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SUPREME COURT OF ARKANSAS

No. CR11-416

JAMES WILLIAM WEDGEWORTH APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** February 16, 2012 APPEAL FROM THE UNION COUNTY CIRCUIT COURT, [NO. CR05-444-4] HONORABLE TED C. CAPEHEART, JUDGE AFFIRMED.

JIM HANNAH, Chief Justice

James William Wedgeworth appeals his conviction of capital murder and sentence of life without parole. A prior conviction of capital murder and sentence of life without parole entered in this case against Wedgeworth was reversed and remanded by this court in *Wedgeworth v. State*, 374 Ark. 373, 288 S.W.3d 234 (2008). Wedgeworth presents three issues on appeal. First, he asserts that the circuit court erred in overruling a hearsay objection when the victim's father testified that the victim came to him for help because "there were threats against her life." Second, Wedgeworth asserts that the circuit court erred in admitting the victim's writings contained in a spiral notebook because the entries constituted hearsay as unsworn, out-of-court statements. Third, Wedgeworth, relying on *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), asserts that, although he did not object, the circuit court committed fundamental error in admitting photographs that were gruesome and introduced solely to inflame the jury. We affirm the conviction and sentence entered in this case. Our

jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(a)(2) (2011).

Wedgeworth admitted that he shot Megan Harbison in the chest with a shotgun, causing her death. His defense was that, at the time he shot Harbison, he was psychotic and therefore not guilty by reason of mental defect. The jury rejected this defense and convicted him of capital murder. He was sentenced to life without parole.

First, Wedgeworth alleges that the circuit court erred in admitting hearsay when it overruled his objection to the testimony of Harbison's father Nathan DuPree that Harbison came to him for help because her relationship with Wedgeworth was beyond her ability to handle and because there were "threats against her life":

> Q. Okay. What, and, and, and as you appreciated her comments to you what was she seeking from you?
>
> A. She wanted to get out, she was seeking help to escape from a, a situation that was bigger than she was able to deal with.
>
> Q. And, and was that something that she articulated to you or something you just perceived, or how did you come to that, that belief insofar as what her purpose was in coming to you as her father?
>
> A. Because she told me that there were threats against her life.

The line of questioning pursued with Dupree was intended to explain why Harbison had come to meet with him. He testified that she called before she got off work that evening and "said that she wanted to come out and talk with her mother and me after work." Dupree described Harbison's demeanor as "remorseful" and said that Harbison confessed that she was having an affair with Wedgeworth and expressed a desire to put it behind her.

Wedgeworth objected to the reference to "threats against her life" as hearsay and

argued that the reference did not fit any of the hearsay exceptions. The State argued it was admissible as a statement of Harbison's then existing mental or physical condition. *See* Ark. R. Evid. 803(3) (2011). Wedgeworth asserted that under Rule 803(3), the statement must be contemporaneous with the threat, "[s]o in order for this to be reliable that mental, existing mental, emotional, or physical condition has to exist contemporaneous with the time of the statement." Wedgeworth further argued there was no "foundation laid" to reveal that Harbison was emotional when she made the statement. However, the testimony revealed that Harbison came to her father because she was afraid and feared for her life. As we noted in *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006),

> [a]n expression of fear falls within the hearsay exception of Rule 803(3). *See, e.g.*, *Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998) (holding that statements that victims had told witnesses they were afraid of Hodge, one made three weeks before death and one made two months before death, were not too remote in time, were admissible under Ark. R. Evid. 803(3), and were relevant); *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993) (stating that witness' testimony that he found the victim crying and when he asked what was the matter, she said, "He's going to kill me" was admissible as a present-sense impression showing the victim's fear under Ark. R. Evid. 803(3)).

MacKool, 365 Ark. at 449, 231 S.W.3d at 700–01. Likewise, the reference to a threat in this case was admissible as a present-sense impression showing the victim's fear under Rule 803(3). We note that Wedgeworth also asserted that his right of confrontation was violated because he did not have the opportunity to question Harbison about the alleged threat. The circuit court ruled only on the assertion that the testimony was admissible under Rule 803(3). The failure to obtain a ruling precludes our review on appeal. *Strain v. State*, 2012 Ark. 42, ___ S.W 3d ___; *see also Gwin v. Daniels*, 357 Ark. 623, 184 S.W.3d 28 (2004) (failure to

obtain a ruling precludes review of the issue because, under appellate jurisdiction, this court is limited to reviewing an order or decree of a lower court).

The second issue concerns the admission of State's exhibit 54—thirteen dated, written recordings from a spiral-bound notebook found in Harbison's apartment after her death. The entries recorded phone calls and other contacts Wedgeworth made with Harbison between June 13 and June 21, 2005. They include statements Wedgeworth supposedly made such as, "If I can't have you no one ever will." In an entry dated June 16, Harbison wrote that Wedgeworth "[t]hreatened my life." Various other contacts are memorialized in the notebook. Wedgeworth objected to their admission based on hearsay, and the circuit court overruled the objection without comment. The diary entries were offered to prove that Wedgeworth did and said what was recorded in the notebook. Therefore, the notebook was offered to prove the truth of the matters asserted within it and constitutes inadmissible hearsay. *See* Ark. R. Evid. 801(c). The State argues that the entries in the notebook fit the hearsay exceptions of state of mind and recorded recollection. *See* Ark. R. Evid. 803(3) and (5).

The entries in the notebook do not appear to be written at or about the time the recorded events occurred. They are not set out in chronological order and apparently were written after the fact to record what had happened in the past. As such, they are not statements of Harbison's then existing state of mind and are not admissible under Rule of Evidence 803(3). *See Cole v. State*, 307 Ark. 41, 48, 818 S.W.2d 573, 577 (1991) (statements of the victim's memory about the past are not statements of her then existing state of mind).

Further, the entries do not fit within the recorded-recollection exception because recorded recollections may not be received as exhibits unless they are offered by the adverse party. *See* Ark. R. Evid. 803(5). Exhibit 54 constitutes hearsay that does not fit any of the exceptions set out in Rule 803. It lacks the guarantees of trustworthiness required to be admitted as an exception to the hearsay rule. *See* Ark. R. Evid. 803(24). The circuit court erred in admitting exhibit 54.

However, exhibit 54 is cumulative of other similar evidence properly admitted. Exhibit 68, a list of callers found on Harbison's caller id was introduced without objection and revealed multiple calls from Wedgeworth to Harbison in the days before the murder. Benji Olds also testified about calls from Wedgeworth to Harbison. Harbison's father testified about calls and attempts by Wedgeworth to contact him and his daughter. The photos mentioned in exhibit 54 were mentioned by Olds. While the circuit court erred in admitting exhibit 54, Wedgeworth has not demonstrated that he was prejudiced by the admission of the evidence. "Evidence that is merely cumulative or repetitious of other evidence admitted without objection cannot be prejudicial." *Eliott v. State*, 342 Ark. 237, 242, 27 S.W.3d 432, 436 (2000). "This court will not reverse an evidentiary decision by the trial court in the absence of prejudice." *Marks v. State*, 375 Ark. 265, 269, 289 S.W.3d 923, 926 (2008).

Finally, Wedgeworth argues that the circuit court committed reversible error when it failed to sua sponte exclude photographs that Wedgeworth asserts were intended to inflame the passions of the jury and that made his conviction a "fait accompli." Wedgeworth did not

object to admission of the photographs, and he instead relies on the *Wicks* exceptions:

> [W]e have recognized four exceptions to the contemporaneous-objection rule, commonly referred to as the *Wicks* exceptions. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). The four *Wicks* exceptions are (1) when the trial court fails to bring to the jury's attention a matter essential to its consideration of the death penalty itself; (2) when defense counsel has no knowledge of the error and hence no opportunity to object; (3) when the error is so flagrant and so highly prejudicial in character as to make it the duty of the court on its own motion to have instructed the jury correctly; and (4) Ark. R. Evid. 103(d) provides that the appellate court is not precluded from taking notice of errors affecting substantial rights, although they were not brought to the attention of the trial court.

Anderson v. State, 353 Ark. 384, 395, 108 S.W.3d 592, 599 (2003).

Wedgeworth asserts that this case is particularly appropriate for a *Wicks* analysis because he admitted that he killed Harbison. However, even where the cause of death is undisputed, a defendant may not prevent the admission of photographs merely by conceding the facts portrayed in the photographs. *Smart v. State*, 352 Ark. 522, 532, 104 S.W.3d 386, 392 (2003). This court has stated that

> [e]ven the most gruesome photographs may be admissible if they assist the trier of fact in any of the following ways: (1) by shedding light on some issue; (2) by proving a necessary element of the case; (3) by enabling a witness to testify more effectively; (4) by corroborating testimony; or (5) by enabling jurors to better understand the testimony. Other acceptable purposes include showing the condition of the victim's body, the probable type or location of the injuries, and the position in which the body was discovered.

Anderson v. State, 2011 Ark. 461, at 9-10, ___ S.W.3d ___, ___ (citations omitted).

This case is replete with evidence of planning and premeditation. But Wedgeworth claimed that, rather then carrying out a plan to kill Harbison, at the moment he pulled the trigger, he suffered from a mental defect. The crime-scene photographs Wedgeworth complains of show what Wedgeworth did in the moment he claims he was suffering from

mental defect. They show, among other things, that the shot entered the center of Harbison's chest, causing maximum injury and bringing about near instant death. The photographs, which shed light on the issue of Wedgeworth's mental state at the time of the shooting were admissible. *See Anderson*, 2011 Ark. 461, at 9, ___ S.W.3d at ___. The photographs taken prior to the autopsy when the body bag was opened assisted Dr. Charles Kokes in his testimony and were admissible. *See Anderson*, 2011 Ark. 461, at 9, ___ S.W.3d at ___. We find no error in admission of the photographs. Therefore, there was no error so flagrant and so highly prejudicial in character as to make it the duty of the court to act on its own motion under *Wicks*.

In addition to the arguments raised by Wedgeworth, we have reviewed the record in this case for reversible error pursuant to Arkansas Supreme Court Rule 4-3(i) (2011), and have found none.

Affirmed.