NO. COA05-437

NORTH CAROLINA COURT OF APPEALS

Filed: 17 January 2006

STATE OF NORTH CAROLINA

v. Robeson County
No. 03 CRS 50400

RICKY BRANDON BRAYBOY,
Defendant.

Appeal by defendant from judgment entered 11 October 2004 by Judge Robert F. Floyd, Jr., in the Superior Court in Robeson County. Heard in the Court of Appeals 8 December 2005.

Attorney General Roy Cooper, by Assistant Attorney General James C. Holloway, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, for defendant-appellant.

HUDSON, Judge.

Defendant Ricky Brandon Brayboy was indicted for the first-degree murder of Vincent Homer Smith ("Smith"). Defendant moved to dismiss the short-form indictment, which motion the court denied on 11 September 2003. At the 4 October 2004 criminal session of the superior court in Robeson County, a jury convicted defendant of second-degree murder. The court sentenced him to a term of 189 to 236 months. Defendant appeals. As discussed below, we find no error.

The evidence tended to show that in the early morning hours of 12 January 2003, Smith went to the home of Andrea Brayboy, defendant's sister, and after grabbing defendant's rifle from behind a door, shot into the ceiling and robbed her at gunpoint. Smith returned the rifle to Andrea, told her to tell defendant that Smith was waiting for him, and left. After hearing what had happened from his sister, defendant took his rifle and drove to a barn where Smith was located. En route, he told his passenger, Juanita Locklear, "I'm going to kill that son-of-a-bitch." After reaching the barn, defendant got out of the car and Smith approached him. Defendant fired the rifle at Smith several times, killing him. An autopsy revealed that Smith suffered ten gunshot wounds. Defendant testified that he believed Smith had a gun as he approached and shot in self-defense.

Defendant first argues that the court erred in denying his pretrial motion to dismiss the short-form murder indictment. Defendant acknowledges that this Court and the Supreme Court have previously held the short-form murder indictment constitutional, *see State v. Holman*, 353 N.C. 174, 179, 540 S.E.2d 18, 23 (2000), *cert. denied*, 534 U.S. 910, 151 L. Ed. 2d 181 (2001); *State v. Washington*, 142 N.C. App. 657, 663, 544 S.E.2d 249, 253, *rev. denied and appeal dismissed*, 353 N.C. 532, 550 S.E.2d 165 (2001), but wishes to preserve this issue for possible reconsideration. Accordingly, we overrule this assignment of error.

Defendant also argues that the court erred in allowing the State to introduce two of defendant's recanted prior statements. We dismiss this assignment of error.

Following the murder, defendant gave four statements to law enforcement officers. At trial, defendant objected to the introduction of his first two statements, because he recanted them in his subsequent statements. In making the objection, defendant cited *State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002). In his brief, however, defendant cites two cases, *Canady* and *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987), which he admits do not apply. Beyond this acknowledgment of cases which do not apply, defendant makes no further argument and cites no other cases on this issue. Pursuant to North Carolina Rule of Appellate Procedure 28(g), this assignment of error is abandoned.

Defendant next argues that the court erred in allowing the State to introduce the typed statement of Juanita Locklear. We do not agree.

Defendant objected to the admission of the statement at trial, on grounds that it is hearsay not falling within any exception. The court overruled the objection because "the statement is materially consistent with what [Juanita Locklear] actually testified to in open court." Defendant contends that the prior statement contradicted Juanita Locklear's testimony.

> It is well-settled that a witness' prior consistent statements are admissible to corroborate the witness' sworn trial testimony. Corroborative evidence by definition tends to strengthen, confirm, or make more certain the testimony of another

> witness. Corroborative evidence need not mirror the testimony it seeks to corroborate, and may include new or additional information as long as the new information tends to strengthen or add credibility to the testimony it corroborates. Prior statements by a witness which contradict trial testimony, however, may not be introduced under the auspices of corroborative evidence.

State v. McGraw, 137 N.C. App. 726, 730, 529 S.E.2d 493, 497, *rev. denied*, 352 N.C. 360, 544 S.E.2d 554 (2000)(internal citations and quotation marks omitted). Corroborative previous statements must be generally consistent with the witness's testimony, but "slight variations between them will not render the statements inadmissible. Such variations affect only the credibility of the evidence which is always for the jury." *State v. Britt*, 291 N.C. 528, 535, 231 S.E.2d 644, 650 (1977). In addition, "[s]ince it is the duty of the objecting party to call to the attention of the trial court the objectionable part, broadside objections to corroborative testimony will not generally be sustained if any portion of such testimony is competent." *State v. Adcock*, 310 N.C. 1, 17, 310 S.E.2d 587, 597 (1984)(internal quotation marks omitted).

Here, the only "inconsistency" alleged by defendant that by our review appears to be truly inconsistent is Locklear's observation of defendant following the murder. The prior statement says defendant "acted like he didn't care," while Locklear's testimony was that defendant was "upset." While this inconsistency might constitute more than a mere variation, defendant did not single out this portion in objecting at trial, but rather made a

broadside objection to the entire prior statement. In accordance with *Adcock*, the trial court properly refused to sustain this objection. We overrule this assignment of error.

Defendant next argues that the court erred in allowing the State to introduce ten autopsy photos. We do not agree.

Photographs which depict "horrible, gruesome or revolting" scenes are not incompetent evidence. *State v. Sledge*, 297 N.C. 227, 231, 254 S.E.2d 579, 583 (1979). "When properly authenticated as a correct portrayal of what it purports to show, a photograph may be used by the witness to illustrate his testimony, and its admission for that purpose is not error." *Id.* While the excessive use of photographs is not appropriate, "[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." *Id.* at 232, 254 S.E.2d at 583 (internal quotation marks omitted). "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." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Here, the State introduced ten autopsy photos. Given that the victim suffered ten gunshots wounds, we cannot say that the court abused its discretion. We overrule this assignment of error.

Defendant next argues that the court erred in denying his motion to dismiss the first-degree murder charge against him because there was not sufficient evidence of premeditation and

deliberation. We conclude this assignment of error is without merit.

As defendant admits in his brief, any error in charging the jury on first-degree murder is cured by a jury verdict of second-degree murder. *See State v. Griffin*, 308 N.C. 303, 313, 302 S.E.2d 447, 454 (1983).

> Because the jury convicted defendant of murder in the second degree, thereby impliedly finding that the killing was without premeditation and deliberation, and in the absence of any showing that the verdict of murder in the second degree was thereby affected, we hold that any error the trial court may have committed in submitting the charge of murder in the first degree to the jury was not prejudicial.

Id. at 313, 302 S.E.2d at 455. The jury here having returned a verdict of second-degree murder, any error in submitting the first-degree murder charge was cured. We overrule this assignment of error.

In his final assignment of error, defendant argues that the court erred in denying defendant's motion for dismissal after the verdict. We do not agree.

Though recognizing that case law does not support his position, defendant urges that we find error in the court's denial.

> In ruling on a motion to dismiss, the evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. Contradictions or discrepancies in the evidence are matters for the jury to resolve, and do not warrant dismissal of the case.
>
> Second-degree murder is the unlawful killing of a human being, with malice, but without

> premeditation and deliberation. The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice. Such a presumption is sufficient to withstand a motion to dismiss for insufficient evidence. The issue of whether the evidence is sufficient to rebut the presumption of malice in a homicide with a deadly weapon is then a jury question.

State v. Taylor, 155 N.C. App. 251, 265-66, 574 S.E.2d 58, 68 (2002), *cert. denied*, 357 N.C. 65, 579 S.E.2d 572 (2003) (internal citations and quotation marks omitted). Here, defendant's intentional use of a deadly weapon gave rise to a presumption that the killing was unlawful and that it was done with malice, which in turn supports the charge of second-degree murder. Defendant relies on his previous argument that the court erred in denying his motion to dismiss the charge of first-degree murder at the close of all evidence. As we have already determined that the court did not err in denying the motion to dismiss the first-degree murder charge, we overrule this assignment of error as well.

No error.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).