NO. COA09-713

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

STATE OF NORTH CAROLINA

v. Catawba County
No. 05 CRS 56577

ROBERT LANE WINDSOR

Appeal by Defendant from judgment entered 24 March 2008 and order dated 18 June 2009 by Judge James W. Morgan in Superior Court, Catawba County. Heard in the Court of Appeals 9 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant-Appellant.

McGEE, Judge.

Robert Lane Windsor (Defendant) was indicted for murder on 19 September 2005. Following a jury trial, Defendant was convicted of first-degree murder. In a judgment entered 24 March 2008, Defendant was sentenced to life in prison without parole. Defendant filed a motion for appropriate relief on 3 April 2008, which the trial court denied in an order dated 18 June 2009. Defendant appeals from both the judgment and the order.

The evidence at trial tended to show that Defendant and Stepheny White (White) had lived together for several years. They experienced relationship problems due, in part, to Defendant's use

of drugs. In 2005, Defendant was arrested for possession of a stolen vehicle and served seventeen days in jail. He was released on 15 August 2005. White began dating Dean Frasure (Frasure), her minister's son, while Defendant was in jail. White and Frasure saw each other almost every day from their first date until 17 August 2005. White attempted to end her relationship with Defendant. White told her minister that Defendant "wouldn't accept the fact that she wanted [their relationship] to be over" and that Defendant continued to call her from jail.

After Defendant was released from jail, he went to his parents' house. Defendant's mother took him to White's trailer on 16 August 2005, and Defendant collected some of his personal items and spoke with White. Defendant testified at trial that he explained to White why he had been in jail and that, after their discussion, he felt their relationship was improving.

Defendant was at his parent's house on 17 August 2005, and asked around the neighborhood for a ride to White's trailer. A neighbor's relative gave Defendant a ride and dropped him off near the trailer park where White lived (the trailer park), around 7:00 p.m. on 17 August. Defendant testified that he spent the night with White in her trailer. However, Frasure testified that he had been with White until approximately midnight and did not see Defendant. Frasure also testified that White had not been concerned about Defendant.

Sharon Forester (Forester), White's neighbor, testified she saw White arrive at her trailer at around 4:00 p.m. on 18 August

2005, which was the usual time White came home from work. Forester said that White normally went into her trailer and then came back out to feed her cat, but she did not do so on 18 August 2005. Instead, Forester heard "thumping noises" coming from inside White's trailer. Forester later saw Defendant leave White's trailer and get into White's vehicle. Forester watched Defendant as he moved White's car around to the back of the trailer. Defendant later drove White's car away from the trailer and Forester called the police.

Wilbert Abram (Abram) testified he was visiting his aunt, who was also White's neighbor, on 18 August, when he observed Defendant parking White's car, with the trunk open, behind White's trailer. Abram watched as Defendant went into White's trailer and came back out dragging a body. Defendant placed the body in the trunk of White's car. Defendant made one more trip into the trailer, and then drove away in White's car.

Police arrived at the trailer park, talked with Forester, and briefly investigated White's trailer. They found no signs of forced entry or struggle. White's trailer was again searched on 19 and 20 August 2005.

Charles Hall (Hall) testified that Defendant came to the house of a mutual acquaintance around 5:00 p.m. on 18 August 2005. Hall did not know Defendant prior to that date, but Hall and Defendant spent the next several days together using drugs, along with Hall's sister, Christina. Defendant used White's bank card to get money to fund their drug use until White's bank cancelled the card.

While they were driving on Interstate 77 near Charlotte, the car ran out of gas. Hall jumped out of the car and ran. Defendant was arrested on the campus of UNC Charlotte on 29 August 2005. Police discovered White's car abandoned on the side of Interstate 77, with White's body still in the trunk with a black garbage bag taped around White's head and neck.

Defendant testified that, after being dropped off near the trailer park around 7:00 p.m. on 17 August 2005, Defendant walked to White's trailer. Defendant found White at the trailer and they were glad to see each other. White told Defendant that she had a date with Frasure that evening. She asked Defendant to find something to do for a couple of hours because she did not want a confrontation between Defendant and Frasure. Defendant left White's trailer and returned around 10:00 p.m. He did not see Frasure that evening. When Defendant returned to White's trailer, she gave him a gift card and Defendant and White spent the night together in White's trailer.

Defendant testified that the next morning, White asked Defendant to fix a clothes dryer for her and gave him her bank card to pay for the repair parts. White then went to work. Defendant testified that he already knew the PIN for White's bank card. When White returned from work, the two argued about the dryer and other issues. White "blew up" and began hitting Defendant. Defendant testified that he put his arms around White in order to calm her. White began gasping and struggling to breathe. Defendant laid White on the floor and she stopped breathing.

Defendant placed White on a couch. White's eyes were open, and Defendant testified that he put a garbage bag over her head because "she kept looking at [him]." When Defendant lifted White, the bag came off, so he taped it on. Defendant carried White to her car, put her in the trunk, and drove away from the trailer park. Defendant went on a drug binge "to take the pain away," using White's bank card to get money from White's account.

Defendant was convicted of first-degree murder and sentenced to life imprisonment. Defendant appeals. Further facts will be discussed as needed.

I. *Motion to Dismiss*

Defendant first argues that the trial court erred by not granting his motion to dismiss for insufficiency of the evidence. Defendant makes three arguments with respect to his motion to dismiss: (1) the State's expert testimony concerning the cause of White's death was "in conflict with indisputable physical facts" and "inherently incredible" and therefore insufficient to submit to the jury; (2) there was insufficient evidence that Defendant killed White after premeditation and deliberation; and (3) there was insufficient evidence that Defendant killed White after lying in wait.

When ruling on a defendant's motion to dismiss, "the trial court must determine '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. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citation omitted).

> The reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. Evidentiary "[c]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal." Finally, sufficiency review "is the same whether the evidence is circumstantial or direct, or both."

Id. at 412-13, 597 S.E.2d at 746 (internal citations omitted). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted). The trial court is to determine whether reasonable inferences of a defendant's guilt can be drawn from the circumstances, and if so, to submit the question to the jury for final determination. *Id.*

At trial, the State tendered Dr. Thomas Owens (Dr. Owens), a forensic pathologist and medical examiner at the Mecklenburg County Medical Examiner's Office, as an expert witness. Dr. Owens performed an autopsy on White and it was his opinion that the cause of White's death was asphyxiation by the plastic bag taped around her head. Defendant presented the testimony of two expert witnesses who questioned Dr. Owens' conclusions: Dr. Page Hudson (Dr. Hudson), retired Chief Medical Examiner for the State of North Carolina, and Dr. Donald Jason (Dr. Jason), a pathologist and associate professor at Wake Forest School of Medicine. Drs. Hudson and Jason disapproved of Dr. Owens' autopsy methodology and conclusions. Dr. Jason testified that "[White's death] couldn't have happened that way." Likewise, Dr. Hudson agreed that

asphyxiation as a cause of death was "enormously unlikely."

Defendant did not contend at trial that Dr. Owens was unqualified to testify as an expert as to the cause of White's death. Defendant now contends that there was insufficient evidence to show that Defendant caused White's death. Defendant argues that the autopsy was incomplete and was performed by a pathologist who was not board-certified. Defendant further argues that Dr. Owens' testimony that White was "most likely" suffocated with a plastic bag was "too unreliable" to support a finding that Defendant caused White's death.

However, in ruling on a motion to dismiss, the trial court is to consider the evidence in the light most favorable to the State, recognizing that inconsistencies and issues of credibility are better left for the jury's consideration and determination. *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746. Defendant argues that "this rule does not apply when the only evidence justifying sending the case to the jury is inherently incredible and in conflict with physical conditions established by the [S]tate's own evidence." Defendant quotes *Jones v. Schaffer*, 252 N.C. 368, 378, 114 S.E.2d 105, 112 (1960), contending that "evidence that is impossible or 'in conflict with indisputable physical facts or laws of nature' is insufficient to go to the jury."

Defendant also relies on *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967). In *Miller*, our Supreme Court reversed the defendant's conviction where the only identification of the defendant was made by a stranger at night, from a distance of 286

feet. *Id.* at 732, 154 S.E.2d at 905. The Supreme Court concluded that "[w]here there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness' identification of the defendant is for the jury, . . . but upon the physical conditions shown here by the State's evidence, the motion [for nonsuit] should have been allowed." *Id.*, 154 S.E.2d at 906.

In the case before us, we do not find any evidence which is "in conflict with indisputable physical facts or laws of nature." *Jones*, 252 N.C. at 378, 114 S.E.2d at 112. Rather, in the light most favorable to the State, Dr. Owens' testimony reflects the following: Dr. Owens detected no evidence of heart attack, heart disease, pulmonary disease, nor any disease of any other internal organs or immunological system. Dr. Owens opined that a plastic bag taped over a person's head would cause asphysixiation and death. He further opined that White died of asphyxiation. However unlikely it may seem that an adult woman could be asphyxiated by an adult man's taping a plastic bag over her head, we do not view it as a physical impossibility. Dr. Hudson testified that, though it was "enormously unlikely[,]" he found Dr. Owens' opinion as to the cause of death "possible, just a little outside of experience that I and others have had." We, therefore, do not agree with Defendant that the evidence as to White's cause of death was insufficient to submit to the jury.

Defendant's remaining arguments concerning the strength and credibility of Dr. Owens' methodology and testimony were addressed

by Defendant's own experts at trial and were questions for the jury to consider and determine. *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746.

A. Premeditation and Deliberation

Defendant was charged with the murder of White under two theories: (1) premeditated and deliberate intent to kill; and (2) lying in wait. A conviction of first-degree murder based on a theory of premeditation and deliberation requires a showing that a defendant killed another person with malice "in execution of an actual, specific intent to kill, formed after premeditation and deliberation." *State v. Propst*, 274 N.C. 62, 70, 161 S.E.2d 560, 566 (1968)(emphasis omitted).

> Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

State v. Conner, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994) (internal citations omitted).

Premeditation and deliberation must often be shown by circumstantial evidence. *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992). Circumstances that a jury should consider include:

> (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant

> before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

Id.

Viewing the evidence in the light most favorable to the State, and cognizant that evidentiary contradictions are for the jury to resolve, we find the following facts particularly relevant in the case before us. *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746. Defendant and White had been in a long-term relationship; White began dating Frasure while Defendant was in jail; White told Defendant that she wanted to end their relationship, but Defendant did not agree; the day of White's death, Defendant waited in White's trailer until White returned home from work; Defendant and White argued about their relationship and the argument turned into a physical confrontation; White was killed by asphyxiation when a plastic bag was taped over her head; Defendant was seen carrying White's body out of her trailer with a plastic bag taped over her head; Defendant placed White's body in the trunk of White's car; Defendant drove White's car for a week while he was on a drug binge; and Defendant used White's bank card to buy drugs.

We find sufficient evidence, both direct and circumstantial, that Defendant killed White with premeditation and deliberation. We therefore find no error in the trial court's denial of Defendant's motion to dismiss.

B. Lying in wait

Defendant next argues that there was insufficient evidence presented to support a murder conviction based on the theory of "lying in wait." However, first-degree murder based on lying in wait was not a separate charge in this case, but rather was a second possible theory of guilt. To the extent that an instruction on lying in wait was unsupported by the evidence, we note that the verdict sheet in the case before us is clear that the jury found Defendant guilty of first-degree murder on *both* a theory of premeditation and deliberation and a theory of lying in wait. *Compare State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (holding that, if a trial court errs and submits alternative theories, one of which is not supported by the evidence "and, as here, it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial."). Because the jury's determination that Defendant killed White after premeditation and deliberation alone is sufficient to support a conviction for first-degree murder, we need not address Defendant's arguments concerning lying in wait.

II. Exclusion of Testimony

Defendant next argues that the trial court erred by excluding certain relevant and admissible expert testimony that would have "debunk[ed] the prosecution's expert." Defendant contends that the trial court's error "abridg[ed] Defendant's right to present a defense." Though the trial court did not state its basis for excluding the testimony at issue, the State counters that it was

"clearly cumulative[.]"

Defendant argues that this is a constitutional violation which we must review *de novo*. The State contends that this is a determination of admissibility, and that we review this issue for an abuse of discretion. In reviewing Defendant's brief, it is clear that he characterizes the evidence for which admission was sought as an "opinion as to the medical soundness and validity of [Dr.] Owens' conclusions." The State contends that there had already been ample testimony regarding the validity of Dr. Owens' determination. We agree with the State's characterization of this issue, and review it for an abuse of discretion.

N.C. Gen. Stat. § 8C-1, Rule 403 provides in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2009). "[I]t is . . . well established that the refusal to permit questions which would invoke merely repetitious or cumulative evidence is not error." *State v. Lindsey*, 25 N.C. App. 343, 348, 213 S.E.2d 434, 438 (1975). A determination of whether to exclude evidence under Rule 403 "based on [the evidence's] cumulative nature . . . is left to the sound discretion of the trial court" and is reviewed for an abuse of discretion. *State v. Barnes*, 345 N.C. 184, 213, 481 S.E.2d 44, 60 (1997). A ruling pursuant to Rule 403 "will only be disturbed 'where the 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. Jacobs, 363 N.C. 815, 823, 689 S.E.2d 859, 864 (2010) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

During the examination of Dr. Hudson, Defendant asked the following questions:

> Q. . . . . And from the standpoint of forensic pathology, your experience, is the conclusion in your opinion reached by Dr. Owens as to the cause of death medically sound?
>
> . . .
>
> Q. In your opinion is the conclusion reached by Dr. Owens supported by available data that was - -

Each question was objected to by the State, and the trial court sustained the objections. Defendant made an offer of proof, in which he showed that, had Dr. Hudson been allowed to answer Defendant's question concerning Dr. Hudson's opinion of Dr. Owens' conclusion, Dr. Hudson would have testified that his "opinion is that it's not nearly as sound as it should be. I'm not saying that it's completely absurd and invalid. I'm just saying that I think it's based on incomplete data and is inaccurate." Had Dr. Hudson been allowed to answer the question of whether the conclusion reached by Dr. Owens was supported by the available data, Dr. Hudson would have testified that Dr. Owens' conclusion was "not supported by available data."

Dr. Hudson was allowed, however, to testify that he thought Dr. Owens' conclusion about the cause of death was "enormously unlikely," and, as discussed above, Dr. Hudson expressed his concern over Dr. Owens' methodology. Further, Defendant elicited

the following testimony from Dr. Hudson regarding a letter Dr. Hudson had written after reviewing Dr. Owens' autopsy report:

> Q. . . . Now, if you'll go ahead and read the next couple sentences, and then I want to ask you something about it.
>
> A. There's obviously a story out there somewhere, but I haven't heard it. The autopsy gives no good clue to cause or even manner of death.
>
> Q. Okay. Let me stop you right there, Dr. Hudson. When you said "the autopsy gives no good clue to cause or even manner of death," let me ask you what you meant by your statement that the autopsy gives no good clue to the cause of death.
>
> A. By cause we - - that's the term you use referring to the - - I'll call it the agency of death, the gunshot wound, the arsenic poisoning, the pneumonia, the whatever it is, the person had in a given case, the item that we put down that we call the cause of death.
>
> . . .
>
> A. [Reading from letter] I was bothered in reading the autopsy report by the short shrift given the head, face exam, and other matters also addressed by Dr. Jason.

Dr. Hudson also testified: "Were I the medical examiner of record on this case, I would have certified the case as cause undetermined. Were I still Chief Medical Examiner, I would have overruled any other determination based on what I've seen so far." In light of the extensive and frank discussions of Dr. Owens' autopsy by Drs. Hudson, Jason and Owens, including the admitted statements recited above, we find that the trial court's determination that the evidence was cumulative was not "manifestly

unsupported by reason[.]" *Jacobs*, 363 N.C. at 823, 689 S.E.2d at 864. We, therefore, find no abuse of discretion in the trial court's sustaining the State's objections to the two questions asked of Dr. Hudson. This argument is without merit.

III. *Closing Arguments*

Defendant next argues that the State made "grossly improper closing arguments [that] denied Defendant a fair trial." Defendant did not object at trial to the remarks made by the State, but now contends that the trial court erred by failing to act *ex mero motu* to intervene and either prevent further remarks or instruct the jury to disregard the comments. The comments to which Defendant directs our attention may be grouped into three categories, which we address in turn.

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citations omitted).

Defendant first points to the following statements made by the prosecutor in closing argument:

> And Dr. Jason - Dr. Jason, I suggest to you, can prove that some doctors will say anything for $2,250.
>
> . . .
>
> Dr. Hudson told you this when asked about the cause of death. He said, I suppose it's possible. I can't say it's impossible, but it's enormously unlikely. Okay, Dr. Hudson, I'll give that to you. . . . But Dr. Jason told you this: Natural causes of death, oh, I put them on the lower end of the scale. I couldn't rule that out. Traumatic causes of death, yeah, that would be higher up on the scale. But I can absolutely, positively rule out that the bag on the head was the cause of death. That's what $2,250 will get you, plain and simple. I can absolutely, positively rule out that the . . . bag on the head was the cause of death.

Defendant contends that these statements exceeded "vigor in unearthing bias" and amounted to personal insult. Defendant relies on our Supreme Court's opinion in *State v. Rogers*, 355 N.C. 420, 562 S.E.2d 859 (2002), arguing that counsel must "refrain from arguing that a witness is lying solely on the basis that the witness has been or will be compensated for his or her services." *Id.* at 464, 562 S.E.2d at 886. We note, however, that the Supreme Court in *Rogers* clarified that

> it is proper for a party to point out potential bias resulting from payment that a witness received or would receive for his or her services. . . . . However, where an advocate has gone beyond merely pointing out that the witness' compensation may be a source of bias to insinuate that the witness would perjure himself or herself for pay, we have expressed our unease while showing deference to the trial court. For instance, we held that an argument made during the guilt-innocence phase of a capital case where the prosecutor stated in reference to the defendant's expert witness, "'It is a sad

> state of our legal system[ ] that when you need someone to say something, you can find them. You can pay them enough and they'll say it,'" *State v. Murillo*, 349 N.C. 573, 604, 509 S.E.2d 752, 770 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999), was not so grossly improper as to require the trial court to intervene *ex mero motu*, *id.* at 606, 509 S.E.2d at 771. Similarly, where a prosecutor argued during a capital sentencing proceeding that the defendant's psychiatric expert was "'[a] guy who's making fifteen hundred dollars a day is absolutely going to tell you every time you show him a crime like this that it's the result of mental illness. His way of life depends on that. . . . Nobody's paying someone fifteen hundred dollars a day to [say defendant is sane],'" *State v. May*, 354 N.C. 172, 180, 552 S.E.2d 151, 156 (2001), we again held that the trial court did not err in failing to intervene *ex mero motu*, *id.* at 181, 552 S.E.2d at 157.

Id. at 462-63, 562 S.E.2d at 885.

In *Rogers*, the State belittled an expert witness and insinuated that the witness was lying because he was being paid to express his opinion. *Id.* at 460, 562 S.E.2d at 883. The State made, *inter alia*, the following statement in *Rogers* regarding the expert's testimony: "And saying it doesn't make it so cause you can pay somebody to say anything." *Id.* at 461, 562 S.E.2d at 884 (emphasis omitted). Our Supreme Court held that "while the prosecutor's argument that the expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay was improper, it was not so grossly improper as to require the trial court to intervene *ex mero motu*." *Id.* at 464, 562 S.E.2d at 886.

Comparing the statements made in the case before us to those discussed in *Rogers*, we find striking similarities. In the case

before us, the State argued that Dr. Jason's statement of certainty regarding the cause of White's death was not credible and that the jury should not believe it because "that's what $2,250 will get you." *Compare State v. May*, 354 N.C. 172, 180, 552 S.E.2d 151, 156 (2001) (where State argued "'[a] guy who's making fifteen hundred dollars a day is absolutely going to tell you every time you show him a crime like this that it's the result of mental illness. His way of life depends on that. . . . Nobody's paying someone fifteen hundred dollars a day to [say defendant is sane]'"); *and State v. Murillo*, 349 N.C. 573, 604, 509 S.E.2d 752, 770 (1998) (where the State argued "'[i]t is a sad state of our legal system[ ] that when you need someone to say something, you can find them. You can pay them enough and they'll say it'"). As in *Rogers*, we hold that where the State "has gone beyond merely pointing out that the witness' compensation may be a source of bias to insinuate that the witness would perjure himself or herself for pay," we must "express[] our unease while showing deference to the trial court." *Rogers*, 355 N.C. at 463, 562 S.E.2d at 885. Therefore, assuming *arguendo* that the State's comments were improper, we find them not "so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

Defendant next contends that the trial court erred in allowing the State to engage in personal attacks against Defendant during the course of the trial. Defendant cites numerous instances of this conduct, but they may be summarized as follows: the State

referred to Defendant as "that murderer" on a number of occasions; the State also argued that Defendant's version of the events was "deception, . . . blame, . . . denial, and . . . minimization[;]" likewise, the State told the jury "if you believe him, [Defendant is] a Boy Scout."

Defendant cites a series of cases regarding improper commentary during closing arguments by the State. *State v. Matthews*, 358 N.C. 102, 112, 591 S.E.2d 535, 542 (2004) (holding that it was inappropriate for the State to comment that the defendant's version of events was "bull crap" because the conduct "exceeded proper boundaries of civility and [included] improper name calling"); *State v. Smith*, 279 N.C. 163, 165, 181 S.E.2d 458, 459 (1971) (holding that the prosecutor's calling the defendant "lower than the bone belly of a cur dog" was improper and required a new trial); *State v. Miller*, 271 N.C. 646, 660, 157 S.E.2d 335, 346 (1967) (holding that it was improper to call the defendants "habitual storebreakers" and opine they were lying); and *State v. Davis*, 45 N.C. App. 113, 114-15, 262 S.E.2d 329, 329-30 (1980) (holding that the State's calling a defendant a "mean S.O.B." warranted a new trial).

We find that the State's comments in the case before us do not approach the same level of name calling, sarcasm, or ill-mannered behavior demonstrated in the above-cited cases. At worst, the State called Defendant a murderer and said that his version of events was a "deception[;]" however, such statements are implicit in the very process of trying a defendant for murder and attempting

to disprove any defenses offered. Further, to the extent that the State made disparaging remarks about Defendant's version of events painting him as a "boy scout," we find that such commentary was not "so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

Defendant next focuses on the State's request that the jury "[s]peak for Stepheny Jo White. [And] [f]ind that murderer sitting over there guilty as charged." Defendant contends that it is improper for the State to ask the jury to place themselves in the shoes of the victim. Defendant asserts that "[w]hat [White] experienced was not relevant to the jury's determination of whether [D]efendant was guilty of murder."

Defendant relies on *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), where the Supreme Court summarized the relevant portions of the State's closing argument as follows:

> On several occasions, the prosecutor asked the jurors to imagine that the victim was their child. Specifically, the prosecutor asked the jurors the following questions: "How many of you would want your child to be drug across a wooded field, a wooded area, to have the skin scraped off her young back like that after these defendants had raped her and abused her body." "The photographs that you've seen during the course of this trial, the photographs showing Sabrina bleeding from her nose, from her mouth, how many of you would like to have to see your child looking like that?" "How many of you would want your child to end up in a morgue looking like that and have to have her body split open to determine how she died?"

McCollum, 334 N.C. at 224, 433 S.E.2d at 152. Because "the

prosecutor repeatedly asked the jury to imagine the victim as their own child[,] [the Court] assume[d] *arguendo* that these arguments were improper. At issue in [*McCollum*], therefore, [was] whether these portions of the prosecutor's closing argument denied the defendant due process." *Id.* The Supreme Court held that the prosecutor's remarks did not deprive the defendant of due process based on the following analysis:

> The prosecutor's arguments here did not manipulate or misstate the evidence, nor did they implicate other specific rights of the accused such as the right to counsel or the right to remain silent. The trial court instructed the jurors that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. Moreover, the weight of the evidence against the defendant with respect to the two aggravating circumstances submitted to the jury was heavy; the defendant's own statement to police officers established that the murder was committed for the purpose of avoiding lawful arrest and that the murder was especially heinous, atrocious or cruel. All of these factors reduced the likelihood that the jury's decision was influenced by these portions of the prosecutor's closing argument. Therefore, the prosecutor's closing argument did not deny the defendant due process.

Id. at 224-25, 433 S.E.2d at 152-53.

In the case before us, the State asked the jury to "speak for [White]" and to find Defendant guilty. The State did not ask the jury to imagine themselves in White's circumstances. Therefore, *McCollum* is not directly applicable to the case before us. Reviewing the comments made by the State, even assuming there was error, we again find that the comments were not "so grossly improper that the trial court committed reversible error by failing

to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107; *see also State v. Cunningham*, 172 N.C. App. 172, 616 S.E.2d 29, 2005 WL 1804343(2005) (unpublished opinion).

IV. *Irrelevant Prejudicial Evidence*

Defendant next argues that the trial court erred by allowing the State to introduce irrelevant evidence concerning Defendant's possession and purchase of pornographic and drug-related magazines. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2009). We review a trial court's ruling on the relevance of evidence *de novo*; however, we give such rulings by the trial court "great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). The State contends that evidence of Defendant's purchase of the pornographic materials, along with evidence of other materials purchased by Defendant while using White's bank card, was relevant to proving the State's theory that Defendant committed the murder for pecuniary gain.

The trial court allowed the testimony of Hall's sister, Christina, over Defendant's objection. Christina was present for at least some of the "drug binge" that Hall and Defendant participated in after White's death. Christina testified that, on 18 August 2005, while Defendant was doing drugs with her brother, she accompanied Defendant to a convenience store where Defendant purchased a pornographic magazine. Christina described the

magazine, over Defendant's objection, as having the following phrases on the cover: "Ten Ways to Kill Someone" and "How to Cut Somebody While Having Sex With Them[.]" The magazine was not admitted into evidence. Further, the State was allowed to introduce into evidence a photograph of the interior of White's car, taken after the car was recovered. In the photograph, pornographic magazines titled "Cheri" and "High Society" were visible. These magazines were admitted into evidence.[1]

Defendant argues that, as determined in *State v. Smith*, 152 N.C. App. 514, 568 S.E.2d 289 (2002), "[a]s a general rule, evidence of a defendant's prior conduct, such as the possession of pornographic videos and magazines, is not admissible to prove the character of the defendant in order to show that the defendant acted in conformity therewith on a particular occasion." *Id.* at 521, 568 S.E.2d at 294. In *Smith*, our Court held that evidence concerning the defendant's "possession of pornographic materials, without any evidence that defendant had viewed the pornographic materials with the victim, or any evidence . . . other than the victim's mere speculation" was irrelevant to a prosecution for sexual offenses involving a minor. *Id.* at 523, 568 S.E.2d at 295. Our Court concluded that, though the evidence was irrelevant, there was no prejudicial error in light of the overwhelming evidence of the defendant's guilt. *Id.* at 524, 568 S.E.2d at 295.

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[1]Defendant's appellate brief characterizes State's Exhibit 78 as "High Times," a drug-related magazine. However, review of the trial transcript reveals that the magazine offered as State's Exhibit 78 was titled "High Society," a pornographic magazine.

Giving the trial court's determination of relevance deference, we find that testimony concerning Defendant's possession of the magazines was relevant to proving what Defendant did with the money he took from White's bank account. Such evidence, and testimony corroborating such evidence, was relevant to the State's theory that Defendant committed the crime for pecuniary gain. Unlike *Smith*, the present case is not a situation where the mere possession of pornography was being offered to show Defendant's tendency to commit a sex act. Rather, Christina's testimony was offered to show what Defendant did with the money he gained access to after White's death, and to corroborate earlier testimony concerning Defendant's activities.

Defendant also argues that the evidence regarding the pornography was highly prejudicial. However, Defendant cites no authority for this contention. This argument is therefore overruled. N.C.R. App. P. (28)(b)(6).

V. *Motion for Appropriate Relief*

Defendant filed a motion for appropriate relief on 3 April 2008, alleging juror tampering, which the trial court denied in an order dated 18 June 2009. On 24 March 2008, the day Defendant was convicted, Defendant learned of allegations concerning an inmate named Bucky Bolden (Bolden). Bolden previously had contact with Defendant in jail and had allegedly attempted to influence the verdict in Defendant's case. Bolden was an acquaintance of Vincent Kienle (Kienle), a juror in Defendant's case. Defendant alleged that Bolden contacted Kienle on numerous occasions in an attempt to

influence the jury to find Defendant guilty and thereafter to impose a harsh sentence on Defendant.

In its order denying Defendant's motion for appropriate relief, the trial court made unchallenged findings of fact, summarized as follows: jury selection in Defendant's trial began on 31 December 2007; Bolden had been arrested on a charge of murder and placed in custody at the Catawba County Detention Center on 11 January 2008; Bolden was housed near Defendant in the Detention Center; Defendant's trial began on 18 February 2008; Bolden spoke with his family over the telephone on 22 February 2008 and learned that Kienle was a juror in Defendant's case; Bolden knew Kienle; and Bolden obtained Kienle's contact information.

Bolden expressed a desire to talk to Kienle. Later that day, Bolden and one of his family members engaged in a three-way telephone call with Kienle. Bolden told Kienle that he wanted to send Kienle a letter and that Kienle should "be cool" if he responded to the letter. Bolden testified that he wrote a letter to Kienle using a code, in which he urged Kienle to "take care of [Defendant]." Bolden testified that he did not like Defendant, but that he did not state that in the letter, because the letter was in code. Bolden testified that he mailed the letter to Kienle, but could not remember if he placed a return address on the letter.

The jury deliberations for the guilt/innocence phase of Defendant's trial began on 11 March 2008. The jury returned a unanimous verdict on 12 March 2008, finding Defendant guilty of first-degree murder. The sentencing phase of Defendant's trial

began thereafter.

Bolden and Defendant "almost got in a fight" on or about 22 March 2008 because Defendant had learned of Bolden's activity. On 23 March 2008, Bolden made three phone calls to Kienle, none of which were answered. Bolden left two voice mail messages with Kienle, one of which contained an instruction to "get [Defendant] put to death or something." Kienle did not testify at the hearing, but he told a private investigator that he had not received any of the messages. The next morning, 24 March 2008, the jury returned a recommendation as to Defendant's punishment. The jury found the existence of neither aggravating nor mitigating factors. On the recommendation form, the jury was instructed to recommend either "death," or "life imprisonment." The jury made the following recommendation: "We, the jury, unanimously recommend that the defendant, Robert Lane Windsor, be sentenced to Life Imprisonment." This recommendation was signed and dated 24 March 2008 and filed that same day.

The party seeking appropriate relief "has the burden of proving by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5)(2009). The moving party must also show that the actions of the trial court in some way prejudiced the outcome of the trial. N.C.G.S. § 15A-1420(c)(6). On appeal, Defendant contends the trial court erred in denying his motion for appropriate relief because "the findings of fact were incomplete and not supported by the evidence." We apply the following standard of review when considering a trial court's

ruling on a motion for appropriate relief: "'When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal.'" *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)).

Defendant challenges the following pertinent findings of fact made by the trial court in its order denying Defendant's motion for appropriate relief:

> 15. There was no evidence that Kienle received the letter [from Bolden], or read the letter or understood what, if any, code was being used by Bolden.
>
> . . .
>
> 25. There was no evidence that Kienle received any of these [voice mail] messages [from Bolden].
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> . . .
>
> 27. There is only mere speculation that Kienle received any outside influence from Bolden or anyone else which would affect his ability to fairly and impartially consider the evidence put before the jury and render a fair verdict for [D]efendant.

Because the voice mail messages Bolden left for Kienle occurred during the evening prior to the jury returning its recommendation for sentencing, and because the jury recommended the shortest of the possible sentences presented to it, we find that Defendant cannot show that the outcome of the sentencing phase was

prejudiced by the voice mail messages. Because these messages were left after Defendant was found guilty of murder, they are irrelevant to a determination of whether his trial was prejudiced during the guilt/innocence phase. We therefore address the letter Bolden allegedly sent to Kienle prior to the jury's verdict.

Defendant first contends that finding of fact number fifteen is in error, because there is a presumption that "mail that is properly sent is presumed to have been delivered and received by the addressee." The State properly points out that the cases on which Defendant relies for this assertion provide a more nuanced statement of the law. *See Santana Gonzalez v. Attorney General of the U.S.*, 506 F.3d 274, 279 (3d Cir. 2007) (holding "that [a] strict evidentiary standard--a strong presumption--applies only when a notice from an Immigration Court or the INS (or Department of Homeland Security) is sent by *certified* mail, and that a weaker presumption of receipt applies when such a notice is sent by *regular* mail"); *Mulder v. C.I.R.*, 855 F.2d 208, 212 (5th Cir. 1988) (noting that, "[w]hile it is presumed that a properly-addressed piece of mail placed in the care of the Postal Service has been delivered, no such presumption of delivery exists for certified mail when the requested return receipt is not received by the sender"); and *Federal Deposit Ins. Corp. v. Schaffer*, 731 F.2d 1134, 1137 (4th Cir. W. Va. 1984) (holding that defendants must be presumed to have received service of "summons and complaint by certified mail to each defendant, properly addressed to his place of residence").

Each of these cases, however, dealt with a factual situation significantly different from the case before us. Assuming the presumption applies where the letter is being sent by regular, and not certified, mail from a detention center and not from the office of a government agency, we find that it would be the "weaker presumption" contemplated in *Santana Gonzalez*. The unchallenged findings of fact made in the trial court's order on Defendant's motion for appropriate relief are informative:

> 12. Bolden testified that he wrote a letter to Kienle shortly after his telephone conversation with him. Bolden testified that he did not like [D]efendant and that he wanted to tell Kienle about him. He testified that he did not write in the letter that he did not like [D]efendant but that Kienle would know the "code" he was using and would understand that Bolden thought [D]efendant was a jerk and that Bolden wanted Kienle to "take care of him[.]"
>
> 13. Bolden testified that he addressed and stamped the letter to Kienle and placed it in the box for outgoing mail. He did not recall if he placed a return address on the envelope. The letter was not returned to Bolden.
>
> 14. The policy of the Detention Center is to not mail letters that have been placed in the outgoing box without a return address. Such letters are not returned to the inmate unless the identity of the sender can be determined.

Taken together, the trial court's unchallenged findings of fact suggest that there was uncertainty as to whether Bolden properly addressed the envelope in that there may not have been a return address included. Had the Detention Center been unable to identify Bolden as the sender of the letter, the letter would not

have been returned to him. Assuming, without determining, that the "weaker presumption" discussed above is applicable to a mailing of this type, we are not persuaded of its application to these facts because it is questionable as to whether Bolden properly addressed the envelope.

Further, the presumption of delivery would not affect that portion of finding of fact fifteen that "[t]here was no evidence that Kienle . . . read the letter or understood what, if any, code was being used by Bolden." In light of the evidence before it and its remaining unchallenged findings of fact, we find that the trial court's findings of fact are supported by competent evidence. We find no manifest abuse of discretion in the trial court's findings and therefore do not disturb them. *See Lutz*, 177 N.C. App. at 142, 628 S.E.2d at 35.

Defendant also argues that the trial court's conclusions of law were improper. Defendant relies on *State v. Neal*, ___ N.C. App. ___, 674 S.E.2d 713 (2009), and argues that Bolden's conduct so tainted the trial that Defendant must be awarded a new trial. In *Neal*, the foreperson of the jury was also the magistrate on the returns of service for the defendant's arrests leading to trial. *Neal*, ___ N.C. App. at ___, 674 S.E.2d at 717. The defendant argued on appeal, and in his motion for appropriate relief, that the magistrate's presence on the jury deprived him of his right to an impartial trial. *Id.* Our Court held that the defendant need not prove that the magistrate was, in fact, influenced by his prior knowledge of the defendant. *Id.* at ___, 674 S.E.2d at 719.

Rather, we held that the risk of unfairness was too great because: "The requirement of neutrality and the appearance of impartiality are cornerstones upon which our system of justice rests. The perception of impermissible bias in a juror shakes the foundation of a defendant's constitutional right to an impartial jury." *Id.*

Defendant contends that, in light of *Neal*, "[i]f Kienle received Bolden's letter, [D]efendant is entitled to a new trial." Defendant argues that "the crucial question for the trial court was whether Bolden communicated with Kienle, not how it affected Kienle." We agree with Defendant's interpretation of *Neal*, but find the facts of the present case significantly distinguishable from those in *Neal*.

In *Neal*, there was uncontroverted proof that the juror had been the magistrate in the defendant's case. In the case before us, in contrast, there was no proof that Kienle had actually received the letter in question. Further, there was no evidence that Kienle understood the code used by Bolden in writing the letter. While there was proof that Kienle was contacted by phone, those calls arose after Defendant's conviction and prior to his sentencing. Because Defendant received the lightest sentence available to him, there could be no showing of prejudice at the sentencing phase.

The trial court's findings of fact include that there is no proof that Kienle received a letter from Bolden. Even if a letter was received, there was no proof that Kienle understood the code in which the letter was written. On its face, the letter would not

have urged unfavorable treatment to Defendant. Based on the trial court's findings of fact, we hold that Defendant failed to prove "by a preponderance of the evidence every fact essential to support the motion." N.C.G.S. § 15A-1420(c)(5). Defendant also failed to show prejudice. Therefore, the trial court's denial of Defendant's motion for appropriate relief was proper.

Affirmed in part; no prejudicial error in part.

Judges GEER and ERVIN concur.

Report per Rule 30(e).