NO. COA05-1262

NORTH CAROLINA COURT OF APPEALS

Filed: 05 July 2006

STATE OF NORTH CAROLINA

v. McDowell County
Nos. 02 CRS 3854
LARRY EUGENE BOWMAN, JR. 02 CRS 53620

Appeal by defendant from judgments entered 26 February 2004 by Judge James U. Downs in McDowell County Superior Court. Heard in the Court of Appeals 19 June 2006.

Attorney General Roy Cooper, by Assistant Solicitor General John F. Maddrey, for the State.

Nancy R. Gaines for defendant-appellant.

STEELMAN, Judge.

Defendant, Larry Eugene Bowman, Jr., was convicted of first-degree rape and first-degree murder based on both malice, premeditation and deliberation, and felony murder. The jury recommended defendant be sentenced to life imprisonment without parole for the first-degree murder conviction and the trial court entered judgment in accordance with that recommendation. The trial court also sentenced defendant to a consecutive term of 336 to 413 months imprisonment for first-degree rape. Defendant appeals.

The State's evidence at trial tended to show the following:

defendant was a friend of the victim's father and lived near the victim and her father. On the morning of 1 November 2002, after the victim's father had left for work, defendant went to the victim's residence to borrow a tool. The thirteen-year-old victim did not know where the tool was, but suggested it may be with some other tools that were in the kitchen. She allowed defendant to enter the residence to look for the tool.

When defendant could not find the tool in the kitchen, the victim walked him back to the door. Defendant then hit her across the face, grabbed her arms, and shook her. Thereafter, defendant had forcible intercourse with the victim, during which time she was screaming and making pain noises. The victim cried and begged defendant to stop, which caused defendant to become angry. Defendant squeezed the victim's neck and hit her until she was unable to speak and he resumed having forcible intercourse with her until he ejaculated inside her vagina. Thereafter, defendant squeezed the victim's neck for approximately five minutes until she was totally silent.

Defendant began thinking about how much he wanted to have intercourse again and he ran to the front door to insure nobody was near the residence. He returned to the victim's bedroom and found her motionless and quiet. Because of how hard it had been for defendant to have intercourse with the victim, he searched for something to lubricate her vagina. He found a bottle with green liquid in it on the victim's makeup stand and squeezed the contents of the bottle into her vagina so they could have sex more easily

the next time. After staring at her naked and motionless body, however, defendant became scared about what would happen to him if he were caught. He believed the only way to avoid getting the death penalty for raping a little girl was to kill her to keep her silent. Defendant then used his pocketknife to cut the victim's throat and pulled the knife back and forth across her throat. Thereafter, defendant ran out of the house, got into his truck, drove to Bojangles where he purchased two biscuits and a tea, and drove to work.

Defendant first contends the trial court erred in denying his pretrial motion to transfer venue. According to the motion, stories about the crime at issue were in the local newspaper, *The McDowell News*. Because of reports regarding the brutality of the crime and the relatively small population in McDowell County, defendant asserted many potential jurors had an acquaintance with or knew of the victim or her family. As a result of the pretrial publicity, defendant argued he could not receive a fair trial in McDowell County.

The ruling on a motion to transfer venue is a matter firmly within the trial court's discretion and will not be overturned on appeal absent a manifest abuse of that discretion. *State v. Richardson*, 308 N.C. 470, 477-78, 302 S.E.2d 799, 804 (1983). "A defendant seeking a new trial on the basis of a trial court's denial of a motion for change of venue or special venire must ordinarily establish *specific and identifiable prejudice* against him as a result of pretrial publicity." *State v. Billings*, 348

N.C. 169, 177, 500 S.E.2d 423, 428 (1998) (emphasis added). In order to meet this burden, defendant "ordinarily must show *inter alia* that jurors with prior knowledge decided the case, that he *exhausted his peremptory challenges*, and that a juror objectionable to him sat on the jury." *Id.* (emphasis in original).

In this case, defendant used only thirteen of his fourteen peremptory challenges in selecting the twelve jurors who were impaneled to hear his case and, thus, he did not exhaust his peremptory challenges. Further, defendant does not argue that *any* individual juror was objectionable to him that sat on the jury. As such, defendant has not shown any specific identifiable prejudice against him as a result of pretrial publicity that necessitated a change of venue. *Accord id.*

Nevertheless, this Court must further examine this issue. Our Supreme Court has indicated that "where the totality of the circumstances reveals that an entire county's population is 'infected' with prejudice against a defendant, the defendant has fulfilled his burden of showing that he could not receive a fair trial in that county even though he has not shown specific identifiable prejudice." *Id.* (citing *State v. Jerrett*, 309 N.C. 239, 258, 307 S.E.2d 339, 349 (1983)(holding the trial court's denial of defendant's motion for change of venue was improper)). In the present case, defendant argues he has established the need for a change of venue in the same manner as the defendant in *Jerrett*. We disagree.

The facts in *Jerrett* are distinguishable from the facts in the

present case. In *Jerrett*, the defendant presented extensive testimony from members of the media, a sheriff, a local magistrate and three attorneys that a fair trial could not be held in Allegheny County. The Court found it "extremely significant" that "the crime occurred in a small, rural and closely-knit county where the entire county was, in effect, a neighborhood." 309 N.C. at 256, 307 S.E.2d at 348. One-third of the prospective jurors knew or were familiar with the victims or their family; four of the jurors who served knew the victim's family or the victims' relatives, six jurors who decided the case knew the State's witnesses, and the foreman stated he had heard a victim's relative discussing the case in an emotional manner. *Id.* at 257, 307 S.E.2d at 348-49.

In this case, the trial court found McDowell County had a population of "slightly more than 42,000 pursuant to the last census in 2000." McDowell County, thus, does not constitute the small "neighborhood" type of environment at issue in *Jerrett*. The trial court also found, *inter alia*, "[t]he main and primary means of newspapers in McDowell County is the McDowell News that has a circulation of slightly less than 15 percent of the population[.]" While a number of prospective jurors had heard about the case prior to trial, none of the seated jurors possessed any preconceived notions about the guilt or innocence of defendant. Further, the level of familiarity the jurors in *Jerrett* had with the victim, the victim's family, and the State's witnesses is not present in this case. In viewing the totality of the circumstances in this case,

we find there is not a reasonable likelihood that pretrial publicity prevented defendant from receiving a fair trial in McDowell County. This argument is without merit.

Next, defendant contends the trial court committed reversible error by denying his motion to exclude or limit the admissibility of seven crime scene photographs and five autopsy photographs on the ground their probative value was outweighed by their inflammatory nature. In determining whether to admit photographic evidence, the trial court must "weigh the probative value of the photographs against the danger of unfair prejudice to the defendant." *State v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (1999) (citing N.C. Gen. Stat. § 8C-1, Rule 403). This ruling is vested in the sound discretion of the trial court, and as a result, will not be reversed absent a clear showing the decision was manifestly unsupported by reason. *Id.*

Here, defendant argues the photographs of the naked and violated body of the thirteen-year-old victim had little purpose except to inflame the jury. Defendant further argues the only thing these photographs accomplished was to keep the jury focused on the horror of the crime, and as a result of seeing the photographs, the jurors could not turn their minds to the lack of intent or planning, or to defendant's state of mind. We find defendant's arguments unpersuasive.

"'Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or

repetitious use is not aimed solely at arousing the passions of the jury.'" *Id.* (citations omitted). In particular, photographs may be used "to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523 526 (1988). Our Supreme Court has affirmed a trial court's admission of autopsy photographs that corroborated the cause of death, *Goode*, 350 N.C. at 259, 512 S.E.2d at 421-22, and the admission of crime scene photographs which showed the location and circumstances of death, *State v. Haselden*, 357 N.C. 1, 14-15, 577 S.E.2d 594, 603 (2003). "Even where a body is in advanced stages of decomposition and the cause of death and identity of the victim are uncontroverted, photographs may be exhibited showing the condition of the body and its location when found." *State v. Blakeney*, 352 N.C. 287, 310, 531 S.E.2d 799, 816 (2000) (citations and internal quotations omitted).

In this case, the record does not demonstrate the challenged photographs showing the victim were used excessively and solely to inflame the passions and prejudices of the jury. Our careful review of the record reveals that each photograph at issue illustrated, in some unique respect, the manner in which the victim was killed and the testimony of three of the State's witnesses. In particular, the seven crime scene photographs showing the victim's body illustrated the various injuries to the victim's body and the location and position of the victim's body at the crime scene. Four of the seven challenged crime scene photographs illustrated

the testimony of the first law enforcement officer responding to the crime scene and the remaining three crime scene photographs illustrated the testimony of a special agent with the State Bureau of Investigation who investigated the crime scene.

The five autopsy photographs at issue illustrated the testimony of the forensic pathologist who performed the autopsy on the victim's body. During his direct examination, the five autopsy photographs were tendered to him, one at a time, and he explained each of the victim's injuries depicted in the photographs and their significance to the victim's cause of death. We conclude defendant has not shown the trial court abused its discretion by admitting the challenged photographs into evidence. This argument is without merit.

NO ERROR.

Judges MCCULLOUGH and HUDSON concur.

Report per Rule 30(e).