



## State v. Smith

616 S.E.2d 30 (2005) | Cited 0 times | Court of Appeals of North Carolina | August 2, 2005

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

Under Rule 403 of North Carolina's Evidence Code, relevant evidence may be excluded at trial if its probative value is substantially outweighed by, inter alia, the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (2004). Here, Defendant Patrick Ricardo Smith contends that evidence admitted by the trial court to show identity and/or common plan or scheme was unduly prejudicial. Because Defendant did not assign error to the admissibility of the evidence under Rule 404(b), and because the trial court gave a lengthy limiting instruction minimizing any possible prejudice, we hold that the trial court did not abuse its discretion in admitting this evidence.

The record reflects that, on 19 July 2002, Defendant entered Discount Check Cashers in Charlotte, North Carolina dressed in a BellSouth uniform and indicated to Stephen Lake-Nestor and Shonna Jant, Discount Check Cashers employees, that he had come to repair the telefax line. Mr. Lake-Nestor and Ms. Jant escorted Defendant to the rear of Discount Check Cashers, where the telephone, telefax, and also the safes were located. Once in the rear of Discount Check Cashers, Defendant grabbed Mr. Lake-Nestor's arm, pulled out a gun, and instructed Mr. Lake-Nestor and Ms. Jant to lie down on the floor. Defendant then instructed Mr. Lake-Nestor to open the safes and put the money contained therein into a bag. While Mr. Lake-Nestor filled the bag with money from one of the safes, another individual with a gun threatened to shoot Ms. Jant. Mr. Lake-Nestor stated that he was unable to remember the combination to the second safe, and Defendant then threatened to shoot Mr. Lake-Nestor in the knee caps. Shortly thereafter, Defendant and the other armed individual left Discount Check Cashers with approximately \$29,000.00.

Mr. Lake-Nestor and Ms. Jant identified Defendant in a photograph line-up and at trial as the person who, clad in a BellSouth uniform, robbed Discount Check Cashers on 19 July 2002. At trial, the court also allowed into evidence testimony regarding an armed robbery of a BellSouth technician's uniform and tools. That robbery took place in Raleigh, North Carolina on 12 July 2002, and the victim of the robbery identified Defendant as the perpetrator both in a photograph line-up and at trial. At trial, additional testimony was allowed into evidence regarding the armed robbery of Cash In Advance in Fayetteville, North Carolina on 2 August 2002. The evidence showed that Defendant, clad in a BellSouth uniform, committed an armed robbery of Cash In Advance, taking over \$1,000.00. Defendant was identified in a photograph line-up and at trial as the perpetrator of the 2 August 2002 robbery.



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On 7 May 2004, a jury found Defendant guilty of robbery with a dangerous weapon. Defendant was sentenced to imprisonment of not less than 150 but not more than 189 months. Defendant appeals.

In his first assignment of error, Defendant does not challenge the admissibility of the evidence regarding the 12 July 2002 robbery under Evidence Rule 404(b),<sup>1</sup> allowing for the admission of evidence as to other crimes or bad acts for certain purposes. Rather, Defendant contends that the trial court erred because such evidence "was unduly prejudicial to the defendant." Because "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[,]," N.C. R. App. P. 10(a), we look only to whether the evidence regarding the 12 July 2002 robbery was unduly prejudicial.

Rule 403 of North Carolina's Evidence Code 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, Rule 403. Whether to exclude relevant evidence under Rule 403 falls within the sound discretion of the trial court, and this Court reviews the trial court's decision solely for an abuse of that discretion. *State v. Sims*, 161 N.C. App. 183, 190, 588 S.E.2d 55, 60 (2003). "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." *Id.* (quotation omitted). A trial court does not abuse its discretion pursuant to Rule 403 where it "guard[s] against the possibility of prejudice by instructing the jury to consider [admissible evidence] only for" permissible purposes under Rule 404(b). *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 74-75 (2002) (prior misconduct not unduly prejudicial under Rule 403 where trial court gave limiting instruction regarding permissible uses of Rule 404(b) evidence); *State v. Lemons*, 348 N.C. 335, 352-53, 501 S.E.2d 309, 320 (1998), sentence vacated on other grounds, 527 U.S. 1018, 144 L.Ed. 2d 768 (1999) (same).

Here, Defendant did not except to the admissibility of the 12 July 2002 robbery evidence under Evidence Rule 404(b). Further, the trial court gave the jury a lengthy limiting instruction regarding the evidence, stating, in part:

... I want to caution you, that that evidence was received in this case, solely, for the purpose of showing, if it does so show, the identity of the person who committed the crime charged in this case, if it was committed.

And that there existed in the mind of this defendant, a plan, scheme, system, or design involving a particular crime charged in this case.

If you believe this evidence concerning [the 12 July 2002] incident[], you may consider this evidence, but only for the limited purpose for which it was received[.]



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Given that the trial court guarded against the possibility of prejudice by instructing the jury to consider the evidence concerning the 12 July 2002 robbery only for limited, permissible purposes under Evidence Rule 404(b), we hold that the trial court did not abuse its discretion in admitting the evidence. Hyatt, 355 N.C. at 662, 566 S.E.2d at 74-75.

In his next assignment of error, Defendant contends that the trial court erred by admitting Rule 404(b) evidence of the 2 August 2002 robbery, "as such was unduly prejudicial." Defendant did not assign error to the admissibility of the evidence pursuant to Rule 404(b), and the trial court gave the same limiting instruction quoted above as to the 2 August 2002 robbery evidence. Therefore, for the reasons previously stated, the trial court did not abuse its discretion in admitting the evidence. Hyatt, 355 N.C. at 662, 566 S.E.2d at 74-75.

In his next assignment of error, Defendant contends that the trial court erred in failing to remove a sitting juror who admitted that he knew one of the State's witnesses, Detective Joel McNelly of the Charlotte-Mecklenburg Police Department.

"The competency of jurors is a matter to be decided by the trial judge. Decisions as to a juror's competency at the time of selection and their continued competency to serve are matters resting in the trial judge's sound discretion." State v. Harris, 283 N.C. 46, 48, 194 S.E.2d 796, 797 (citations omitted), cert. denied, 414 U.S. 850, 38 L.Ed. 2d 99 (1973). The trial court's discretionary power to regulate the composition of the jury continues beyond empanelment. It is within the trial court's discretion to excuse a juror and substitute an alternate at any time before final submission of the case to the jury panel. These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion . . .

State v. McLaughlin, 323 N.C. 68, 101, 372 S.E.2d 49, 70 (1988), vacated on other grounds, 494 U.S. 1021, 108 L.Ed. 2d 601 (1990); see also State v. Conaway, 339 N.C. 487, 518, 453 S.E.2d 824, 844 (1995) ("Once a jury has been impaneled, any further challenge to a juror is a matter within the trial court's sound discretion." (citing State v. Harris, 323 N.C. 112, 123, 371 S.E.2d 689, 696 (1988))).

Here, one juror informed the bailiff that he knew Detective McNelly, a witness for the State. The juror had attended a meeting of the United Way Youth Education Council at which Detective McNelly had given a presentation about gang activity. The juror realized that he had had the limited contact with Detective McNelly only after Detective McNelly began testifying. Upon learning of the prior contact and in the presence of the State and Defendant, the trial court asked the juror "[w]hat if any effect would that prior contact have upon you in your consideration of the evidence in this case, including your weighing of the credibility of each witness including, Detective McNelly?" The juror did "not think it would have any negative effect. I think I can remain neutral and weigh each person's testimony on its own merits." The trial court then asked whether "that prior contact [would] factor into your mind in any way, so as to cause you to attribute any more or any less credibility to the testimony of Detective McNelly in this particular action[,]" to which the juror answered "No, sir."



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The trial court then asked whether the prior contact "caused you to form any opinions about the case[,]" to which the juror responded no. The trial court inquired into whether the juror "continue[d] to have an open mind about the case[,]" to which the juror responded yes. The trial court asked whether the juror "still f[elt] as comfortable in serving on this case as you did previously?" The juror said "I do. I wanted to make the Court aware so whatever needed to happen could. If there's some protocol or, something that's suppose to unfold. I feel like I can remain objective. I feel like I've been that the whole time." Finally the trial court inquired if the juror was "satisfied that you can still act in a manner that would be fair both the State and to this Defendant," to which the juror replied yes.

Given the minimal prior contact between the juror and Detective McNelly and the lengthy colloquy the trial court conducted to ensure the juror's objectivity and impartiality, it cannot be said that the trial court erred, much less abused its discretion, in denying Defendant's request to remove that juror in favor of the alternate juror.

In his next assignment of error, Defendant contends the trial court erred in failing to dismiss due to the insufficiency of the evidence to support the crime charged.

When reviewing a motion to dismiss, we view "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (citation omitted), cert. denied, 537 U.S. 833, 154 L.Ed. 2d 50 (2002). If we find substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to have denied the motion. *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citing *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)).

Here, Defendant was charged with robbery with a dangerous weapon. Section 14-87 of North Carolina's General Statutes defines robbery with a dangerous weapon as:

Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87 (2004). Therefore, to obtain a conviction for robbery with a dangerous weapon pursuant to section 14-87, the State must proffer substantial evidence of (1) an unlawful taking of personal property from another; (2) the possession, use or threatened use of a firearm or other dangerous weapon, and (3) danger or threat to the life of the victim. *In re Stowe*, 118 N.C. App. 662, 664, 456 S.E.2d 336, 338 (1995).



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Here, there was abundant substantial evidence as to each element of robbery with a dangerous weapon. Mr. Lake-Nestor and Ms. Jant testified at trial that Defendant entered Discount Check Cashers on 19 July 2002, the day of the charged robbery, dressed in a BellSouth uniform. Mr. Lake-Nestor and Ms. Jant testified that Defendant said he had come to repair the telefax line and was brought to the back of Discount Check Cashers, where the telephone and telefax lines, as well as the safes, were located. Mr. Lake-Nestor and Ms. Jant testified that Defendant then grabbed Mr. Lake-Nestor's arm, pulled out a gun, and demanded that Mr. Lake-Nestor take the money out of the safes and put it into a bag. While Mr. Lake-Nestor removed the money from one of the safes and gave it to Defendant, he was unable to remember the combination for the second safe. Defendant then threatened to shoot Mr. Lake-Nestor in the knee caps. Defendant and another individual, who had held a gun to Ms. Jant and threatened to shoot her, fled Discount Check Cashers with approximately \$29,000.00. Mr. Lake-Nestor and Ms. Jant positively identified Defendant in photograph line-ups and at trial. Clearly, the State proffered substantial evidence as to each element of the crime charged.

Finally, Defendant contends the trial court erred by: (1) finding the non-statutory aggravating factor that Defendant's conduct was part of a course of conduct that included the commission of violent acts against others; and (2) sentencing the Defendant in the aggravated range. Specifically, the trial court found that the defendant's actions in this particular case, the case of Robbery With a Dangerous Weapon committed against Discount Check Cashers in Charlotte, North Carolina, fits a non-statutory aggravating factor that this conduct by defendant was part of a course of conduct that was part of an overall scheme or plan that included the commission of violent acts against other persons.

Our Supreme Court has recently held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." State v. Allen, \_\_ N.C. \_\_, \_\_ S.E.2d \_\_, \_\_ (1 July 2005) (No. 485PA04); see State v. Speight, \_\_ N.C. \_\_, \_\_ S.E.2d \_\_, \_\_ (1 July 2005) (No. 491PA04). Therefore "those portions of N.C.G.S. § 15A-1340.16 (a), (b), and (c) which require trial judges to consider evidence of aggravating factors not found by a jury or admitted by the defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence violate the Sixth Amendment to the United States Constitution." Allen, \_\_ N.C. at \_\_, \_\_ S.E.2d at \_\_. Accordingly, "Blakely errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible per se." Allen, \_\_ N.C. at \_\_, \_\_ S.E.2d at \_\_.

As the aggravating factor here was neither a prior conviction nor admitted by Defendant, and the facts for the aggravating factor were not presented to a jury and proved beyond a reasonable doubt, pursuant to Allen and Speight we remand for resentencing.

No Error in part, Remanded for resentencing in part.



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Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

Report per Rule 30(e).

1. Evidence Rule 404(b) states: 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) (2004).

