156). "To be admissible, prior bad acts do not need to 'rise to the level of unique and bizarre' and instead will be considered sufficiently similar and admissible 'if there are some unusual facts present in both crimes that would indicate the same person committed them.'" *Id.*

Ruling on the admissibility of Mr. Driscoll's testimony, the court made the following findings of law and fact:

With respect to the testimony of Brian Driscoll, the [c]ourt has considered the evidence that was offered by the State and the arguments of counsel. Having reviewed the case law that was provided by counsel, I do find that the statements made by Ms. Bland, that she feared [] [D]efendant and feared [] [D]efendant might kill her, are statements of her existing then state of mind and highly relevant to show the status of the relationship to [] [D]efendant. I note that courts have consistently allowed evidence spanning an entire relationship to show the malice, intent, and ill will towards the victim. While there

STATE V. BOYNTON

Opinion of the Court

is some issue of remoteness in time, the courts have noted that that remoteness in time affects the weight to be given the evidence, but not its admissibility. The defense's objection to that evidence is noted for the record, but it's overruled.

Here, addressing the issue of similarity, Mr. Driscoll testified that while living across from Bland in late 2009 and early 2010, she came "over to our apartment and would knock on the door voicing concern about aggressive behavior, her and Andrew having fights. There are times where she mentioned that he had been physically aggressive and that – and that she was concerned that he would be violent with her or kill her." Between the incidents alleged by Mr. Driscoll and the murder, Defendant referred to Bland as a "f***** d***** b*****" and a "f***** c***[.]"

There are sufficient similarities between the prior bad acts and the facts surrounding the murder: (1) both the prior bad acts at issue and in the murder occurred in Bland's residence; (2) Bland was the victim in both instances; (3) Defendant was the aggressor in both instances; and (4) Defendant had access to her residence at both the time of the previous acts and at the time of the murder. Supreme Court precedent has emphasized that the analysis focuses on the *similarities* rather than the differences and the similarities here, accordingly, are sufficient to satisfy this prong. *See Pickens*, 385 N.C. at 359, 893 S.E.2d at 200 (explaining that the analysis for admissibility of 404(b) evidence focuses on the similarities rather than differences).

There is no bright-line rule for the temporal proximity required to make 404(b)

evidence admissible, rather, “the probative value (and thus the admissibility) of 404(b) evidence must be determined on a case-by-case basis.” *State v. Maready*, 362 N.C. 614, 625, 669 S.E.2d 564, 571 (2008). “[T]he extent of its probative value depends largely on intervening circumstances[,]” and is increased if “part of a clear and consistent pattern . . . that is highly probative of” a defendant’s mental state in a later case. *Id.* at 624, 669 S.E.2d at 570.

A nine-year difference may detract from the weight given to Mr. Driscoll’s testimony, but that difference does not constitute trial court error in admitting it. While temporal proximity of 404(b) evidence offered to show intent goes to its initial admissibility in that it is factored into the similarities test, it is more impactful on the weight given to the evidence by the jury. *See Maready*, 362 N.C. at 623, 669 S.E.2d at 624 (allowing the introduction of prior bad acts that occurred sixteen years before); *see also Beckelheimer*, 366 N.C. at 133, 726 N.C. at 160 (explaining that a longer period of time between prior bad acts and a current offense goes to the weight given when the prior bad acts are offered for purposes other than propensity).

Additionally, Defendant’s intervening and derogatory statements about Bland increase the probative value of Mr. Driscoll’s testimony by showing a clear and consistent pattern of hostile feelings and emotions towards Bland. Bland feared for her life because of Defendant’s aggressive and violent actions towards her; a fear that becomes more reasonable and probative of Defendant’s ill-will and malice towards Bland in light of his derogatory statements.

Despite Defendant's arguments to the contrary, both the similarity and temporal proximity weigh in favor of admitting Mr. Driscoll's testimony as evidence of the ill-will and malice Defendant harbored towards Bland. Accordingly, the trial court did not err in admitting 404(b) evidence of Defendant's prior bad acts as evidence of intent.

2. Rule 403

Having concluded Mr. Driscoll's testimony was admissible under Rule 404(b), we now review the trial court's 403 determination for abuse of discretion. Rule 403 states "[a]lthough 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 (2021). Because Rule 403 analysis requires a balancing between probative value and prejudice, our Supreme Court has stated that the "better practice is for the proponent of the evidence, out of the presence of the jury, to inform the court of the rule under which he is proceeding and to obtain a ruling on its admissibility prior to offering it." *State v. Morgan*, 315 N.C. 626, 640, 340 S.E.2d 84, 93 (1986).

Here, the trial court received defense counsel's arguments that the introduction of Mr. Driscoll's testimony would be highly prejudicial but, overruled the objection. Mr. Driscoll's testimony tended to show Bland feared Defendant and was concerned Defendant may kill her. An instance in the past offered for the limited purpose of showing Defendant's ill-will and malice towards Bland is highly unlikely to overshadow and prejudice Defendant when the crime on review is a murder

involving over twenty stab wounds. Moreover, under *Thibodeaux*, it is well established that this evidence is highly relevant; thus, the trial court did not commit error in allowing the State to introduce it. *Thibodeaux*, 352 N.C. at 578, 532 S.E.2d at 804.

The trial court's decision was the result of a deliberate balancing rather than a decision unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. Accordingly, the trial court did not abuse its discretion in finding Mr. Driscoll's testimony to be more probative than prejudicial.

B. Jury Instructions

Next, Defendant argues the trial court committed plain error by instructing the jury that 404(b) evidence could be used as evidence of Defendant's intent. Specifically, Defendant contends "[w]hile the instruction was correct as a general statement of the limited use of 404(b) evidence, instructing the jury on a prior bad act when the evidence concerned an incident that failed to meet the requirements of temporal proximity and similarity is reversible error."

This Court looks at whether a trial court committed plain error when a party fails to object to a jury instruction at trial. *State v. Wiley*, 355 N.C. 592, 615–16, 565 S.E.2d 22, 39–40 (2002) (citations omitted). Plain error occurs when "a fundamental error occurred at trial . . . [which] had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (cleaned up and citations omitted). The burden to show this is on the

defendant. *Id.* Plain error “should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error[.]” *Id.* at 517, 723 S.E.2d at 333 (citations omitted).

Regarding Mr. Driscoll’s testimony, the court instructed:

Evidence has been received tending to show that Kimberly Bland believed [] [D]efendant may kill her. This evidence was received solely for the purpose of showing that [] [D]efendant had the intent, which is a necessary element of the crime charged in this case, or that [] [D]efendant had the malice or ill will, which is a necessary element of a crime charged in this case. 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.

As a threshold matter, the evidence for which the challenged instructions were given was, as concluded above, admissible. Further, the jury instructions were pattern instructions given to limit any prejudicial effect that Mr. Driscoll’s testimony may have had. The record also reflects that the instructions were given to satisfy a request of Defendant’s trial counsel. Additionally, Defendant’s other statements were likely sufficient in the minds of a juror to constitute the requisite malice needed to show intent.

We hold the trial court did not err, much less commit plain error. Regardless, Defendant fails to carry his burden of showing a fundamental error that probably impacted the jury’s finding.

C. Ineffective Assistance of Counsel

Defendant contends he received ineffective assistance of counsel. “IAC 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. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). “To make a successful ineffective assistance of counsel claim, a defendant must show that (1) defense counsel’s ‘performance was deficient,’ and (2) ‘the deficient performance prejudiced the defense.’” *State v. Waring*, 364 N.C. 443, 502, 701 S.E.2d 615, 652 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)) (citations omitted). Our Supreme Court has “often approved of jury instructions that are consistent with the pattern instructions,” because they reflect a “long-standing, published understanding of our case law and statutes.” *State v. Walston*, 367 N.C. 721, 731, 766 S.E.2d 312, 319 (2014) (citations and quotation marks omitted).

Here, the cold record reveals the jury instructions were produced through an in-chambers meeting and were sufficient to satisfy a request of defense counsel. Additionally, the jury instructions given were pattern jury instructions for 404(b) evidence. Because we concluded that the evidence was admissible, Defendant was not prejudiced by the use of pattern jury instructions. Consequently, Defendant has failed to show defense counsel’s performance was deficient. Defendant’s argument is without merit.

III. Conclusion

For the aforementioned reasons, Defendant received a fair trial, free from error.

NO ERROR.

Judges MURPHY and STADING concur.

Report per Rule 30(e).