NO. COA06-6

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v. Davidson County
00 CRS 11820-25

JUSTIN JAMEL MCDONALD,
Defendant.

Appeal by defendant from a judgment entered 27 August 2002 by Judge Richard L. Doughton in Davidson County Superior Court. Heard in the Court of Appeals 20 September 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

David Belser for the defendant.

BRYANT, Judge.

Justin Jamel McDonald (defendant) appeals from a 27 August 2002 judgment consistent with a jury verdict finding him guilty of three counts of first degree murder and two counts of first degree kidnapping. Defendant was sentenced to three terms of life without parole for the first degree murder convictions and one term of 133 to 169 months for one of the first degree kidnapping convictions, to run consecutively.

Facts and Procedural History

In February 1999, Robin and Kimberly Rhyne and their two-year-old son, Hunter Rhyne, were found murdered near their home in

Statesville, North Carolina. Prior to their murders, Robin and Kimberly began smoking crack cocaine. They received their supply from Deek Lackey. Lackey sold crack for defendant and defendant's roommate, Russell McIntosh.

On 18 January 1999, Robin met with defendant, intending to sell defendant Robin's 1988 Porsche. Defendant, Brian McDonald (defendant's cousin) and Lackey drove to Robin's residence. Once there, defendant and Robin got in the Porsche and drove to the location where defendant and McIntosh sold and kept drugs (Mindon Place). Defendant's cousin and Lackey followed in a separate vehicle. While at Mindon Place, defendant was seen walking over to a parked, inoperable vehicle which was identified as a storage place for drugs and firearms. When defendant and Robin left Mindon Place, defendant was seen wearing a black leather jacket that he had borrowed from Lackey two days earlier. Shortly after leaving Mindon Place, defendant was seen operating Robin's Porsche alone. Defendant went to the home of Takesha "Tasha" Reid and gave her a ride in the Porsche. While seated in the Porsche, Tasha saw the black leather jacket on the back seat and asked if she could wear it. However, defendant stated he had "thrown up" on the jacket earlier that evening and did not allow Tasha to wear it. During the early morning hours of 19 January 1999, a family living near Mindon Place testified defendant came to their house, wearing a black leather jacket, and woke them up in order to use their bathroom. The school-aged daughter testified that she observed

defendant wash blood off his hands through a crack in the bathroom door.

Also on 19 January 1999, Dale Jordan, a friend of the Rhyne family had observed defendant driving Robin's Porsche. In speaking with Kim Rhyne at the Rhyne residence, Jordan learned that Robin had not yet returned after leaving with defendant the previous day. While Jordan was at the Rhyne residence, Kim received a call and demanded the caller tell her where her husband was or she would "tell the police where every crack house in town was." After the phone call, Lackey arrived at the Rhyne residence and Jordan and Lackey left around 10:00 p.m. to search for Robin. When Jordan and Lackey returned to the Rhyne residence, Kim's car was gone and no one was home.

On 15 March 1999 defendant was indicted for two counts of first degree kidnapping, three counts of first degree murder and one count of armed robbery. In November 1999, the trial court declared a mistrial, as the jury was unable to reach a unanimous verdict. The trial court also granted defendant's motion to dismiss the indictment for armed robbery. On 11 July 2002, a second trial commenced in Davidson County Superior Court. On 27 August 2002, a jury found defendant guilty of first degree murder of Robin Rhyne, based on premeditation and deliberation; first degree murder of Kimberly Rhyne, based on premeditation and deliberation and the felony murder rule; first degree murder of Hunter Rhyne based on the felony murder rule; and guilty of two

counts of first degree kidnapping of Kimberly and Hunter Rhyne. Defendant appeals.

Defendant raises fourteen issues on appeal summarized as follows: whether the trial court erred in (I) denying defendant's motions to dismiss the first degree murder charges; (II) denying defendant's motions to dismiss the kidnapping charges; (III) giving the jury instruction on acting in concert as to Kim and Hunter Rhyne; (IV) admitting the photographs of Robin's grave; (V) limiting the cross-examination of a jailhouse informant; (VI) admitting all expert testimony; and (VII) denying the jury's request for a transcript.

I. Motions to Dismiss First Degree Murder Charges

Defendant first contends the trial court erred in denying his motions to dismiss first degree murder charges as to Robin, Kim and Hunter Rhyne. When considering a motion to dismiss, the trial court must "determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996).

> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider the evidence unfavorable to the State, or determine any witness' credibility.

State v. Robinson, 355 N.C. 320, 336-37, 561 S.E.2d 245, 256, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002).

First degree murder is the unlawful killing of another with malice, premeditation and deliberation. *State v. Misenheimer*, 304 N.C. 108, 113-14, 282 S.E.2d 791, 795-96 (1981). When a killing occurs intentionally and with a deadly weapon, two presumptions arise: (1) the killing was unlawful; and (2) the killing was done with malice. *State v. Faust*, 254 N.C. 101, 106, 118 S.E.2d 769, 772, *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961). "[P]remeditation and deliberation are mental processes and ordinarily are not susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence. *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 822-23 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733, *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

Evidence was presented at trial tending to establish that defendant murdered Robin. Robin died from four contact gunshot wounds to the head and he suffered injuries consistent with defensive wounds to the hand/arm. Defendant was the last person seen with Robin in Robin's car. Defendant was driving Robin's car after Robin disappeared. Robin's car was recovered by the police and contained Robin's blood and defendant's bloody palm print. Also found was a black leather jacket worn by defendant with Robin's blood on it. Defendant was observed washing blood off his hands the night Robin was missing. The murder weapon was found at

an apartment where defendant lived and the victim's buried body was found at defendant's former residence. While in jail, defendant told jailhouse inmates of his involvement in the murder.

Evidence was presented that defendant admitted that he and McIntosh abducted Kimberly and Hunter from their home. They were taken to a remote wooded area where McIntosh had formerly resided and were executed. Kim's body was found wearing only socks and with bruises, scrapes and cuts on her feet, legs and knees. She died from nine gunshot wounds, seven to the head and face. Hunter suffered a single gunshot wound to the back of his head. The Rhyne residence was found disheveled, the phone line had been cut, and a number of personal possessions and items for Hunter remained in the home. Further evidence showed defendant and McIntosh were drug dealers and Kim had threatened to provide the police with information of drug dealing locations. Viewing the evidence in the light most favorable to the State the trial court did not err in denying defendant's motion to dismiss and submitting the first degree murder charge as to all victims to the jury. These three assignments of error are overruled.

II. Motions to Dismiss Kidnapping Charges

Defendant argues the trial court erred in denying defendant's motion to dismiss the kidnapping charges as to Kim and Hunter Rhyne. We disagree.

Kidnapping is the unlawful confinement, restraint, or removal of a person from one place to another for the purpose of: (1) holding that person for a ransom or as a hostage, (2) facilitating

the commission of a felony or facilitating flight of any person following the commission of a felony, (3) doing serious bodily harm to or terrorizing the person, or (4) holding that person in involuntary servitude. N.C. Gen. Stat. § 14-39(a) (2005). Kidnapping is in the first degree when the victim is not released in a safe place or is seriously injured or sexually assaulted during the commission of the kidnapping. *State v. Bell*, 359 N.C. 1, 25, 603 S.E.2d 93, 110 (2004), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005).

The State presented evidence that defendant and McIntosh lived together and dealt drugs together, that defendant had murdered Kim's husband and that Kim threatened to inform police about drug dealing in the area unless she found her husband. Witnesses testified to defendant's statements regarding breaking into the Rhyne home, abducting Kim and Hunter, taking them into the woods and shooting them. The murder weapon was discovered in McIntosh's apartment. Viewed in the light most favorable to the State, the evidence was substantial as it was relevant and adequate to convince a reasonable mind that Kim and Hunter were victims of first degree kidnapping. The trial court did not err in denying defendant's motion to dismiss. These assignments of error are overruled.

III. Acting in Concert Jury Instruction

Defendant contends the trial court erred in giving the jury instruction on acting in concert as to the kidnapping and murder of Kim and Hunter Rhyne. We disagree. Jury instructions, viewed in

their entirety, are sufficient where the law of the case is presented in such a manner as to not mislead the jury. *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005).

> Before the court can instruct the jury on the doctrine of acting in concert, the State must present evidence tending to show two factors: (1) that defendant was present at the scene of the crime, and (2) that he acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Robinson, 83 N.C. App. 146, 148, 349 S.E.2d 317, 319 (1986). The doctrine of acting in concert occurs when "two persons join in a common purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof." *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *sentence vacated on other grounds by*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972).

Defendant has failed to show how the jury was misled by receiving the acting in concert instruction. Based on the State's evidence showing the relationship between defendant and McIntosh, the location where they had lived and dealt drugs together, and evidence that defendant murdered Robin with the weapon found in McIntosh's apartment, the acting in concert jury instruction was proper. This assignment of error is overruled.

IV. Admission of Robin's Grave Photographs

Defendant argues the trial court erred in admitting the photographs of Robin's grave. For the reasons below, we find no error.

A trial court's ruling under Rule 403 of the North Carolina Rules of Evidence is reviewed for abuse of discretion, which "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). Rule 403, states that, "[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 (2005). "Unfair prejudice" for purposes of the Rule "means an undue tendency to suggest a decision on an improper basis, usually an emotional one." *Hennis*, 323 N.C. at 283, 372 S.E.2d at 526 (holding the trial court had erred in allowing the State to introduce thirty-five photographs taken at a murder scene and autopsy, many of which were repetitive in content; to make duplicate slides of these photos and project them at trial onto a large screen located just above the defendant's head; and to then distribute the actual photos themselves to the jury just before the State rested its case, in a slow, silent process that took a full hour).

At trial, the State offered a series of photographs of the grave site where the body of Robin Rhyne was discovered. The photographs were admitted as illustrative evidence to assist the testimony of an SBI Agent[1] and were used to illustrate the area where the body was located, the clothing, a driver's license, a check card, and other items important in identifying the body and determining when the murder took place. *See State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978) (Photographs may be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of first degree murder.).

Defendant alleges the photographs are excessive and unduly prejudicial. However, at trial defendant objected to only one photograph as being repetitious. Further defendant has included no photographs in the record on appeal. Defendant has failed to show the trial court did not properly exercise its discretion in admitting the photograph for illustrative purposes.[2] Additionally, there is no showing of abuse of discretion in admitting all of the photographs as illustrative of the SBI Agent's testimony. *See State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000)

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[1]Photographs are usually competent to explain or illustrate anything that is competent for a witness to describe in words. *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988).

[2]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. *State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988).

(quotations omitted) (no abuse of discretion admitting fifty-one photographs which illustrated the "condition of the victim's body, its location, and the crime scene [and] corroborated defendant's confession in that they demonstrated that the victim was attacked in his bedroom, that he fell to the floor with his head toward the closet, that he was stabbed while on the floor, and that his neck was cut with a saw while on the floor."), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001). This assignment of error is overruled.

V. Cross-Examination of Jailhouse Informant

Defendant argues the trial court erred in limiting cross-examination of a jailhouse informant. We disagree. "The trial judge has the duty to keep cross-examination within reasonable bounds, and we see no abuse of discretion or error prejudicial to defendant." *State v. Little*, 27 N.C. App. 467, 474, 219 S.E.2d 494, 498, *disc. review denied*, 288 N.C. 732, 220 S.E.2d 621 (1975).

The State's witness, Michael Camp, testified to statements made by defendant while they were incarcerated together in the Davidson County jail in 2001. On cross-examination, defendant sought to elicit testimony from Camp as to statements made two years earlier while they were incarcerated in Charlotte. However, the trial court ruled that the State had not opened the door to such statements and therefore defendant was not permitted to cross-examine Camp regarding the 1999 statements. *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988); *State v. Lovin*, 339 N.C. 695, 454 S.E.2d 229 (1995); *State v. Vick*, 341 N.C. 569, 461 S.E.2d 655

(1995). The statement that defendant sought to introduce was not part of the same verbal transaction as that testified to on direct examination. *Vick*, 341 N.C. at 579, 461 S.E.2d at 660. Defendant was not seeking to cross examine Mr. Camp in order to introduce parts of the 2001 statement testified to on direct, but rather sought to introduce a statement made by defendant which was part of another discussion at a different time that had not been elicited by the State. *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296, *death sentence vacated*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976). Defendant was not entitled to introduce the earlier statements made in Charlotte in 1999 since the State had not opened the door for such testimony. *Weeks*, 322 N.C. at 167, 367 S.E.2d at 904. Defendant has failed to show an abuse of discretion by the trial court in limiting defendant's cross-examination of Camp. This assignment of error is overruled.

VI. Expert Evidence Admitted

Defendant argues the trial court erred in admitting all expert testimony introduced at trial.[3] Defendant contends the trial court failed to make findings as to the reliability and methodology of each expert and therefore, the evidence testified to by each expert was not properly admitted. Defendant's arguments are misplaced.

The trial court followed North Carolina Rule 702 of the Rules of Evidence in accepting each expert and determined: "(1) whether

[3]Expert evidence introduced at trial included testimony as to fingerprinting; forensic chemistry, fiber and hair analysis; forensic serology, blood fluid and bloodstain pattern; and molecular genetics and DNA analysis.

the expert's proffered method of proof [was] reliable, (2) whether the witness presenting the evidence qualifie[d] as an expert in that area, and (3) whether the evidence [was] relevant." *State v. Morgan*, 359 N.C. 131, 160, 604 S.E.2d 886, 903-04 (2004), *cert. denied*, ___U.S.___, 163 L. Ed. 2d 79 (2005); *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686-87 (2004); *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995). "[R]ulings under Rule 702 will not be reversed on appeal absent an abuse of discretion." *Id.* at 160, 604 S.E.2d at 904, *accord State v. Anderson*, ___ N.C. App. ___, 624 S.E.2d 393, 397 (2006).

A review of the transcript reveals the trial court considered each expert's reliability based on their individual qualifications and expertise. Defendant has failed to show an abuse of discretion by the trial court. This assignment of error is overruled.

VII. Jury Request for Transcript

Defendant argues the trial court erred in denying the jury's request for a transcript. Defendant contends the trial court abused its discretion by making no further inquiry regarding the jury's request to see the transcript. We disagree.

"Where the trial court clearly indicates it is exercising discretion, a decision to deny a jury request will be upheld." *State v. White*, 163 N.C. App. 765, 770, 594 S.E.2d 450, 453 (2004). During deliberations of the guilt/innocence phase of the trial, the trial court received a note from the jury requesting transcripts. The trial court denied the request and the jury foreman was informed by the trial court that it was the duty of each juror to

recall and remember the evidence that was submitted and to rely on their memories. Our review of the record reveals no indication that the trial court failed to exercise its discretion in denying the jury's request. *See* N.C. Gen. Stat. §15A-1233(a) (2005) ("If the jury after retiring for deliberation requests a review of certain testimony . . . *[t]he judge in his discretion . . . may* direct that requested parts of the testimony be read to the jury [.]") (emphasis added). This assignment of error is overruled.

No error.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).