IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	**WD80610**
v.	)	
	)	**OPINION FILED:**
	)	**June 26, 2018**
TYREAK ALEXANDER SPEED,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Nodaway County, Missouri
The Honorable Roger M. Prokes, Judge

Before Division IV: Mark D. Pfeiffer, Chief Judge, and
Karen King Mitchell and Anthony Rex Gabbert, Judges

Mr. Tyreak Speed ("Speed") appeals from the judgment entered by the Circuit Court of Nodaway County, Missouri ("trial court"), following a jury trial in which he was found guilty of one count of the class C felony of rape in the second degree. The trial court sentenced Speed to three years' imprisonment. In Speed's sole point on appeal, he asserts that the trial court erred in admitting into evidence photographs showing marijuana and drug paraphernalia found in the house where the rape took place. We affirm.

Facts and Procedural History[1]

On March 14, 2015, B.D.[2] was a student at Northwest Missouri State University in Maryville, Missouri. She and some friends decided to attend a fraternity party that evening. For about an hour before going to the party, she drank alcohol with a friend in her dormitory room. At about 10:30 p.m., they left for the fraternity party. At the party, within an hour, she filled up her twenty-four-ounce water bottle once or twice with "jungle juice," a mixture of vodka and fruit juice. When she left the party to go back to her dormitory, she was "pretty drunk" and slurring her words. After about twenty minutes, she and some friends went back to the fraternity party and within two hours B.D. drank three or four more water bottles of "jungle juice."

While at the fraternity party the second time, B.D. met Speed. They danced and kissed. Around 2:00 a.m., B.D.'s friends wanted to go back to their dormitory. Instead of going with her friends, B.D. went with Speed to a nearby house. She could not walk very well, was slurring her words, and "wasn't very coherent." Speed had to help B.D. walk to the house.

When B.D. and Speed arrived at the house, they went into a room with people who were taking "dabs," concentrated doses of marijuana. When B.D. took a dab, she started coughing, and someone gave her water to drink. She had no memory of what happened immediately after she drank the water. The next thing she did remember was waking up in the bathroom, leaned over the sink, with Speed behind her and his penis inside her vagina. She had not told him that he could have sexual intercourse with her. She yelled at him to stop and tried to push him off, but was unsuccessful due, in part, to her continued intoxication. B.D. started to cry. Eventually,

[1] "On appeal from a jury-tried case, we view the facts in the light most favorable to the jury's verdict." *State v. Carter*, 523 S.W.3d 590, 593 n.1 (Mo. App. W.D. 2017) (internal quotation marks omitted).

[2] Pursuant to section 595.226.1 of the REVISED STATUTES OF MISSOURI 2016, we have used initials to identify the victim so as to protect the victim's identity.

Speed stopped, unlocked the bathroom door, and walked B.D. back to her dormitory. Speed would later describe B.D. as "blacked out drunk" in a statement to law enforcement.

When B.D. arrived at her dormitory around 3:30 a.m., she was crying hysterically. Her roommate took B.D. to the resident assistants, who called campus security, the housing hall director, and the campus sexual assault advocate. Law enforcement was contacted, and B.D. was taken to the hospital and underwent a sexual assault forensic examination ("SAFE").

Maryville Department of Public Safety Detective Ryan Glidden, in the execution of a search warrant for the house where B.D. was raped, found marijuana and drug paraphernalia in multiple locations inside the house. Later on March 15, Speed returned to the house, and officers brought him to the police department where he was interviewed by Detective Glidden. Speed repeatedly denied having sexual intercourse with B.D. In Speed's written statement, he described that he and B.D. were "smoking blunts and smoking out of a bong. . . . [B.D.] barely could even walk because of the amount of alcohol she drank but she started to smoke." Detective Glidden also collected a buccal swab with a Q-tip from the inside of Speed's mouth as a sample to send to a DNA laboratory for analysis along with the SAFE kit.

Maryville Department of Public Safety Officer John Vaught also assisted in the execution of the search warrant as the evidence officer. In the house where B.D. was raped, he found marijuana and drug paraphernalia in the house in multiple locations. He took photographs of his observations inside the house. Most of the photographs were of drugs or drug paraphernalia in multiple locations inside the house, with a few photographs of evidence of possible sexual activity, specifically of a used condom on the floor and an open condom package.

The Maryville Department of Public Safety sent Speed's DNA sample and samples from the SAFE kit to a DNA diagnostic center for analysis. The partial DNA profile obtained from

tests of B.D.'s vaginal swabs, rectal swabs, and underwear samples matched Speed's DNA profile or any of his paternally-related male relatives.

Speed was charged by information with one count of rape in the first degree, § 566.030,[3] for having "sexual intercourse with another person who was incapacitated, incapable of consent, or lacked the capacity to consent due to her intoxication by inserting his penis into her vagina." In the alternative, the information charged Speed with one count of the class C felony of rape in the second degree, § 566.031, alleging that "on or about March 15, 2015, [Speed] had sexual intercourse with [B.D.] knowing that he did so without her consent."

At trial, Speed testified on his own behalf and provided a different version of events from his initial statement to law enforcement denying that he had engaged in sexual intercourse with B.D. Instead, Speed testified that he had consensual sex with B.D. He denied raping her.

The jury found Speed not guilty of first-degree rape and guilty of second-degree rape. Speed filed a motion for new trial, which the trial court overruled. The trial court sentenced Speed to three years' imprisonment in the Department of Corrections.

Speed timely appealed.

Standard of Review

At trial, Speed objected to the admission of photographic evidence of drugs and drug paraphernalia observed by law enforcement during the execution of the search warrant as irrelevant and immaterial, but he failed to include the issue in his motion for new trial. "An issue is not preserved for appellate review if the issue is not included in the motion for a new trial." *State v. Clay*, 533 S.W.3d 710, 718 (Mo. banc 2017). Consequently, as Speed concedes, this issue is not preserved.

[3] All statutory references are to the REVISED STATUTES OF MISSOURI 2000, as updated through the 2014 Noncumulative Supplement, unless otherwise indicated.

However, Rule 30.20 allows claims that are not preserved to be reviewed for plain error in the discretion of the court. *State v. Taylor*, 466 S.W.3d 521, 533 (Mo. banc 2015). Plain error review involves a two-step process. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009).

> First, we determine whether the trial court committed evident, obvious and clear error affecting the defendant's substantial rights. If the defendant does not get past the first step, our inquiry ends. If we determine that a plain error occurred, however, we then must decide whether the error actually resulted in manifest injustice or a miscarriage of justice.

State v. Smith, 370 S.W.3d 891, 894 (Mo. App. E.D. 2012) (internal citations omitted).

Analysis

In Speed's sole point on appeal, he asserts that the trial court plainly erred by admitting State's exhibits 109 through 111 and 114 through 137, photographs of marijuana and drug paraphernalia inside the residence where the rape took place. At trial, Officer Vaught testified that during execution of the search warrant, he observed marijuana and drug paraphernalia in multiple locations in the house and took photographs of his observations. When the State offered the photographs into evidence, defense counsel objected on the grounds of relevancy and materiality: "There's no question there's some drug paraphernalia and drugs and all that, but this is not a drug charge. It's other crimes evidence that is irrelevant and immaterial and prejudicial. So I would object to it." The prosecutor responded:

> In Count 1, the State has alleged that the victim was incapacitated because of an intoxication. Part of the evidence in the State's first victim witness was the fact that she was given something to smoke, marijuana, and I believe that this corroborates her statement, which it was challenged in cross-examination by whether or not she was really intoxicated or not. This corroborates that marijuana was there, that it was prevalent, that there was paraphernalia all over. And so I believe it goes to bolster the State's witness, the fact that she consumed not only alcohol but controlled substances as well, and that was specifically attacked by the defense in cross-examination.
>
> THE COURT: [Defense counsel]?

> [DEFENSE COUNSEL]: Judge, as to Exhibits 109, 110, 111, and Exhibit 114 through and including 137, those are all irrelevant and immaterial and prejudicial. It's way overkill because there were over 11 people apparently hanging out in that residence, all of them utilizing marijuana and drug paraphernalia. It's operation overkill to introduce all of these pictures that have absolutely no evidence of any kind of sexual activity. So I object to them as being irrelevant and immaterial and prejudicial. Certainly the rubber and the rubber container, those are relevant and material. I don't object to those.

The trial court admitted the photographs into evidence.

"'[A] photograph is not rendered inadmissible simply because other evidence described what is shown in the photograph.'" *State v. Clark*, 280 S.W.3d 625, 632 (Mo. App. W.D. 2008) (quoting *State v. Rousan*, 961 S.W.2d 831, 844 (Mo. banc 1998)). "'A photograph, generally speaking, is superior to words as a means of description, and it should not be rejected because by presenting an accurate portrayal it tends to be inflammatory.'" *State v. Smith*, 185 S.W.3d 747, 756 (Mo. App. S.D. 2006) (quoting *State v. Burnfin*, 606 S.W.2d 629, 630 (Mo. 1980)). "'Photographs are relevant if they depict the crime scene, . . . or otherwise constitute proof of an element of the crime[,] or assist the jury in understanding the testimony.'" *State v. Collings*, 450 S.W.3d 741, 762 (Mo. banc 2014) (quoting *Rousan*, 961 S.W.2d at 844). Furthermore, "[t]he [S]tate is entitled to introduce evidence of the circumstances surrounding the offense charged" in order to "paint[ ] a complete picture of the crime charged." *State v. Manley*, 223 S.W.3d 887, 892 (Mo. App. W.D. 2007) (internal citations and quotation marks omitted).

Here, the State adduced substantial evidence of B.D. and Speed smoking marijuana and of marijuana and drug paraphernalia being found in the house by the police when they executed the search warrant. B.D. described going into a room with other people who were taking "dabs" and taking a "dab" herself. Detective Glidden testified that he discovered marijuana and drug paraphernalia in multiple locations inside the house when the search warrant was executed. Maryville Public Safety Patrol Officer Adam James assisted in executing the search warrant and

testified that when he entered the house, he observed "[d]rug paraphernalia, as far as marijuana, marijuana smoking devices and marijuana." Officer Sarah Kahmann testified that B.D. told her that "at the residence she smoked a substance through a glass smoking device" and admitted to the officer that she had used "wax," which B.D. explained was "a very pure form" of tetrahydrocannabinol or marijuana. Speed did not object to the officers' testimony about marijuana and drug paraphernalia in the house and the photographs in question did nothing more than "paint a complete picture" of the scene of the crime that had previously been described by witness testimony.

Additionally, "[photographs] are also relevant where they corroborate a witness's testimony." *State v. Mort*, 321 S.W.3d 471, 483 (Mo. App. S.D. 2010) (citing *State v. Masden*, 990 S.W.2d 190, 193 (Mo. App. W.D. 1999)). B.D. testified that after drinking alcohol and smoking marijuana, she "blacked out" and did not remember anything until she woke up in the bathroom, leaning over the sink, with Speed behind her and his penis inside her vagina. Defense counsel attacked her version of events, specifically her claim that she lost consciousness. The photographs of marijuana and drug paraphernalia in the house were relevant to explain why B.D. "blacked out" just prior to the criminal offense.

Finally, defense counsel referred to the presence and use of marijuana at the house throughout the trial. During Detective Glidden's cross-examination, defense counsel read a statement, which had been admitted without objection, that Speed had given to the detective, containing a description of the presence and use of marijuana:

> I saw [B.D.] . . . and we were all smoking blunts and smoking out of a bong. Everyone in the whole living room smoked with us.
>
> . . . .

> . . . [B.D.] was smoking with us and she barely could even walk because of the amount of alcohol she drank[,] but she started to smoke.

During Speed's direct examination, defense counsel questioned him regarding his friend who rented the house where the marijuana was found:

> Q: Why does he allow the place where he lives to be a drug den? Because that's the only way we can describe it.
>
> A: It's not that he allowed it. He just has three other roommates so . . .
>
> Q: You saw the pictures. It's a drug den. Why does he allow that to take place?
>
> A: I can't answer why he would let that happen in his house.

Later during direct examination, defense counsel questioned Speed as to why he went to his friend's house after leaving the fraternity party:

> Q: Okay. Now, why did all of you head over to [Speed's friend's] house, which basically is a drug den? Why did you go over there?
>
> A: Because that's the people I came with and that's their house and that's who I came to [the fraternity party] with, so I left with them to go back to their house.

Defense counsel asked whether there were people smoking marijuana reefers at his friend's house, and Speed replied, "Yes." Defense counsel also inquired about B.D.'s behavior when she arrived at the house: "Did she just sit there and relax or did she start puffing on marijuana?" Speed testified that he observed people rolling and puffing on blunts, which he described as a tobacco cigar filled with marijuana. He said he and B.D. smoked marijuana blunts in the bedroom.

Under these circumstances, Speed can neither show that it was error for the trial court to permit the introduction of the photographic evidence of which he complains nor show that he was prejudiced by the admission of the photographs. In general, "prejudice does not exist when

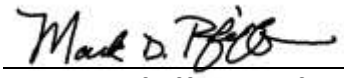
the objectionable evidence is merely cumulative of other evidence that was admitted without objection and that sufficiently establishes 'essentially the same facts.'" *Smith*, 185 S.W.3d at 757 (quoting *State v. Haddock*, 24 S.W.3d 192, 196 (Mo. App. W.D. 2000)).

We conclude that the trial court did not err, plainly or otherwise, in overruling objections to the admission of the drug paraphernalia photograph exhibits.

Point denied.

Conclusion

The trial court's judgment is affirmed.



Mark D. Pfeiffer, Chief Judge

Karen King Mitchell and Anthony Rex Gabbert, Judges, concur.