NO. COA09-1546

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. Onslow County
No. 07 CRS 52556

MICHAEL ANGELO WOLFE,
Defendant.

Appeal by defendant from judgment entered 2 June 2009 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 12 May 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Edwin W. Welch, for the State.

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

HUNTER, Robert C., Judge.

Michael Angelo Wolfe ("defendant") appeals from a judgment entered 2 June 2009 after a jury found him guilty of first degree murder in connection with the death of Lakkysha Glover ("Glover"). After careful review, we find no error.

Background

The evidence at trial tended to establish the following facts: At the time of her death in March 2007, Glover lived with defendant in an apartment in Jacksonville, North Carolina along with their newborn baby, K.W., and Glover's three-year-old daughter, C.S.

According to Valerie Stevens ("Stevens"), C.S.'s grandmother, defendant and Glover seemed to have a good relationship. Michelle Bruinton ("Bruinton"), a friend of Glover's, testified at trial that when she was questioned by a detective about Glover's relationship with defendant, she stated that the two had a good relationship. However, Katherine Slater ("Slater"), a co-worker of Glover's, testified that Glover told her that "things were not good and that she planned to ask [defendant] to move out after the baby was born, if things did not change." Another co-worker, Lisa Weidner ("Weidner"), testified that Glover told her that "things weren't going well in the relationship and, basically, that she was done and she was going to be asking [defendant] . . . to move out the weekend coming up[,]" which was 10 March 2007.

On 7 March 2007, at 4:20 a.m., Glover received a voice mail message from an unidentified person with a low pitched muffled voice. The voice mail was not played for the jury; however, Detective Len Condry ("Detective Condry"), who listened to the recording multiple times, testified regarding its contents. Detective Condry testified that the message contained "a lot of profanity[.]" Additionally, there was "a comment about [Glover's] boyfriend"; "a comment about something being owed"; and Glover's brother Charles Glover ("Charles") was mentioned in it. Detective Condry stated: "I have a very difficult time understanding what this message says."

On 8 March 2007, defendant filed a report with the Jacksonville Police Department in which he claimed that he was

attacked at a local carwash. The assailant pressed something against the back of his head and stated, "ain't nobody want to . . . rob [you] . . . tell Charles to pay us what he owe us." The attacker then told defendant to tell Charles, "to pay us what he owe us before shit gets ugly." Defendant heard another person yell "come on man, let's go" and when he turned around, defendant saw a dark colored car drive away. At that time, Charles, who resided in Alabama, was in Jacksonville visiting a friend, Jesse Zickafoose ("Zickafoose").

On 9 March 2007, defendant rented a car and drove to Allendale, South Carolina. In his statement to police, defendant claimed that he was going to Allendale to pick up his mother and bring her back to Jacksonville so she could see K.W. At trial, the court took judicial notice that Allendale was 311 miles from Jacksonville.

On 10 March 2007, C.S. went over to her grandmother's house for the night. Stevens and Glover agreed that Stevens would return C.S. the following day, 11 March 2007, at 12:00 p.m. At around 6:00 a.m. on 11 March 2007, Eleanor Patrick ("Patrick"), who lived directly below Glover, heard someone walking around in Glover's apartment. Patrick stated that she never heard voices or a struggle; rather, it sounded like someone getting up to start his or her day.

Later in the day on 11 March 2007, Stevens, who was supposed to return C.S. to Glover at around noon, tried to call Glover but did not get an answer at her apartment. At approximately 4:00

p.m., Stevens went to Glover's apartment and saw that the door was ajar. Stevens entered the apartment and noticed that it appeared to have been ransacked. Stevens found K.W. propped up on a bed with a pillow. When Stevens entered the bathroom, she discovered Glover's body bent over into the bathtub, which was filled with water. Stevens immediately took K.W. out of the apartment and called 911.

The Jacksonville Police and the State Bureau of Investigation determined that Glover's death was the result of drowning, but there was no evidence of a struggle. The time of death could not be ascertained. Above Glover's body, written on the wall with a pink felt tip pen, were the words "U NEXT CHARLES."

When questioned by Detective Condry, defendant claimed that he had been in Allendale the entire night of 10-11 March 2007. Upon receipt of defendant's cellular telephone records, police were able to determine where defendant was when he received telephone calls. Saju Kallolickal, a radio frequency engineer who designs and maintains cellular telephone networks, testified that when a cellular telephone call is made or received, "the phone will contact the nearest tower." Cellular telephone records will show when a call was made or received as well as the location of the nearest tower to the telephone. In this case, defendant received a call at 10:19 p.m. on 10 March 2007 while in Allendale. At 3:48 a.m. on 11 March 2007, defendant received a call while in Wilmington, North Carolina. Text messages received at 5:08 a.m. and 5:09 a.m. on 11 March 2007 signified that defendant was in

Jacksonville at that time. Subsequent calls made on 11 March 2007 showed defendant progressively heading back to Allendale. Additionally, defendant's rental car records logged defendant's total mileage at 1,299 miles. The distance between Jacksonville and Allendale is 311 miles. The telephone records and the mileage on defendant's vehicle led police to believe that defendant was in Allendale on 10 March 2007, but in the early morning hours of 11 March 2007, defendant traveled back to Jacksonville and then immediately back to Allendale. Due to the inconsistencies between this evidence and defendant's statement to police, defendant was arrested for Glover's murder.

Defendant was indicted by a grand jury on 10 June 2008. Defendant's trial began on 26 May 2009 and defendant was found guilty of first degree murder on 2 June 2009. Defendant was sentenced to life imprisonment without the possibility of parole. Defendant timely appealed to this Court.

Discussion

I.

Defendant first argues that the testimonies of Slater and Weidner, admitted over defendant's objection, that Glover expressed dissatisfaction with her relationship with defendant, and that she planned on asking defendant to move out of their apartment the weekend of 10 March 2007, were inadmissible at trial. The trial court ruled that the statements were admissible to establish the state of mind of the declarant pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(3) (2009). Defendant does not contest that aspect of the

trial court's ruling; rather, defendant argues that the testimony was irrelevant and that the probative value of the testimony was outweighed by unfair prejudice.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2009). Hearsay is generally inadmissable at trial pursuant to N.C. Gen. Stat. § 8C-1, Rule 802 (2009); however, Rule 803(3) allows admission of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . ." "Such a statement must also be relevant to a fact at issue in the case (Rule 402) and its probative value must not be substantially outweighed by its prejudicial impact (Rule 403)." *State v. Jones*, 137 N.C. App. 221, 227, 527 S.E.2d 700, 704, *disc. review denied*, 352 N.C. 153, 544 S.E.2d 235 (2000).

> Whether the probative value of the victim's statements in this case is substantially outweighed by the danger of unfair prejudice to defendant is a matter left solely in the discretion of the trial court, and the trial court's decision will not be disturbed on appeal absent a showing of abuse of discretion.

State v. Hipps, 348 N.C. 377, 393, 501 S.E.2d 625, 635 (1998).

Defendant's argument that the testimonies of Slater and Weidner were irrelevant to the case is without merit. The testimonies were relevant to establish that Glover was unhappy in her relationship with defendant and that she planned to ask defendant to move out of the house. The testimony thus served to

establish a motive for Glover's murder and to rebut the testimony of Stevens and Bruiton that Glover and defendant had a good relationship. *See State v. Brown*, 350 N.C. 193, 513 S.E.2d 57 (1999) (holding that decedent's statements concerning dissatisfaction with his marriage were admissible to establish a potential motive for the defendant's act of murder and to rebut defendant's testimony that she and the victim had a happy marriage).

Defendant further claims that the evidence was unduly prejudicial. "[A]ll evidence favorable to [the State] will be, by definition, prejudicial to defendants. The test under Rule 403 is whether that prejudice to defendants is unfair." *Matthews v. James*, 88 N.C. App. 32, 39, 362 S.E.2d 594, 599 (1987). Upon review of the testimonies of Slater and Weidner, we find no abuse of discretion in the trial court's ruling as the prior statements of the decedent were relevant to the case and were not unduly prejudicial under Rule 403.

II.

Next, defendant argues that the trial court erred in allowing autopsy photographs of Glover to be published to the jury. We disagree.

"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 defendant [pursuant to Rule 403]." *State v. Blakeney*, 352 N.C. 287, 309, 531 S.E.2d 799, 816 (2000). It is well established that "'[p]hotographs 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.'" *Blakeney*, 352 N.C. at 309-10, 531 S.E.2d at 816 (quoting *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988)).

Defendant claims that two photographs — close-up images of Glover's head and lung — "added nothing to the State's case" and therefore should not have been published to the jury. "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 . . . ." *State v. Wynne*, 329 N.C. 507, 517, 406 S.E.2d 812, 816-17 (1991). The two photographs at issue showed frothing in Glover's nose as well as in her lung, which, as testified to by Dr. Charles Garrett, was evidence that Glover's death was the result of drowning. "[P]hotographs of the victim's body may be used to illustrate testimony as to the cause of death[.] Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree . . . ." *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526 (internal citations omitted). We hold that the photographs in this case were properly admitted for illustrative purposes and we see no unfair prejudice to defendant as the photographs were not repetitious, excessive, or meant to inflame

the passions of the jury. *Blakeney*, 352 N.C. at 309-10, 531 S.E.2d at 816.

III.

Defendant argues that the trial court erred when it explained to defendant that if he chose to play Glover's 7 March 2007 voice mail message for the jury, it would be considered evidence for the defense. The defendant chose not to present evidence and was, therefore, entitled to open and close the final arguments before the jury under Rule 10 of the General Rules of Practice for the Superior and District Courts. Defendant claims that he was entitled to play the message to illustrate the testimony of Detective Condry, a State's witness, and, thus, the message should not have been considered substantive evidence for defendant. In other words, defendant sought to play the voice mail message and still be allowed to open and close final arguments.

"Rule 10 of the General Rules of Practice for the Superior and District Courts confers upon the defendant in a criminal trial the right to both open and close the final arguments to the jury, provided that 'no evidence is introduced by the defendant[.]' This right has been deemed to be critically important and the improper deprivation of this right entitles a defendant to a new trial." *State v. English*, 194 N.C. App. 314, 317, 669 S.E.2d 869, 871 (2008) (quoting N.C. Super. and Dist. Ct. R. 10 (2007)); *see also State v. Eury*, 317 N.C. 511, 517, 346 S.E.2d 447, 450 (1986) ("The right to closing argument is a substantial legal right of which a

defendant may not be deprived by the exercise of a judge's discretion.").

> [T]he proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness. If the party shows it to a witness to refresh his recollection, it has not been offered into evidence.

State v. Hall, 57 N.C. App. 561, 564, 291 S.E.2d 812, 814 (1982).

This test was adopted by our Supreme Court in *State v. Macon*, 346 N.C. 109, 113, 484 S.E.2d 538, 540 (1997). In *Macon*, during the State's direct examination, a police officer testified regarding the investigation surrounding the victim's death and the search of the defendant's home. *Id.* On cross-examination, defense counsel asked the police officer to read notes made by another officer from the defendant's post-arrest interview, which had not been discussed in the State's case. *Id.* Defense counsel marked the notes as a defense exhibit but did not offer the notes into evidence or publish the notes to the jury. *Id.* Our Supreme Court concluded that the notes were actually offered into evidence and held that defendant had introduced evidence within the meaning of Rule 10. *Id.* at 114, 484 S.E.2d at 541. The Court stated that, while the writing was not introduced into evidence by the defense, Rule 10 was satisfied because the witness read the notes to the jury. *Id.* The Court's decision was based on the fact that "[t]he jury received the contents of defendant's statement as substantive evidence without any limiting instruction, not for corroborative or

impeachment purposes, as defendant did not testify at trial and the statement did not relate in any way to [the witness]." *Id.*

Since *Macon*, this Court has established that "[a]lthough not formally offered and accepted into evidence, evidence is also 'introduced' when [a] new matter is presented to the jury during cross-examination and that matter is *not* relevant to any issue in the case." *State v. Shuler*, 135 N.C. App. 449, 453, 520 S.E.2d 585, 588 (1999).

> New matters raised during the cross-examination, which are relevant, do not constitute the 'introduction' of evidence within the meaning of Rule 10. To hold otherwise, would place upon a defendant the intolerable burden of electing to either refrain from the exercise of his constitutional right to cross-examine and thereby suffer adverse testimony to stand in the record unchallenged and un-impeached or forfeit the valuable procedural right to closing argument.

Id. at 453, 520 S.E.2d at 588-89 (internal citations and quotation marks omitted). In *Shuler*, we granted a new trial to the defendant, after the trial court erroneously denied her the right to make the final closing argument. The defendant, who was on trial for embezzlement, had attended several interviews with a co-worker, Jackson, who testified against the defendant at trial. On direct examination, Jackson testified to statements made by the defendant during the interviews. On cross-examination, defense counsel asked Jackson to read parts of the interview transcripts in order to put the defendant's statements into context. This Court held that, although some of the topics raised on cross-examination

were "new matter[s]," all were "relevant to Jackson's testimony during direct examination." *Id.* at 454, 520 S.E.2d at 589.

In the present case, despite the fact that the State did not question Detective Condry concerning the voice mail message, the trial court necessarily determined that the cross-examination of Detective Condry regarding the voice mail did *not* constitute evidence for defendant. Whether that determination was erroneous is not at issue here. The question on appeal is whether playing the voice mail itself would have constituted substantive evidence for defendant. Defendant argues that the voice mail was intended to merely illustrate Detective Condry's testimony. We disagree. Defendant relies on *State v. Hennis*, where this Court held the trial court erred when it determined that defendant had introduced evidence by referencing a diagram and a police report while cross-examining the investigating officer. 184 N.C. App. 536, 539, 646 S.E.2d 398, 400 (2007). The Court reasoned:

> [D]efendant's exhibits related directly to Detective Vaughn's testimony on direct examination. Moreover, such exhibits did not constitute substantive evidence. Although the jury received the diagram (Exhibit A) without any limiting instruction, the record shows it was used to merely illustrate Detective Vaughn's prior testimony. The record also shows the incident report (Exhibit B) was not published to the jury as substantive evidence, nor was it given to the jury to examine whether it illustrated, corroborated, or impeached Detective Vaughn's testimony.

Id.

Here, defendant was allowed by the trial court to question Detective Condry regarding the investigation and what he

discovered, including the voice mail message. Clearly defense counsel sought to introduce the message as exculpatory evidence for defendant — to establish that someone other than defendant was threatening Glover — not merely to illustrate the Detective's testimony. Accordingly, we hold that the trial court did not err in instructing defense counsel that introduction of the voice mail message would constitute substantive evidence for defendant.

IV.

Next, defendant argues that the trial court erred in refusing to allow defendant to question Detective Condry regarding a report written by a forensic document examiner, Dr. Larry Miller ("Dr. Miller"), in which Dr. Miller gave a "qualified opinion" that Glover's two brothers and defendant "probably did not write" the words written on the bathroom wall where Glover was murdered. Dr. Miller indicated that Jesse Zickafoose "may have authored the questioned material." Dr. Miller was not present to testify and the trial court determined that the report was hearsay. Defendant argued that the document should be admitted as a business record under N.C. Gen. Stat. § 8C-1, Rule 803(6), a public record under N.C. Gen. Stat. § 8C-1, Rule 803(8), or pursuant to the "catch-all provision" of N.C. Gen. Stat. § 8C-1, Rule 803(24).

Under Rule 803(6), evidence recorded in the course of a regularly conducted business activity is not excluded by the hearsay rule where it is

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information

> transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

A qualifying business record "is admissible when 'a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.'" *State v. Price*, 326 N.C. 56, 77, 388 S.E.2d 84, 95 (quoting *State v. Springer*, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973)), *vacated on other grounds*, 498 U.S. 802, 111 S. Ct. 29 (1990).

There is no evidence in this case that the handwriting analysis conducted by Dr. Miller was "kept in the course of a regularly conducted business activity." Dr. Miller, an employee of East Tennessee State University, was asked to perform the handwriting analysis by Detective Condry. There is no evidence that Dr. Miller's services were part of a regularly conducted business activity. Moreover, Detective Condry was not a custodian of the records of Dr. Miller, nor was he in any way qualified to testify regarding the methods under which the report was made. Other than stating that Detective Condry hired Dr. Miller, defendant points to no other factors that would suggest Detective

Condry was qualified to authenticate the document as a business record.

A public record and report, as defined under Rule 803(8), is not excluded by the hearsay rule. A public record is defined as:

> [r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Dr. Miller's report in no way meets the definition of a public record or report.

The "other exceptions" to the hearsay rule are defined in Rule 803(24) as follows:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to

> provide the adverse party with a fair opportunity to prepare to meet the statement.

Dr. Miller's report standing alone had no "circumstantial guarantees of trustworthiness." Moreover, under Rule 803(4)(B), the statement in the report was certainly not more probative than Dr. Miller's testimony concerning his determinations. Defendant did not seek to subpoena Dr. Miller at trial. In sum, we hold that Dr. Miller's report alone did not satisfy any of the exceptions to the hearsay rule and Detective Condry was not in a position to authenticate the document. Consequently, the trial court did not err in refusing to admit Dr. Miller's report into evidence.

V.

Finally, defendant argues that the trial court erred when it overruled defendant's objections to two statements made by the prosecution during closing arguments: (1) with regard to the writing on the bathroom wall, the prosecution stated, "ladies and gentlemen, there's been no evidence presented to show that the defendant did not write that" and (2) with regard to the voice mail message, the prosecution stated, "this tape, that, you know, the [S]tate has it. Well, so does the defense." Defendant argues that the State was attempting to shift the burden of proof to defendant and comment upon defendant's decision not to testify. We disagree.

"The scope of jury arguments is left largely to the control and discretion of the trial court . . . ." *State v. Call*, 349 N.C. 382, 419, 508 S.E.2d 496, 519 (1998). The prosecutor, as well as defense counsel, is entitled to argue the evidence presented and all reasonable inferences that flow from that evidence. *State v.*

Mann, 355 N.C. 294, 307, 560 S.E.2d 776, 785, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). In assessing the impropriety of the prosecutor's statements, they must be considered "in the context in which they were made and in light of the overall factual circumstances to which they referred." *Call*, 349 N.C. at 420, 508 S.E.2d at 519.

A defendant's election to exercise his Fifth Amendment protection against self-incrimination may not be used against the defendant. *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994). "A statement that may be interpreted as commenting on a defendant's decision not to testify is improper if the jury would naturally and necessarily understand the statement to be a comment on the failure of the accused to testify." *State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 840-41, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001).

However, our courts have held that the State is permitted to comment on a defendant's failure to produce exculpatory evidence or to contradict evidence that the State has presented. *See, e.g., State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993) (concluding that although the prosecutor may not "comment[] upon the defendant's failure to testify," the prosecutor may "comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State" (internal citation and quotation marks omitted)); *State v. Jordan*, 305 N.C. 274, 280, 287 S.E.2d 827, 831 (1982) ("Although the defendant's failure to take the stand and deny the charges may not be the

subject of comment, the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument.").

Here, considering the prosecutor's statements in their context, they are not a comment on defendant's decision not to testify, but rather on his failure to present exculpatory evidence or evidence that would contradict the State's evidence. Defendant had the opportunity to present the voice mail message as substantive evidence and defendant had the opportunity to subpoena Dr. Miller to the stand to authenticate and testify concerning his handwriting analysis. Defendant chose not to do so. Moreover, the prosecutor's statements served to rebut the following statements made by defense counsel during his closing: (1) "Four people gave samples to the police. They went out and found an expert. . . . Do you think if it was helpful to the [S]tate that you would have read that report? We submit the answer is, unequivocally, yes." and (2) "The State has the tape but they refused to play it for you. Hold that against them. It's their job to present the evidence to you . . . and you haven't been able to hear it."

In sum, we hold that the prosecutor's statements were neither a direct nor inferential comment on defendant's constitutionally protected right to refuse to testify. Defendant's argument is, therefore, overruled.

No Error.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).