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NO. COA01-1085

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Lenoir County
No. 99 CRS 2586

ANTHONY DOVE

Appeal by defendant from judgment entered 25 October 2000 by Judge Thomas D. Haigwood in Lenoir County Superior Court. Heard in the Court of Appeals 6 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant appellant.

TIMMONS-GOODSON, Judge.

Anthony Dove ("defendant") appeals his conviction of first-degree murder, two counts of discharging a firearm into occupied property, and one count of unlawful possession of a blue light.

The State's evidence at trial tended to show the following: In January 1998, defendant discovered that his wife, Debra Dove ("Debra"), was having an affair with her co-worker, Victor Williams ("Victor"). After learning of the affair, defendant became enraged and assaulted Debra, cutting her hair with a knife and threatening to kill her. Defendant also forced Debra to reveal where Victor

lived. Throughout the course of the following year, defendant harassed, followed, intimidated, threatened, and physically attacked Victor. The threats and harassment began in January of 1998, when defendant fired a shot outside of Victor's home and left a note reciting, "I know where you live." In April of 1998, defendant and Victor were involved in a physical altercation. A week later, defendant assaulted Victor in a parking lot. In the summer of 1998, witnesses observed defendant fire a gun outside of Victor's residence while shouting obscenities. In September, October and December, defendant made several threats to kill Debra and Victor "if he ever saw them together."

Debra and Victor obtained separate restraining orders against defendant, and he was ordered to leave the marital residence. Defendant subsequently moved into an apartment and began a relationship with Falesha Holmes ("Holmes"). During the course of the relationship, Holmes applied for, and was granted, a gun permit. She thereafter purchased a Highpoint nine-millimeter semi-automatic handgun.

Debra and Victor became engaged in December of 1998. In January of 1999, Debra and Victor attended a formal dance, despite their fear that defendant would see them together in public. Three days later, Victor was shot and killed as he traveled to work.

Days before the murder, evidence tended to show that defendant used his credit card to purchase a flashlight, gloves, a cap, shoe polish, a shine brush, starch paste, and a child's toy flip-phone as well as ammunition for a nine-millimeter handgun. Defendant

also purchased a blue light commonly used by law enforcement personnel. On the day before the murder, a maintenance man repaired a toilet in defendant's apartment. While looking for a pen, he observed a handwritten list that included the following text: "take serial number off gun; something to catch shells; flashlight; cap; black shoe polish; smoke half a cigarette; put it out and smoke a whole cigarette and put it in ashtray; take a bath in alcohol at [Holmes']."

On the day of the murder, defendant rented a vehicle that resembled an unmarked police car. With the unmarked vehicle and blue light, the State's evidence tended to show that on the evening of 25 January 1999, defendant, resembling a law enforcement officer, followed Victor while he was driving to work. He thereafter flashed his blue light, indicating that Victor should stop his vehicle. Defendant then approached the vehicle and fired a shot to Victor's head, killing him.

Two months after the crime, a fisherman found a gun in a river. Upon examination of the gun, officials at the State Bureau of Investigations ("SBI") determined that the gun was the same gun previously purchased by Holmes.

Upon conclusion of the evidence, the jury found defendant guilty of first-degree murder under the felony murder rule. The jury also found defendant guilty of two counts of discharging a firearm into occupied property, and possession of a blue light. Defendant appeals.

In his first assignment of error, defendant argues that the trial court erred by allowing the State to introduce evidence that defendant sexually assaulted Debra one year before the murder. At trial, Debra testified that when defendant discovered that she and Victor were having an affair, he began hitting her. He then stripped the clothing from her body, cut her hair with a knife, sodomized her, and told her that she had humiliated him by having an affair with Victor. Defendant contends that such evidence was highly prejudicial, and that its only relevance was to show defendant's bad character and predisposition to violence. Defendant therefore maintains that the trial court abused its discretion in admitting this evidence. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence provides in pertinent part that:

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) (2001). Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Therefore, as long as evidence of other crimes, wrongs or acts is relevant to any other

fact or issue other than the defendant's propensity to commit the crime for which he is being tried, the evidence is admissible. See *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

However, Rule 403 provides 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 (2001). The decision of whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court and will be disturbed only upon a showing that its ruling was "manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

In the instant case, the State offered testimony of the prior sexual assault to show the depth and scope of defendant's desire for revenge and punishment against people who humiliated him. Furthermore, the evidence was admissible because it served the purpose of establishing a chain of events explaining the context, motive, and set-up of the crime charged, and further, formed an "integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury.'" *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (quoting

United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985)),
cert. denied, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999).

In *White*, the defendant was charged with the murder of two of his girlfriend's family members. The State elicited testimony that the defendant was so determined to control his girlfriend that he kidnapped her, assaulted her, bound her to his bed, and threatened to kill her family if she ever left him. *Id.* at 551-52, 508 S.E.2d at 264. On appeal, the defendant argued that such evidence was inadmissible under Rule 404(b) of the North Carolina Rules of Evidence because it "ha[d] nothing to do with the murder[s]" for which he was being tried. *Id.* at 551, 508 S.E.2d at 264. Our Supreme Court held that the evidence was properly admitted under Rule 404(b) to show the defendant's motive for killing the two family members, namely, retaliation and identification of the defendant as the person who committed the murders. *Id.* at 552, 508 S.E.2d at 264.

Similarly, in the present case, the evidence of defendant's prior assault on Debra was relevant to show defendant's motive for killing Victor, namely, retaliation for the affair, the depth of his ill will towards Debra and Victor, and his extreme desire for revenge and punishment. Because the evidence was offered for a purpose other than to show the propensity of defendant to commit the crime for which he was being tried, we hold that the trial court did not abuse its discretion in admitting the evidence of the prior sexual assault. This assignment of error is overruled.

Defendant next contends that the prosecutor's statements

during closing arguments were grossly improper, and that the trial court's failure to intervene *ex mero motu* entitle him to a new trial. During her closing argument, the prosecutor stated the following:

And in September of '98, after gun shopping with Anthony Dove -- and I don't really know how to categorize Falesha Holmes other than the girlfriend. She's kind of like a mystery person because you have not heard her testify in this case, the girlfriend of the defendant. She did not come into this courtroom and take an oath to tell the truth.

But we know from the documents and we know from Arline Hines, the owner of the La Grange Sports Shop, that she walked into that shop one day, a woman alone, and walked up to the sales counter and told Arline without any second thought -- a woman went out shopping and pointed out a weapon and sa[id] I want that. I want that. And Arline says -- he tells her, you know, ma'am, that's kind of a heavy weapon. Wouldn't you be interested in a revolver, something that's smaller? I want that.

And in September of '98, Falesha Holmes walks out of that gun shop with that gun, which we know beyond a reasonable doubt is the gun that killed Victor Williams.

Defendant failed to object to these statements at trial. He nonetheless now contends that the comments concerning Holmes' failure to testify were grossly improper and calculated to mislead and prejudice the jury, because Holmes had a privilege to testify. This argument is without merit.

"[T]he arguments of counsel are left largely to the control and discretion of the trial judge and . . . counsel will be granted wide latitude in the argument of hotly contested cases." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). A defendant who fails to interpose an objection at trial to

statements made by the prosecutor must demonstrate on appeal “that the remarks were so grossly improper that the trial court erred by failing to intervene *ex mero motu*.” *State v. Ward*, 354 N.C. 231, 261, 555 S.E.2d 251, 270 (2001) (quoting *State v. Call*, 349 N.C. 382, 419-20, 508 S.E.2d 496, 519 (1998), *cert. denied*, ___ U.S. ___, 151 L. Ed. 2d 548 (2001)). “To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.” *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). In determining whether an argument is grossly improper, we must examine the context in which it was given and the circumstances to which it refers. *See State v. Cummings*, 353 N.C. 281, 297, 543 S.E.2d 849, 859, *cert. denied*, ___ U.S. ___, 151 L. Ed. 2d 286 (2001).

Contrary to defendant's assertions, there is no evidence in the record to suggest that Holmes had a privilege not to testify. She was not defendant's wife and therefore did not possess a spousal privilege. Furthermore, the prosecutor's comments, viewed in the context in which they were uttered, merely characterized the relationship of defendant and Holmes and directed the jury's attention to the fact that Holmes purchased the gun that was used to commit the murder. The comment was not so egregious as to be grossly improper and warrant intervention *ex mero motu* by the trial court. Even if the prosecutor's comment about Holmes was improper, it was not grossly improper and could not have prejudiced defendant's case in light of the overwhelming evidence of his

guilt. We therefore overrule this assignment of error.

In a related argument, defendant contends that the prosecutor's improper characterization of the law of circumstantial evidence warranted intervention by the trial court. We disagree.

In her closing arguments, the prosecutor told the jury:

And the State, as I told you during jury selection, we did not have any eye witnesses. He created the crime scene. He planned it. He staged it. But in North Carolina, the judge will tell you the law says that circumstantial evidence has the same weight as direct evidence.

And the judge will instruct you that in regards to circumstantial evidence, that is proof of a chain or group of facts and circumstances indicating the guilt or innocence of a defendant, that the law makes no distinction between the weight to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence.

Defendant contends that the proper rule of law regarding circumstantial evidence is that "the law makes no distinction between the weight to be given to either direct or circumstantial evidence." Defendant argues that the prosecutor's statement made it likely that the jury gave the State's circumstantial evidence greater weight than it would have otherwise given and was therefore so grossly improper and prejudicial as to warrant a new trial.

Viewing the argument in its entirety, the prosecutor's argument was not a misstatement of the law, much less a grossly improper misstatement as to require the intervention *ex mero motu* by the trial court. In any event, the trial court properly

instructed the jury as follows:

There are two types of evidence from which you may find the truth as to the facts of a case: direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain or group of facts and circumstances indicating the guilt or innocence of a defendant.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

Therefore, any prejudice resulting from alleged misrepresentations of law by the prosecutor was cured by the trial court's proper instructions on the applicable law. See *State v. Buckner*, 342 N.C. 198, 238, 464 S.E.2d 414, 437 (1995) (noting that, "[a]ssuming *arguendo* that the prosecutor's statement were erroneous, the error was cured by the trial court's proper instructions" on the applicable law), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996). Accordingly, this assignment of error is overruled.

In his next assignment of error, defendant contends that the trial court erred by admitting hearsay evidence. At trial, the State sought to introduce evidence that defendant had previously been convicted of assaulting Victor and, as part of that conviction, had been ordered to "not assault, follow, harass, or interfere with Victor Williams." The trial court sustained defendant's objection to the admission of the assault conviction; however, the trial court allowed the State to elicit testimony that defendant was under a court order to "stay away" from Victor. Defendant asserts that the evidence amounted to impermissible opinion evidence, because it tended to show only defendant's

violent propensities, specifically against Victor, and was moreover highly prejudicial. We disagree.

Under Rule 404(b) of the North Carolina Rules of Evidence, "evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused.'" *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54 (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 91 (2d ed. 1982)). "[E]vidence of a defendant's prior assaults on the victim for whose murder the defendant is being tried is admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim under N.C.G.S. § 8C-1, Rule 404(b)." *State v. Gary*, 348 N.C. 510, 520, 501 S.E.2d 57, 64 (1998).

We conclude that this evidence is logically relevant to establish the first-degree elements of malice, intent, premeditation and deliberation. The evidence also tends to establish defendant's ill will against Victor and lack of accident. Therefore, the evidence was relevant to an issue other than defendant's character. Furthermore, the evidence could not have prejudiced defendant in light of the fact that the jury had previously heard that Debra and Victor obtained restraining orders against defendant.

Next, we must determine whether this relevant evidence was unfairly prejudicial to defendant and thus, inadmissible under Rule 403 of the North Carolina Rules of Evidence. As stated above, "[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. "Necessarily, evidence which is probative in the State's case will have a

prejudicial effect on the defendant; the question is one of degree." *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). The exclusion of evidence under Rule 403 is a matter left to the sound discretion of the trial court. See *State v. Alston*, 341 N.C. 198, 229, 461 S.E.2d 687, 703 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996).

In the instant case, we cannot say that the trial court abused its discretion in admitting the evidence. The trial court conducted a *voir dire* and, after considering arguments of counsel, allowed the State to elicit testimony regarding the restraining order. It did not, however, allow the State to admit the assault conviction. Clearly, the court conducted a balancing test under Rule 403 in deciding that the probative value of such evidence outweighed its prejudicial effect. Accordingly, this assignment of error is overruled.

Defendant next contends that the trial court erred by denying his motion to dismiss the charge of possession of a blue light. Defendant asserts that there was insufficient evidence that defendant possessed a blue light. We disagree.

"In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences which may be drawn from the evidence." *State v. Hairston*, 137 N.C. App. 352, 354, 528 S.E.2d 29, 30 (2000). "When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Lucas*, 353 N.C. 568, 580-81, 548 S.E.2d 712, 721 (2001). If there is substantial evidence of each element of the charged offense and of the defendant being the perpetrator of the offense, the case is for the jury and the motion to dismiss should therefore be denied. See *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

_____The elements of unlawful possession of a blue light are: (1) possession of an operable blue light designed for use on an emergency vehicle; and (2) for use other than by a law enforcement officer in the performance of his official duties. See N.C. Gen. Stat. § 20-130.1(c) (2001). "Possession of any item may be actual or constructive." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). In order to have actual possession, a person must have physical or personal custody of the item. See *id.*

Constructive possession occurs when the item is not in an individual's physical custody, "but he nonetheless has the power and intent to control its disposition." *Id.*

_____In the instant case, although no witness actually observed the blue light in defendant's possession, substantial evidence was presented from which a rational jury could infer that defendant possessed a blue light. The State's evidence tended to show the following facts: (1) on 1 December 1998, defendant telephoned Gall's Inc., and with his credit card, purchased a blue halogen dash light for \$62.98, to be delivered to defendant's address; (2)

UPS records revealed that the blue light was shipped to defendant's address on the same date the blue light was purchased; and (3) bank records revealed that defendant charged \$62.98 to his credit card for a blue light. Defendant never challenged the charges from Gall's Inc., and further, never returned the blue light. Viewing the evidence in the light most favorable to the State, we hold there was substantial evidence that defendant possessed a blue light. Therefore, defendant's motion to dismiss was properly denied. This assignment of error is overruled.

Defendant also argues that the short-form murder indictment violated his constitutional rights, in that it failed to allege premeditation and deliberation, or that the murder was committed in the course of another felony. This argument is without merit.

Our Supreme Court has recently re-affirmed the constitutionality of the short-form indictment, holding that the short-form indictment alleges all necessary elements of first-degree murder and is sufficient to indict on any theory of murder. See *State v. Holman*, 353 N.C. 174, 180, 540 S.E.2d 18, 22-23 (2000) (holding that the short-form indictment does not impinge upon defendant's Sixth Amendment right to notice or his rights under Article I, Section 19 of the North Carolina Constitution), *cert. denied*, ___ U.S. ___, 151 L. Ed. 2d 181 (2001); *State v. Braxton*, 352 N.C. 158, 175, 531 S.E.2d 428, 438 (2000) (holding that "premeditation and deliberation need not be separately alleged in the short-form indictment"), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). We therefore reject defendant's argument.

Based on the foregoing analysis, we hold that defendant's trial was free from prejudicial error.

No error.

Judges MARTIN and CAMPBELL concur.

_____ Report per Rule 30(e).