NO. COA01-831

NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2002

STATE OF NORTH CAROLINA

v. Wayne County
No. 98 CrS 19551

WILLIAM HENRY O'REILLY, JR.
Defendant

Appeal by defendant from judgment entered 3 March 2000 by Judge Carl L. Tilghman in Wayne County Superior Court. Heard in the Court of Appeals 15 August 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Ronald M. Marquette, for the State.

Adrian M. Lapas for defendant-appellant.

EAGLES, Chief Judge.

Defendant William Henry O'Reilly, Jr., was indicted and tried for first-degree murder. Defendant was found guilty of the lesser included offense of second-degree murder.

The evidence tended to show the following. The defendant was employed by the victim, Leslie Elton Warrick, Jr., to assist in the day to day operations of the victim's antique business. Before working for the victim, defendant resided in a local halfway house for recovering alcoholics and was employed as a manual laborer for a local construction firm. For approximately five months prior to

the victim's death, the defendant had been living with the victim. Since defendant suffered from a long history of alcohol abuse, this living arrangement was contingent upon defendant remaining alcohol and drug free. During the days preceding the victim's death, he became aware that defendant had resumed abusing alcohol. Consequently, the victim began planning to evict defendant.

On 4 December 1998, Warrick sought the assistance of Donnie Wade, another of his employees, to help move defendant out later that day. Wade testified that he left his other job early, so that he could help Warrick. However, by the time Wade arrived at the victim's house, Warrick was already dead. At approximately 1:28 p.m., defendant called the Goldsboro Police Department and told the 911 operator that he had just killed the victim, Warrick, because the victim had tried to sexually assault him.

The victim's body was found in the downstairs hallway, lying face down in a pool of blood, with his pants around his ankles. The victim's skull had been fractured in several places, as a result of at least twenty-five discernible blows to the head by blunt objects. The area surrounding the victim's body was littered with pieces of broken marble, which had once formed the top of a pedestal in the downstairs hallway. One piece of this marble was still embedded in the victim's head. A brass figurine and a broken brass candlestick holder were also found near the body. Hair matching the victim's hair was found adhering to the candlestick holder. There were bloodstains on the wall and baseboard behind a pedestal adjacent to the body, which stood approximately twelve

inches off the floor. The blood drops on the wall began at floor level and continued up the wall approximately ten inches. Blood and other indications of a struggle were discovered throughout the upstairs portion of the house. However, defendant's room appeared undisturbed.

The police found the defendant outside the house, wearing only a pair of jeans. His hands, chest and jeans were covered in the victim's blood and his breath smelled of alcohol. Defendant told police that he had killed the victim to defend himself against a homosexual attack.

At trial, defendant testified that before he moved in with the victim, he expressed to the victim some concern that the victim was a homosexual, based on rumors he had heard. Further, that defendant agreed to move in, only after asserting to the victim that defendant was not a homosexual. The day of victim's death, defendant awoke to find the victim standing over him at his bed. Both the defendant's genitals as well as the victim's genitals were exposed. The victim was holding defendant's penis in his hand. Defendant further testified that he blacked out immediately after awakening, only vaguely remembering some sort of struggle, until he called 911.

Defendant also sought to testify concerning several trips that the victim made to New York. On *voir dire*, defendant testified that the purpose for the trips were for the victim to be tested for AIDS. The trial court sustained the prosecution's objection that the testimony was irrelevant.

The State's evidence also included expert testimony. Doctor Robert L. Thompson, a forensic pathologist in the Office of Chief Medical Examiner, performed an autopsy. He testified that the marble from the pedestal in the hall and the brass candlestick holder could have caused the injuries suffered by the victim. Doctor Thompson further testified that the blows which caused the skull fractures would have caused the victim to loose consciousness, but he could not establish the order in which the injuries were sustained.

Special Agent John W. Bendure of the North Carolina State Bureau of Investigation testified as an expert in the areas of forensic and trace evidence. Agent Bendure testified that the marble fragments surrounding the victim, including the one embedded in the victim's head, all came from the same source. Agent Bendure also testified that he recovered a hair, later identified as the victim's, from the broken brass candlestick holder found in the victim's house. Over defendant's objection, Agent Bendure testified that bloodstain patterns on various pieces of the marble found around the victim, as well as on the lower part of the wall near the victim's body, indicated that the victim was already lying on the floor when some of the blows were inflicted.

After conviction, the trial court found as a sentencing factor in aggravation that the offense was especially heinous, atrocious, or cruel pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(7) (2001). The court found as sentencing factors in mitigation that the defendant had a support system in the community and that he had

been a model prisoner. The court further found that the factor in aggravation outweighed the factors in mitigation and sentenced defendant in the aggravated range. Defendant appeals.

Defendant first argues that the trial court improperly found as an aggravating factor that the crime was especially heinous, atrocious, or cruel, pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(7)(2001). Specifically, defendant contends that the evidence was insufficient to support the trial court's finding of this factor, as compared to other second-degree murders.

We note that defendant has raised this objection for the first time on appeal.

> It is the general rule that failure to object to an alleged error in the trial court waives the consideration of such error on appeal. When a defendant has failed to object to an alleged error, but contends that an exception "by rule or law was deemed preserved or taken without" an objection at trial, it is the defendant's burden to establish his right to appellate review "by showing that the exception was preserved by rule or law or that the error alleged constitutes plain error." Defendant may carry this burden by "alert[ing] the appellate court that no action was taken by counsel at trial and then establish[ing] his right to review by asserting the manner in which the exception was preserved or how the error may be noticed although not brought to the attention of the trial court." If defendant fails to comply with these requirements, his right to appellate review is waived.

State v. Degree, 110 N.C. App. 638, 642, 430 S.E.2d 491, 494 (1993)(citations omitted).

Here, the trial court initially considered two factors in aggravation, *i.e.*, that "[t]he offense was especially heinous,

atrocious, or cruel," N.C. Gen. Stat. § 15A-1340.16(d)(7)(2001), and that "[t]he defendant took advantage of a position of trust or confidence to commit the offense." N.C. Gen. Stat. § 15A-1340.16(d)(15)(2001). When given the opportunity to comment on the factors submitted by the State, defense counsel stated that he "did not particularly care to be heard on number seven," objecting only to factor number fifteen. Therefore, defendant failed to object at trial to the finding that the "offense was especially heinous, atrocious, or cruel."

Moreover, defendant has not given notice to this Court of his failure to object at trial. Likewise, defendant has neither asserted that the error constitutes plain error, nor shown how the issue was otherwise preserved without an objection. Accordingly, we hold that defendant waived his right to appellate review on this issue.

Defendant next argues that the trial court improperly excluded testimony concerning his awareness that the victim had undergone AIDS testing. Specifically, defendant contends that his knowledge that the victim had been tested for AIDS is "probative of the intent element of second-degree murder." After a careful review of the record in light of defendant's argument, we disagree.

We begin by noting that "'[r]elevant evidence' means 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 (2001). Furthermore, "[s]econd-degree murder

is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). "Malice may be express or implied and . . . need not amount to hatred or ill will . . . ." *Id.* In fact, "[a]n act that indicates a total disregard for human life is sufficient to supply the malice necessary to support the crime of second degree murder." *State v. Wilkerson*, 295 N.C. 559, 581, 247 S.E.2d 905, 918 (1978).

Here, the defendant was permitted to testify regarding the victim's reputation as a homosexual, as well as the concerns that this awareness raised in defendant's own mind. Defendant also testified concerning statements made by the victim about the victim's sexual orientation. Presumably, this testimony was offered to support defendant's theory that he was the victim of a homosexual assault. However, after a careful review of the defendant's testimony, we are not persuaded that defendant's knowledge that the victim had undergone AIDS testing would have tended to make the existence of malice either more or less probable. While that evidence might have marginal relevance with respect to the existence of specific intent or adequate provocation, defendant does not argue this point. On the record before us, this testimony has no relevance.

Given the context, it appears that the testimony was offered more for its potential to arouse passion and prejudice in the jury, as a justification for defendant's malice, than for any tendency it might have to negate the existence of malice. For this reason,

even assuming the testimony was relevant, its exclusion was nevertheless proper.

Rule 403 of the North Carolina Rules of Evidence provide in part: "[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). We have already noted that admission of this evidence would create an unreasonably high danger that the jury's decision might be based on impermissible grounds. "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Hoffman*, 349 N.C. 167, 184, 505 S.E.2d 80, 91 (1998), *cert. denied*, 526 U.S. 1053, 119 S.Ct. 1362 (1999). On appeal, discretionary decisions "will not be overturned unless it is shown that the ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Goode*, 341 N.C. 513, 538, 461 S.E.2d 631, 646 (1995). Moreover, the trial court need not make specific findings to support the exclusion of evidence so long as it appears from the record that the required balancing was conducted.

In *State v. Washington*, this Court held:

> Although the trial court did not make a specific finding that the probative value of the evidence outweighed its prejudicial effect, the procedure that was followed demonstrated that the trial court conducted the balancing test under Rule 403. We cannot say that the trial court abused its discretion . . . .

141 N.C. App. 354, 367, 540 S.E.2d 388, 397-98 (2000), *cert. denied*, 353 N.C. 396, 547 S.E.2d 427 (2001).

In *Washington*, defendant objected to the admission of testimonial evidence. The court excused the jury, permitted *voir dire* of the witness to determine the substance of the testimony, heard arguments from counsel, and ruled on the evidence.

Here, the State made a timely objection which the trial court initially overruled during a bench conference. Following *voir dire* of the witness and arguments from counsel, the court reconsidered its original ruling and sustained the State's objection. It is clear from the record that the trial court conducted the required balancing. Even more indicative of this point, is the fact that the court reconsidered and corrected its original ruling. Therefore, we cannot say that the trial court abused its discretion by denying admission of this evidence.

Finally, defendant argues that the trial court improperly permitted Agent Bendure to testify as an expert in the field of bloodstain pattern interpretation. Specifically, defendant contends that Agent Bendure lacked the qualifications to render an opinion in this area.

Agent Bendure was called primarily to testify as an expert in forensic and trace evidence. His testimony centered predominantly around his analysis of the pieces of marble and the candle holder found near the victim's body. However, Agent Bendure was also permitted to testify concerning the blood stains that appeared on the marble fragments, as well as to the difference in appearance

between stains caused by pooled blood and stains caused by projected or spattered blood. Later, when Agent Bendure was shown photographs of blood that had been found on the wall near the victim's body, he testified that in his opinion those stains had been projected onto the surface of the wall, from a source lower than the bottom of the pedestal.

Before receiving Agent Bendure's opinion testimony, *voir dire* was conducted concerning his qualifications. Agent Bendure testified that his primary area of expertise was fiber analysis, physical and elemental matching, and arson analysis. He also stated that he was neither an expert in blood, nor a serologist. He testified further that he had neither taught courses nor published articles concerning blood evidence. Defendant argues that Agent Bendure was not qualified to testify. We disagree.

Rule 702 of the North Carolina Rules of Evidence provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2001). Our Supreme Court has held "bloodstain pattern interpretation is an appropriate area for expert testimony." *State v. Goode*, 341 N.C. 513, 530, 461 S.E.2d 631, 641 (1995).

Moreover, it is well settled in North Carolina that:

> The determination of admissibility of expert opinion testimony is within the sound discretion of the trial court, and the admission of such testimony will not be

> reversed on appeal unless there is no evidence to support the finding that the witness possesses the requisite skill. "Once expertise is demonstrated, the test of admissibility is helpfulness." If the witness is better qualified than the trier of fact to form an opinion, that witness may render an opinion regarding the subject matter. The witness need not be experienced with the identical subject area in a particular case . . . [if] training and experience gave him knowledge sufficient to render him better qualified than the trier of fact . . . .

McLean v. McLean, 323 N.C. 543, 556-57, 374 S.E.2d 376, 384 (1988)(citations omitted). *See also State v. Goode*, 341 N.C. 513, 529, 461 S.E.2d 631, 640 (1995)("It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession."). "Once properly admitted, the weight to be given the evidence [is] a decision for the jury." *State v. Whiteside*, 325 N.C. 389, 398, 383 S.E.2d 911, 916 (1989).

Here, Agent Bendure had been a State Bureau of Investigation Agent for nineteen years, working both in the laboratory and in the field on major homicide investigations. For ten to fifteen years, he had worked closely with the SBI's leading experts in the field of bloodstain pattern interpretation and had gained a working knowledge of the techniques utilized in this area. In addition, for ten years, Agent Bendure had been involved in teaching crime scene investigation at the SBI Academy and was present while the SBI's leading experts taught the courses relating to bloodstain pattern interpretation. Finally, Agent Bendure had testified in other cases

as to bloodstain pattern interpretation, although his testimony had been narrowly limited to the direction of blood travel.

After a thorough review of the trial transcript, it is clear that Agent Bendure's statement that he was not a blood spatter expert was merely his candid qualification of the scope of his expertise. Agent Bendure was not a serologist and he was not capable of giving an opinion as to the type of weapon used. However, this does not render him wholly incompetent to testify in this area. These qualifications relate more to the weight to be given the witness's testimony, not its admissibility.

We conclude that the evidence before the trial court was sufficient to support the finding that, based on his knowledge, skill, and experience, Agent Bendure possessed the requisite skill to testify as to his opinion about the direction of blood travel. The witness was tendered only for this very limited purpose. The trial court properly limited the scope of his opinion to the extent of his expertise. After careful review, we cannot say that the trial court abused its discretion in admitting Agent Bendure's testimony.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).