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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-404

Filed: 21 February 2017

Burke County, No. 13 CRS 52351

STATE OF NORTH CAROLINA,

v.

DAVID MATTHEW HIGGINS, Defendant.

Appeal by Defendant from judgment entered 10 August 2015 by Judge Mark E. Klass in Burke County Superior Court. Heard in the Court of Appeals 19 September 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melissa L. Trippe, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for Defendant-Appellant.

INMAN, Judge.

A defendant charged with first-degree murder on a theory of premeditation and deliberation is not entitled to a jury instruction regarding intoxication when the evidence at trial, considered in a light most favorable to the defendant, does not show a degree of intoxication that would prevent the defendant from forming a specific intent to commit the offense.

David Matthew Higgins ("Defendant") appeals his conviction for first-degree murder on the basis of malice, premeditation, and deliberation following a jury trial. Defendant contends that the trial court erred by failing to instruct the jury regarding the defense of voluntary intoxication, by misstating a limiting instruction regarding photographs, and by admitting in evidence prejudicial crime scene and autopsy photographs. After careful consideration, we conclude that Defendant has failed to demonstrate reversible error.

Factual and Procedural Background

On 4 August 2014, Defendant was indicted for first-degree murder. The case came on for trial on 3 August 2015, Judge Mark E. Klass presiding. The evidence at trial tended to show the following:

In the evening of Saturday, 10 August 2013, and continuing into the early morning of Sunday, 11 August 2013, Defendant smoked crack cocaine with his acquaintance Damon Kincaid ("Kincaid") while driving a Hummer around rural areas in Burke and Caldwell counties. Early Sunday morning, Defendant drove, with Kincaid asleep in the front passenger seat, to the home of his neighbor, Jacob Coley ("Coley"). Defendant woke Coley up, stating he had a way for the two of them to make some money. Thinking Defendant intended to sell drugs, Coley dressed and left with Defendant, riding in the backseat.

Defendant drove down a gravel road off of Highway 105. He stopped the vehicle just off the road beside a clearing in the woods and shot Kincaid, who remained sleeping in the front passenger seat, three times. Defendant then ordered Coley to help get Kincaid's body out of the vehicle. Coley sat in disbelief until Defendant demanded a second time that he help remove Kincaid's body. Coley got out and walked to the front passenger side exterior of the vehicle. Defendant had already dragged Kincaid's body out of the vehicle, but one of Kincaid's legs was stuck in the seatbelt. Coley pulled the seatbelt and Defendant removed the body, moving it four or five feet away from the vehicle. Defendant searched Kincaid's clothing and then said to Coley, "Let's go." While Defendant was driving back to his home, Coley asked Defendant why he shot Kincaid. Defendant replied, "Crack."

The following Tuesday, 14 August 2013, Kincaid's mother called the Caldwell County Sheriff's Office to report her son missing. She said her son could be identified by a tattoo on his foot that said "DOA 9/20/81," which was his birthdate. In response, investigators spoke with an individual at a residence where Defendant and Kincaid had visited late Saturday or early Sunday and learned that the two men had left together in a Hummer. Investigators also interviewed Defendant's uncle, the owner of the Hummer, who stated that Defendant had wrecked the vehicle and was in the hospital. Defendant's uncle informed the investigators that the vehicle was located in a local body shop, and gave them consent to search the vehicle.

The investigators located the vehicle and conducted a search. They found small-caliber shell casings and red stains on the front passenger seat and door jamb. Forensic analysis determined that the stains were blood consistent with Kincaid's DNA.

Special Agent Marc Sharpe of the State Bureau of Investigation interviewed Defendant four times, first at the hospital on Wednesday, 15 August 2013, and last at the Burke County Sherriff's Office on Sunday, 19 August 2013. Defendant initially denied knowing where Kincaid was and denied harming him. Eventually Defendant led Special Agent Sharpe to Kincaid's body. The body was extremely decomposed, with the head and left hand missing. A tattoo on the top of the right foot read "DOA 9/20/81." Investigators eventually located a skull nearby that was identified as Kincaid's.

Over the objection of defense counsel, the trial court admitted in evidence photographs of the crime scene and autopsy to illustrate testimony by two witnesses regarding the condition of Kincaid's skull and body. Pathologist Dr. Jerri McLemore used photographs to explain how he identified the body as Kincaid's and to illustrate his opinion that Kincaid died from three gunshot wounds to the head. Investigator Rodney Norman used photographs to illustrate his testimony regarding the condition in which Kincaid's body was found. Defendant presented no evidence.

At the charge conference, defense counsel requested that the trial court instruct the jury regarding the defense of voluntary intoxication. The trial court denied the request. Defense counsel objected to the trial court's ruling.

At the close of all arguments, the trial court instructed the jury. The trial court provided the following limiting instruction regarding photographic evidence of Kincaid's body admitted at trial: "Photographs and videos were introduced in the evidence in this case for the purpose of illustrating and explaining the testimony of witnesses. These photographs or videos may be considered by you for any other purpose."[1] Defense counsel did not object when the erroneous instruction was given or after all instructions were completed.

The jury found Defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation. Defendant was sentenced to life without parole. Defendant filed timely notice of appeal.

Analysis

I. Jury Instructions

A. *Jury Instruction Regarding Voluntary Intoxication*

Defendant contends that the trial court erred by refusing Defendant's request for an instruction on voluntary intoxication. "A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence."

[1] The correct instruction would have informed jurors that the photographs or videos "may *not* be considered by you for any other purpose." N.C.P.I. Crim. 104.50 (emphasis added).

State v. Haywood, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (2001). Because the evidence, considered in a light most favorable to Defendant, did not show a degree of intoxication that would prevent Defendant from forming a specific intent to kill, we conclude that the trial court did not err.

Properly preserved "challeng[es to] the trial court's . . . jury instructions are reviewed *de novo*[.]" *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Therefore, we review *de novo* the trial court's refusal to instruct jurors on the defense of voluntary intoxication.

"When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to the defendant." *State v. Flaugher*, 214 N.C. App. 370, 383, 713 S.E.2d 576, 587 (2011) (quoting *State v. Keitt*, 153 N.C. App. 671, 677, 571 S.E.2d 35, 39 (2002)). "Evidence of mere intoxication, however, is not enough to meet [a] defendant's burden of production." *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988).

Voluntary intoxication can support a defense to the charge of first-degree murder by premeditation and deliberation only if "the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense." *State v. Golden*, 143 N.C. App. 426, 430, 546 S.E.2d 163, 166 (2001). "[I]t is . . . well established that an instruction on voluntary intoxication is not required in

every case in which a defendant claims that he killed a person after consuming intoxicating beverages or controlled substances." *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992).

> Before the trial court will be required to instruct on voluntary intoxication, [the] defendant must produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried [the] 'defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.'

Golden, 143 N.C. App. at 430, 546 S.E.2d at 166-67 (quoting *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987)).

In *State v. Brogden*, the defendant's wife testified that the defendant " 'drank more than three or four mixed drinks of liquor a day[,]' . . . [and, on the day in question he] consumed 'maybe three or four' drinks before the leaving the house . . . [and] two and a half cans of beer" as he drove around prior to stopping at the victim's store, where he shot and killed the victim. 329 N.C. 534, 548, 407 S.E.2d 158, 167 (1991) (brackets omitted). The North Carolina Supreme Court held the trial court was not required to instruct the jury regarding voluntary intoxication because the evidence tended to show that the defendant was not too intoxicated to (1) drive a car, (2) fire a gun, (3) hit the victim with all three shots, and (4) flee the murder scene. *Id.* at 548, 407 S.E.2d at 167.

Here, as in *Brogden*, the evidence that Defendant smoked crack cocaine before killing the victim, without more, was insufficient to support a jury instruction on voluntary intoxication. Defendant points to evidence that he "smoked a lot of crack" prior to the shooting. He also notes Special Agent Sharpe's statement during his interrogation of Defendant that when people smoke crack "things can happen[,] [t]hings can go wrong, [t]hings can occur" without a drug user's actually intending for those particular things to happen. However, the evidence also showed that Defendant was coherent enough to drive to a friend's home, to take the friend accompanying him and Kincaid to an isolated location where Defendant killed Kincaid, to demand that his friend help remove Kincaid's body from the vehicle, and to remember days later where he had left the victim's body. And unlike the defendant in *Brogden*, Defendant did not present any evidence regarding the degree of his intoxication.

Considered in the light most favorable to Defendant, we cannot conclude that this evidence was sufficient to warrant an instruction on voluntary intoxication.

B. *Jury Instruction Regarding Photographic Evidence*

Defendant contends that the trial court plainly erred by omitting the word "not" in its jury instruction regarding photographic evidence. We disagree.

Defendant failed to object to the instruction at trial. Where a defendant fails to challenge an alleged error in jury instructions, we review for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). The plain error rule

> is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)). When determining whether plain error occurred on the basis of a defective jury instruction, "the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79 (citation omitted).

Here, the trial court erroneously instructed the jury that photographs introduced to illustrate and explain witness testimony "may be considered by you for any other purpose." After reviewing the entire record, we conclude that the trial court's instruction did not amount to plain error. The State presented overwhelming

evidence—aside from the photographs—of Defendant's guilt, including Defendant's confession to the killing, an eyewitness account of the killing, and medical testimony regarding the cause and circumstances of the victim's death. Thus, considering the entire record, we cannot conclude that the trial court's misstatement in the jury instructions regarding photographs amounted to plain error.

II. Analysis of Photographic Evidence Admission

Defendant contends that the trial court abused its discretion by admitting thirteen photographs of the victim's body and skull. Defendant asserts that these photographs were cumulative, gruesome, repetitive, "tempting to a decision on emotional grounds," and resulted in undue prejudice. We disagree.

Rule 403 of the North Carolina Rules of Evidence provides the following:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, of 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 (2015).

Deciding whether evidence should be excluded pursuant to Rule 403 falls within the sound discretion of the trial court. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "Abuse of discretion results 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." *Id.* at 285, 372 S.E.2d at 527 (citation omitted).

"[T]he unnecessary use of inflammatory photographs in excessive numbers solely for the purpose of arousing the passions of the jurors may deny defendant a fair and impartial trial." *State v. Sledge*, 297 N.C. 227, 231, 254 S.E.2d 579, 582 (1979). On the other hand, photographs are not inadmissible solely because they depict "horrible, gruesome, or revolting" scenes. *Id.* at 231, 254 S.E.2d at 583. Inflammatory photographs are admissible to illustrate witness testimony about gruesome crimes or deaths. *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526. The North Carolina Supreme Court has held that "[w]hat constitutes an excessive number of photographs must be left largely to the discretion of the trial court in the light of their respective illustrative values." *State v. Dollar*, 292 N.C. 344, 355, 233 S.E.2d 521, 527 (1977).

Here, the State submitted in evidence six photographs of the victim's body during autopsy. Dr. McLemore, the pathologist, testified that the photographs "collectively" helped to illustrate her testimony regarding the condition of the body and her determination that the victim died from gunshot wounds. Also, the State submitted in evidence seven photographs of the path to the victim's body and of the victim's skull from different angles. These photos were used to illustrate Detective Lieutenant Rodney Norman's testimony addressing how investigators found the victim's body, the condition of the body when it was found, and how the victim died. The photographs helped to illustrate the witnesses' testimony and also corroborated

Coley's account of the shooting and disposal of the body. Because the photographs illustrated and corroborated witness testimony, we cannot conclude that the trial court abused its discretion in admitting the photographs.

Conclusion

We conclude that the trial court did not err in refusing to instruct the jury regarding the defense of voluntary intoxication and that the trial court's limiting instruction regarding photographs did not constitute plain error. We also conclude that the trial court did not abuse its discretion on admitting certain photographic exhibits introduced by the State.

NO ERROR.

Chief Judge MCGEE and Judge STROUD concur.

Report per Rule 30(e).