NO. COA08-1370

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

STATE OF NORTH CAROLINA

v. Surry County
Nos. 04 CRS 52862,
DONALD R. BROWN 07 CRS 2826

Appeal by defendant from judgment entered 16 May 2008 by Judge R. Stuart Albright in Surry County Superior Court. Heard in the Court of Appeals 21 May 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Jill Ledford Cheek, for the State.

Russell J. Hollers, III for defendant-appellant.

BRYANT, Judge.

Donald R. Brown (defendant) appeals from judgment and conviction entered upon jury verdicts finding him guilty of first-degree murder and first-degree rape. We find no prejudicial error.

Facts

The victim, Carolyn Brown, was married to defendant. The couple lived in Surry County beside the residence of defendant's parents. Carolyn was a diabetic, and due to a debilitating stroke, dragged her left leg when she walked and carried her left arm curled to her chest. On 14 August 2004, around 6:30 p.m., Carolyn

drove her niece to the movie theater in Winston-Salem to watch a movie. After the movie ended, Carolyn returned home around 12:30 a.m.

The next morning, Carolyn was found dead, lying naked in her bed. An autopsy revealed Carolyn had been beaten to death. She suffered blunt force trauma to the head and neck, which resulted in abrasions, contusions, and hemorrhages. Carolyn also suffered multiple injuries including broken ribs on both sides of her body, bruises, and contusions over much of her body. She also suffered abrasions around her vagina and defendant's sperm was found inside her vagina and rectum.

The defendant testified that on 14 August 2004, he began drinking around 10:00 a.m. and consumed approximately forty cans of beer and five rocks of crack cocaine throughout the course of the day. Defendant became upset when Carolyn arrived home late, and testified he and Carolyn began to "argue," which escalated into a fight. After their fight, the couple went to bed and had intercourse. The next morning, defendant tried to wake Carolyn but realized something was wrong when she was non-responsive. When law enforcement officers arrived at the home, defendant made incriminating statements that he had unintentionally killed Carolyn.

Defendant presented the testimony of John Frank Warren, III, a psychologist who testified that if defendant had in fact consumed as much alcohol and crack cocaine as defendant contended, defendant would have been incapable of forming the requisite intent to kill

Carolyn. Dr. Warren, during cross-examination, indicated that defendant would not have been able to achieve an erection to have intercourse with Carolyn had he actually consumed the amount of alcohol and drugs defendant claimed he consumed.

On 16 May 2008, a jury found defendant guilty of one count of first-degree murder and one count of first-degree rape. Following conviction, defendant was sentenced to life imprisonment without parole on the charge of first-degree murder and a consecutive sentence of 384 to 470 months imprisonment on the charge of first-degree rape. Defendant appeals.

On appeal, defendant contends: (I) the trial court committed plain error by allowing admission of testimony by defendant's probation officer; (II) the trial court committed plain error by allowing cross-examination of defendant regarding his prior convictions; (III) the trial court erred by not intervening *ex mero motu* during the prosecution's closing argument; (IV) the trial court committed plain error by allowing into evidence photographs depicting the crime scene and the victim; and (V) the trial court erred by denying defendant's motion to dismiss the "short-form" murder indictment.

I

Defendant argues the trial court committed plain error by allowing defendant's probation officer to testify that defendant was on probation for assault, had pending assault charges, and

spoke with the probation officer about assaulting women. We disagree.

"Plain error is error so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Holbrook*, 137 N.C. App. 766, 767, 529 S.E.2d 510, 511 (2000) (citations and internal quotations omitted).

> The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotations and citations omitted). "[D]efendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

At trial, Jim Matty, defendant's probation officer, testified without objection that defendant was on probation for assault at the time of the murder, defendant was facing pending charges for previous assaults against the victim, and that he and defendant

discussed that defendant should not hit women and defendant agreed that hitting women "wasn't a good thing." Defendant contends Mr. Matty's testimony was inadmissible under Evidence Rules 403 and 404(b) because it was improper and prejudicial character evidence.

Rule 404(b)

Pursuant to North Carolina Rules of Evidence, Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith," however, such evidence "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007).

> Rule 404(b) state[s] a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Syriani, 333 N.C. 350, 377, 428 S.E.2d 118, 132 (1993) (citation and emphasis omitted).

In *Syriani*, our Supreme Court addressed an argument identical to that proffered by defendant. In ruling on whether the trial court committed plain error by admitting testimony regarding the defendant's prior bad acts towards his wife, the Court reasoned:

> "'When a husband is charged with murdering his wife, the State may introduce evidence covering the entire period of his married life to show malice, intent and ill will towards the victim.'" *State v. Lynch*, 327 N.C. 210,

> 219, 393 S.E.2d 811, 816 (1990) (quoting *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985)). Specifically, evidence of frequent quarrels, separations, reconciliations and ill-treatment is admissible as bearing on intent, malice, motive, premeditation and deliberation. *State v. Moore*, 275 N.C. 198, 206-07, 166 S.E.2d 652, 658 (1969), *disapproved on other grounds by State v. Young*, 324 N.C. 489, 492, 380 S.E.2d 94, 96 (1989). Further, threats against a victim have "always been freely admitted to identify [the defendant] as the killer, disprove accident or justification, and to show premeditation and deliberation." *Braswell*, 312 N.C. at 561, 324 S.E.2d at 247. Further still, remoteness "generally affects only the weight to be given ... evidence, not its admissibility." *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991); *cf. State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986) (remoteness relevant to admissibility of prior bad acts to show common scheme or plan). "'In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of his feelings.'" *Moore*, 275 N.C. at 207, 166 S.E.2d at 658 (quoting *State v. Rash*, 34 N.C. 382, 384 (1851)).

Id. at 377, 428 S.E.2d at 132.

Following the reasoning in *Syriani*, Mr. Matty's testimony regarding the basis of defendant's probation and about other bad acts directed toward defendant's wife was admissible under Rule 404(b) to prove lack of accident, intent, malice, premeditation, and deliberation - all of which were issues disputed by defendant.

Rule 403

Alternatively, defendant contends Mr. Matty's testimony should have been excluded because the probative value was far outweighed by the risk of unfair prejudice. Rule 403 provides that 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 (2007). "Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court." *State v. Cotton*, 318 N.C. 663, 668, 351 S.E.2d 277, 280 (1987). "Abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *Syriani*, 333 N.C. at 379, 428 S.E.2d at 133. We conclude the trial court did not abuse its discretion by allowing the testimony about defendant being on probation for assault and defendant's prior assault towards the victim. The evidence was admissible to rebut defendant's assertion that he killed his wife by accident.

Even had the admission of Mr. Matty's testimony been in error, defendant has failed to establish that there is a reasonable possibility that a different result would have been reached. Mr. Matty's testimony was elicited in part to refute defendant's theory that he was too intoxicated at the time of the incident to form the specific intent to kill the victim. Mr. Matty testified he visited defendant on the evening of the incident to ensure that defendant was abiding by the terms of his probation. Mr. Matty also testified that he checked defendant to ensure that he had not been using drugs or consuming alcohol - both of which would have been

violations of defendant's probation. Mr. Matty further testified that defendant did not display any indication on that evening that he was impaired by alcohol or drugs.

The State presented overwhelming evidence refuting defendant's theory that he was so intoxicated at the time of the incident that he was unable to form specific intent. In addition to the testimony of Mr. Matty, the State also presented the testimony of Anthony Kirsch, one of the first emergency responders to arrive at defendant's home on Sunday morning. Mr. Kirsch testified he had observed intoxicated individuals on several occasions and if defendant had actually consumed forty beers and five rocks of crack cocaine Saturday evening, Mr. Kirsch would have recognized that defendant was intoxicated Sunday morning. Further, defense witness Dr. Warren testified that if defendant had in fact consumed the amount of alcohol and cocaine he claimed, defendant would not have been able to achieve an erection to have intercourse with the victim. This testimony was contrary to defendant's testimony. Finally, the State presented overwhelming evidence of defendant's prior assaults against the victim, as well as the brutal nature of the injuries defendant inflicted upon the victim. Given the vast amount of evidence presented by the State refuting defendant's contention that he was unable to form specific intent, defendant has failed to establish that a different result would have been reached at trial had Mr. Matty's testimony not been admitted. This assignment of error is overruled.

II

Defendant next argues the trial court committed plain error by allowing the prosecution to cross-examine defendant regarding the underlying facts surrounding assault convictions and regarding other convictions more than ten years old. Specifically, defendant contends the State elicited the testimony to establish defendant's bad character and to show that he acted in conformity therewith. We disagree.

Prior Assaults Upon Victim

Defendant contends the trial court committed plain error by allowing the prosecutor to question defendant about the underlying facts surrounding his prior convictions. However, as we have already discussed, evidence of defendant's prior attacks on the victim were admissible under Rule 404(b) and were not excluded by Rule 403. *See Syriani*, 333 N.C. at 378, 428 S.E.2d at 132 (holding evidence of testimony about "defendant's frequent arguments with, violent acts toward, separations from, reconciliations with, and threats to his wife were admissible under Rule 404(b) to prove issues he disputed – that is, lack of accident, intent, malice, premeditation and deliberation . . .").

Other Prior Assault

Defendant also argues the trial court committed plain error by allowing the prosecutor to question defendant on cross-examination about a prior assault conviction against John Bellows. When a defendant chooses to testify, evidence of prior convictions is admissible for the purpose of attacking his credibility. N.C. Gen. Stat. § 8C-1, Rule 609(a) (2007). Rule 609(a) provides: "For the

purpose of attacking the credibility of a witness, evidence that he has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." *Id.* This inquiry is limited to the name of the crime, the time and place of the conviction, and the punishment imposed. *State v. Lynch*, 334 N.C. 402, 409, 432 S.E.2d 349, 352 (1993). "[E]vidence which is otherwise inadmissible is admissible to explain or rebut evidence introduced by defendant." *State v. Smith*, 155 N.C. App. 500, 509, 573 S.E.2d 618, 624 (2002) (*quoting State v. O'Hanlan*, 153 N.C. App. 546, 561, 570 S.E.2d 751, 761 (2002)). Defendant opened the door to impeachment of his testimony that he loved his wife and that he was "good" to her. Defendant also opened the door to impeachment by testifying in response to testimony by the State's witnesses about physical altercations that occurred between him and other individuals. The evidence of defendant's prior conviction for assault against Mr. Bellows was admissible for the purpose of impeaching defendant's credibility. Therefore, the trial court did not err by allowing the testimony.

Older Convictions

Defendant also argues the trial court committed plain error by allowing the prosecution to cross-examine defendant about convictions that were more than ten years old. "When more than ten years have passed after a conviction, evidence of the conviction is inadmissible unless the court determines, in the interests of justice, that the probative value of the conviction supported by

specific facts and circumstances substantially outweighs its prejudicial effect." *State v. Muhammad*, 186 N.C. App. 355, 362-63, 651 S.E.2d 569, 574 (2007) (quotations omitted). "[T]he trial court must make findings as to the specific facts and circumstances which demonstrate the probative value outweighs the prejudicial effect." *State v. Hensley*, 77 N.C. App. 192, 195, 334 S.E.2d 783, 785 (1985); *see also State v. Shelly*, 176 N.C. App. 575, 581, 627 S.E.2d 287, 294 (2006) (requiring the court to make specific findings showing the probative value outweighs the prejudicial effect of evidence of convictions that are more than ten years old).

In the present case, the trial court failed to make findings regarding the probative value and prejudicial effect of defendant's convictions that were older than ten years. However, because defendant failed to raise this objection at trial, defendant has the burden of showing he was prejudiced by this evidence. *See Shelly*, 176 N.C. App. 575, 584, 627 S.E.2d 287, 295 (2006) ("even if the trial judge's findings on a challenge to the admissibility of prior conviction evidence are found to be inadequate under Rule 609(b), Defendant would be entitled to a new trial only if the admission of such evidence unfairly prejudiced his defense."). Given the overwhelming evidence against defendant of other attacks and assaults against the victim, defendant cannot establish that there is a reasonable probability a different result would have been reached at trial had this evidence not been admitted. Defendant has failed to show how he was prejudiced by this

evidence. *See State v. Hensley*, 77 N.C. App. 192, 196, 334 S.E.2d 783, 785 (1985) (no reversible error when defendant was properly impeached by seven other convictions before his 13-year-old conviction was improperly introduced since the inclusion "could not have appreciably worsened the jury's view of his credibility"), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986). Therefore, this assignment of error is overruled.

III

Defendant next argues the trial court erred by not intervening *ex mero motu* during the prosecutor's closing argument. Defendant concedes that because of his failure to object to the closing argument at trial the standard of review is "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107 (2002) (citations omitted).

"In order to carry this burden, defendant must show that the prosecutor's comments so infected the trial that they rendered his conviction fundamentally unfair. Moreover, the comments must be viewed in the context in which they were made and in light of the overall factual circumstances to which they referred." *State v. Call*, 349 N.C. 382, 420, 508 S.E.2d 496, 519 (1998) (citations omitted). "Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Wiley*,

355 N.C. 592, 620, 565 S.E.2d 22, 42 (2002) (citations and internal quotations omitted).

Defendant first contends by this assignment of error that the prosecutor "denigrated [defendant]'s expert witness [Dr. Warren]" by suggesting that Dr. Warren thought he would tell the "dumb" jurors of Surry County "what specific intent is about." Defendant contends this argument was improper because it referred to matters outside of the record. Defendant also contends the prosecution's argument that "they" - being defendant and his witnesses - were lying was grossly improper and such argument was the prosecutor's assertion of his opinion that the witnesses were lying. Finally, defendant contends the statement at the close of the prosecution's argument that "somebody ought to do something about crime in Surry County" was a request for the jury to find defendant guilty for the purposes of generally deterring crime.

Having thoroughly reviewed the arguments in context, we determine that the prosecutor properly argued the facts or reasonable inferences derived from the facts. Further, the prosecutor's assertion that defendant and his witnesses were lying, although improper, did not so infect defendant's trial with unfairness that the conviction was rendered fundamentally unfair. *See State v. Gell*, 351 N.C. 192, 211, 524 S.E.2d 332, 345 (2000) (holding prosecutor calling witness a liar was improper but did not establish the conviction was fundamentally unfair and the trial court was not required to intervene *ex mero motu*).

Finally, the prosecution's closing statement that "somebody ought to do something about crime in Surry County" was not grossly improper. In *State v. Barrett*, 343 N.C. 164, 180, 469 S.E.2d 888, 897 (1996), the prosecution made a similar argument that "somebody ought to do something about [crime]." Our Supreme Court held the prosecution's statements were a "comment[] on the seriousness of the crime and the importance of the jury's duty." *Id.* at 181. 469 S.E.2d at 898. The Court stated, "[w]e have previously held that the prosecutor is allowed to argue the seriousness of the crime," and concluded that the prosecutor's comments were not grossly improper. *Id.*

In the instant case, as in *Barrett*, the prosecutor's comment to the jury emphasized the seriousness of the crime and the importance of the jury's duty. Having carefully reviewed the record, we can not say that the prosecutor's comments were grossly improper and therefore the trial court did not err by failing to intervene *ex mero motu*. This assignment of error is overruled.

IV

Defendant next contends the trial court committed plain error by admitting twenty-eight photos of the crime scene and autopsy. As stated previously, "[p]lain error is error so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *Holbrook*, 137 N.C. App. at 767, 529 S.E.2d at 511 (2000) (internal quotations omitted). After carefully reviewing the

evidence in the record, we conclude defendant has failed to meet his burden.

In *State v. Chapman*, 359 N.C. 328, 611 S.E.2d 794 (2005), our Supreme Court discussed the admission of photographs:

> 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. 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. In the past, this Court has affirmed a trial court's admission of autopsy photographs which corroborated the cause of death and admission of crime scene photographs which show the location and circumstances of death.

Id. at 350, 611 S.E.2d at 812-13 (internal citations and quotations omitted). In the instant case, the admitted photographs illustrated the victim's injuries and the cause of the victim's death. The record shows that the photographs were not unnecessarily duplicative and were not admitted for the sole purpose of inciting the passion of the jury. Therefore, the trial court did not err in admitting the photos. Defendant has failed to establish plain error. This assignment of error is overruled.

V

In his final argument, defendant contends the trial court erred by entering judgment on the basis of a "short form" murder indictment because the indictment did not allege each of the elements of first-degree murder. However, defendant concedes that our Supreme Court has upheld the constitutionality of short-form

indictments, but requests this Court reconsider the issue. See *State v. Mitchell*, 353 N.C. 309, 328-29, 543 S.E.2d 830, 842 (2001) (holding short form indictment alleges all necessary elements of first-degree murder). Defendant has neither advanced new authority nor new arguments in support of his contentions. Therefore, this assignment of error is overruled.

For the foregoing reasons, we find no prejudicial error.

NO PREJUDICIAL ERROR

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).