NO. COA06-473

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

STATE OF NORTH CAROLINA

v. Forsyth County
No. 02 CRS 61547

RICKY KENARD ROYSTER,
Defendant.

Appeal by defendant from a judgment dated 14 April 2005 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 7 February 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Tiare B. Smiley, for the State.

Leslie C. Rawls for defendant-appellant.

BRYANT, Judge.

Ricky Kenard Royster (defendant) appeals from a judgment dated 14 April 2005, and entered consistent with a jury verdict finding defendant guilty of first-degree murder. We find defendant received a fair trial, free from error.

Facts and Procedural History

On the morning of 10 October 2002, the body of Roselyn Dethrow was discovered at the edge of the woods at Old Town Park in Winston-Salem, North Carolina. The previous evening, defendant and his girlfriend, JoAnn Bizzell, had been interviewed at the park by

a police officer responding to a call reporting a suspicious vehicle.

Defendant's name had initially been brought to the attention of police officers investigating a missing person report regarding Roselyn Dethrow and made by her father on 9 October 2002. Ms. Dethrow's father had indicated to police that defendant was Ms. Dethrow's boyfriend, although their relationship had been troubled, and that defendant was the last person to have seen her the night she went missing. Officers contacted defendant on his cell phone on 10 October 2002 and he said he had only spoken on the phone to Ms. Dethrow a couple of nights before. Defendant agreed to come to the station to give further information and arrived fifteen minutes later. Ms. Dethrow's body was found minutes after defendant arrived.

During his interview with the investigating detectives, defendant admitted to killing Ms. Dethrow and calling Ms. Bizzell, asking her to help him dispose of the body. Ms. Bizzell was interviewed at the same time as defendant and told detectives she went to defendant's house on 8 October 2002. There, she found defendant crying and he admitted to her he had killed Ms. Dethrow. Defendant was arrested and subsequently indicted on the charge of first-degree murder.

Defendant was tried before a jury during the 21 March 2005 Criminal Session of Forsyth County Superior Court, the Honorable Ronald E. Spivey, presiding. On 11 April 2005, the jury returned a verdict finding defendant guilty of first-degree murder. After

a subsequent capital sentencing hearing, the jury found a single aggravating factor and sixteen mitigating factors, and recommended a sentence of life imprisonment without parole. The trial court entered judgment dated 14 April 2005, consistent with the jury verdict and sentencing recommendation, sentencing defendant to life imprisonment without parole. Defendant appeals.

Defendant raises the issues of whether the trial court erred in: (I) denying defendant's motion to suppress his statements made to the investigating detectives; (II) admitting evidence regarding the *in utero* fetus carried by Ms. Dethrow at the time of her death; and (III) excluding statements attributed to defendant concerning his state of mind.

I

Defendant first contends the trial court erred in denying defendant's motion to suppress his statements made to the investigating detectives. We disagree.

"*Miranda* warnings protect a defendant from coercive custodial interrogation by informing the defendant of his or her rights." *State v. Al-Bayyinah*, 359 N.C. 741, 749, 616 S.E.2d 500, 507 (2005), *cert. denied*, __ U.S. __, 164 L. Ed. 2d 528 (2006). "The proper inquiry for determining whether a person is 'in custody' for purposes of *Miranda* is 'based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement [to] the degree associated with a formal arrest.'" *State v. Barden*, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002) (quoting

State v. Buchanan, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001)), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). This Court "must therefore determine whether, based upon the trial court's findings of fact, a reasonable person in defendant's position would have believed that he was under arrest or was restrained in his movement to that significant degree." *State v. Garcia*, 358 N.C. 382, 396-97, 597 S.E.2d 724, 736-37 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). We review the "facts and circumstances together as a whole because the effect on a reasonable person is best discerned from context." *Id.* at 400, 597 S.E.2d at 738. In evaluating a trial court's ruling on a motion to suppress, "the trial court's findings of fact are binding on this Court if supported by the evidence, the conclusions are questions of law which are fully reviewable by this Court on appeal." *State v. Barber*, 335 N.C. 120, 129, 436 S.E.2d 106, 111 (1993), *cert. denied*, 512 U.S. 1239, 129 L. Ed. 2d 865 (1994).

In the case at hand, the trial court's findings of fact were supported by the following evidence. Defendant voluntarily went to the Winston-Salem Police Department at the request of Deputy Fleurette Phillips of the Forsyth County Sheriff's Office. Deputy Phillips had called defendant and sought to question him regarding the missing persons investigation underway concerning Ms. Dethrow. Upon arriving at the police station, defendant was told he was free to leave or wait for the detectives handling the investigation to interview him. Defendant remained in the lobby until Detectives Michael Rowe and Mark Smith of the Winston-Salem Police Department

arrived to interview him. Defendant was then taken to the interview room and left in the room with the door open. Defendant had not been arrested, had not been given any *Miranda* warnings and was not in custody at this time.

During the interview by Detectives Rowe and Smith, defendant was not restrained and was informed that he was free to leave at any time. The initial interview was not recorded, although the detectives took hand-written notes, and in the course of the interview defendant confessed to killing Ms. Dethrow. A recorded statement was subsequently taken from defendant during which defendant again confessed to killing Ms. Dethrow. Defendant had still not been placed under arrest and had not been given any *Miranda* warnings at the time he gave the recorded statement. After giving the recorded statement, defendant went to the restroom, accompanied by Detective Smith. While in the restroom defendant asked if he would be arrested. Defendant was told that decision was up to the district attorney. Shortly thereafter the detectives conferred with the district attorney and defendant was formally arrested.

Based upon a totality of the evidence, a reasonable person in defendant's position would not believe he was under arrest or that his freedom of movement was restrained to the degree of a formal arrest until he was escorted to the restroom. Defendant had been told that he was free to leave at any point and had been left in the interview room with the door open and unlocked several times. The detectives did not act in a manner indicating defendant was

under arrest until he was escorted to the restroom by Detective Smith. Further, defendant never asked to leave the premises; never gave any indication that he wished to leave; and never requested to speak with anyone. Thus, the trial court did not err in concluding that for the purposes of *Miranda*, defendant was not in custody during the time the statements were given. These assignments of error are overruled.

II

Defendant next contends the trial court erred in admitting evidence regarding the *in utero* fetus carried by Ms. Dethrow at the time of her death. Defendant specifically argues the trial court erred in admitting testimony describing the fetus, and in admitting evidence regarding the length of time it would take the fetus to die. Defendant asserts the trial court erred because the testimony was not relevant under Rule 401 of the North Carolina Rules of Evidence, and was also unduly prejudicial and should have been excluded under Rule 403. *See* N.C. Gen. Stat. §§ 8C-1, Rules 401, 403 (2005). We disagree.

"Rulings under North Carolina Rule of Evidence 403 are discretionary, and a trial court's decision on motions made pursuant to Rule 403 are binding on appeal, unless the dissatisfied party shows that the trial court abused its discretion." *State v. Chapman*, 359 N.C. 328, 348, 611 S.E.2d 794, 811 (2005). Our Supreme Court has also held that

> [e]vidence is relevant if it has any logical tendency to prove a fact at issue in a case, and in a criminal case every circumstance calculated to throw any light upon the

> supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue[.]

State v. Arnold, 284 N.C. 41, 47-48, 199 S.E.2d 423, 427 (1973) (internal citations omitted). Additionally, this Court has held that

> Rule 401 sets a standard to which trial judges must adhere in determining whether proffered evidence is relevant; at the same time, this standard gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has *any* logical tendency to prove any fact that is of consequence. Thus, even though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.

State v. Wallace, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (internal citations omitted), *disc. rev. denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

We first note that no evidence was admitted concerning the length of time it would take for the *in utero* fetus to die. At trial, the State did ask the Medical Examiner who conducted the autopsy on Ms. Dethrow "would the child have died immediately?" Defendant objected to this question and was overruled by the trial court. However, the Medical Examiner responded, "I don't know if there are any studies that are showing how long a fetus can survive if the mother is dead. So I don't know if I could accurately answer that." Defendant again objected and moved to strike the Medical Examiner's response, but was overruled by the trial court because

no opinion was stated as to the State's question. As no evidence was admitted concerning the length of time it would take for the *in utero* fetus to die, defendant cannot show he was prejudiced by the trial court's decision to overrule his objections on this issue.

Defendant's argument as to whether the trial court erred in admitting testimony describing the *in utero* fetus is similarly misplaced. At trial, the State elicited testimony from the Medical Examiner as to the height and weight of the fetus and the fact that it appeared to be otherwise normal. These autopsy facts are relevant to motive. In his confession to the investigating detectives, defendant admitted he strangled Ms. Dethrow to death during an argument with her wherein she threatened to tell his church about their sexual relationship and that she was pregnant out of wedlock. Further, the limited testimony elicited by the State concerning the *in utero* fetus was not unduly prejudicial to defendant. *See State v. Cagle*, 346 N.C. 497, 506, 488 S.E.2d 535, 542 ("Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree."), *cert. denied*, 522 U.S. 1032, 139 L. Ed. 2d 614 (1997). Thus, the trial court did not err in admitting this testimony. These assignments of error are overruled.

III

Defendant lastly contends the trial court erred in excluding statements attributed to defendant concerning his state of mind. We disagree. Rule 803(3) of the North Carolina Rules of Evidence allows for the admission of

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

N.C. Gen. Stat. § 8C-1, Rule 803(3) (2005). The failure of a trial court to admit such evidence, however, will not result in the granting of a new trial absent a showing by defendant "'that a reasonable possibility exists that a different result would have been reached absent the error.'" *State v. Smith*, 357 N.C. 604, 610, 588 S.E.2d 453, 458 (2003) (quoting *State v. Weeks*, 322 N.C. 152, 170, 367 S.E.2d 895, 906 (1988)). Further, "[s]tatements that merely recount a factual event are not admissible under Rule 803(3) because such facts can be proven with better evidence, such as the in-court testimony of an eyewitness." *Smith*, 357 N.C. at 609, 588 S.E.2d at 457.

Defendant argues the trial court erred in excluding four statements: (1) a statement by defendant's co-worker regarding an April 2002 incident where defendant was upset after an argument with Ms. Dethrow; (2) a statement by the barber of both defendant and Ms. Dethrow regarding defendant's desire that Ms. Dethrow not move in with him; (3) a statement by Ms. Dethrow's attorney and long-time friend regarding defendant's telling her that Ms. Dethrow came to his house unwanted and repeatedly called him; and (4) defendant's statements in a Winston-Salem Police Incident Report in which he said Ms. Dethrow kept coming to his residence after he

told her to stay away. The last three statements are merely statements of fact which are not admissible under Rule 803.

The first statement, however, does address defendant's state of mind regarding an argument defendant had with Ms. Dethrow five months prior to Ms. Dethrow's murder, and may have been admissible under Rule 803. However, given that testimony concerning defendant's troubled relationship with Ms. Dethrow came in through other witnesses, defendant cannot show that a reasonable possibility exists that a different result would have been reached had the first statement been admitted. This assignment of error is overruled.

No error.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).