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NO. COA09-296

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v. Forsyth County
No. 06 CRS050775

JOSE VALVERE-LIBORIO

Appeal by Defendant from judgment entered 19 August 2008 by Judge Catherine C. Eagles in Superior Court, Forsyth County. Heard in the Court of Appeals 15 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the state.

Glover & Petersen, P.A., by James R. Glover, for Defendant Appellant

WYNN, Judge.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."[1] Here, Defendant contends the trial court erred by allowing the jury to view a photograph of the alleged victim's unborn fetus. Because allowing the jury to view a single photograph of an unborn fetus was not unduly prejudicial, we find no error.

The State's evidence at trial tended to show that on the morning of 17 January 2006, police officers responded to an

[1] N.C. Gen. Stat. § 8C-1, Rule 403 (2007).

emergency call from the apartment of Rosenda Prudente-Rodriguez. Upon arrival, the officers found Rosenda's husband, Defendant Jose Valvere-Liborio, kneeling next to Rosenda's pregnant body on the floor of their apartment. Later, it was determined that Rosenda died as a result of a gunshot wound to the head. The couple shared the apartment with their children, J.A.P. and J.P.

Dr. Ellen Reimer, medical examiner, performed an autopsy on Rosenda's body during which she removed the fetus from Rosenda's body. A photograph of the fetus was taken and later, at trial, admitted as evidence.

During the trial, the couple's seven-year old son, J.A.P., testified that his father had hurt his mother and that he saw his father's gun. J.A.P. stated that his father threw the gun away and took him to a friend's house. During a search of the area identified by J.A.P., officers did not find a gun.

From a jury verdict finding him guilty of first-degree murder, Defendant appeals. He argues the trial court erred by (I) allowing the jury to view an irrelevant and unfairly prejudicial photograph of the unborn fetus; and (II) allowing J.A.P. to testify without being sworn under oath.

I.

First, Defendant argues that the trial court erroneously allowed the jury to view a photograph of the unborn fetus because the photograph was irrelevant, and if relevant, the probative value of the photograph was outweighed by its prejudicial effect.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2007). Otherwise admissible evidence can be excluded if it is found to be unduly prejudicial. For example, "[t]he probative value of photographs or images may be eclipsed by its tendency to prejudice if they are inflammatory, excessive, or repetitious." *State v. Riffe*, 191 N.C. App. 86, 95, 661 S.E.2d 899, 906 (2008). "Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each likewise lies within the discretion of the trial court." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citations omitted). Thus, the admission of photographic evidence is reviewed for an abuse of discretion to determine whether the trial 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. Parker*, 315 N.C. 249, 258-59, 337 S.E.2d 497, 503 (1985) (quotations omitted).

Here, the record shows that the photograph was relevant because it was suggestive of the Defendant's maliciousness toward the victim. "Malice may be express or implied and it need not amount to hatred or ill will, but may be found if there is an intentional taking of the life of another without just cause, excuse or justification." *State v. Robbins*, 309 N.C. 771, 775, 309

S.E.2d 188, 190 (1983) (citations omitted). At trial, Vitelia Hernandez testified that Rosenda had to quit her job because she was assaulted by Defendant. The testimony suggested that Defendant assaulted Rosenda because she was pregnant. The photograph of the fetus illustrated how far along Rosenda was in the pregnancy.

Additionally, we do not believe that the admission of a single photograph was so excessive or inflammatory that it amounted to an abuse of discretion by the trial court. In a similar case, our Supreme Court used a totality of the circumstances test to determine whether gruesome photographs were unduly prejudicial. The Court's analysis focused on the content and the manner in which the photographs are used. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527 (1988). Here, the jury viewed one photograph of the fetus and the photograph was suggestive of relevant facts. We hold that the use of a single photograph, passed amongst the jurors, did not result in undue prejudice.

II.

Defendant next argues that the trial court erroneously allowed child witness, J.A.P., to testify without being sworn under oath in contravention of N.C. Gen. Stat. § 8C-1, Rule 603 (2007). However, Defendant failed to raise an objection to the admissibility of testimony by the child witness. Despite failing to object at trial, Defendant contends that the issue is preserved for appeal as a matter of law.

Generally, a failure to object prohibits issues from being raised on appeal. "Despite the constitutional nature of the oath

requirement, our appellate courts have consistently held that where the trial court fails to administer the oath to a witness, the defendant's failure to object waives appellate review of the court's error." *State v. Beane*, 146 N.C. App. 220, 225, 552 S.E.2d 193, 196 (2001) (citations omitted). However, when a court's decision not to administer the oath was deliberate, a defendant is not completely barred from raising the issue on appeal. In *Beane*, the Court noted that an objection under those circumstances would not have prompted the trial court to take corrective action. *Id.* at 225, 552 S.E.2d at 197. The Court determined that a review for plain error would be appropriate. *Id.*

Here, the court's decision not to administer the oath was deliberate, preserving a review for plain error which places a substantial burden on the defendant.

> Where, as in this case, a defendant has failed to object, the defendant has the burden of showing that the error constituted plain error, that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.

State v. Bishop, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (citations omitted).

N.C. Gen. Stat. § 8C-1, Rule 603 requires that before testifying, "every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." However, commentary to Rule 603 provides flexibility for affirmation regarding special categories of

witnesses. "The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and *children*. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required." N.C. Gen. Stat. § 8C-1, Rule 603 official commentary (2007)(emphasis added).

In this case, the record shows that in light of the flexible standard used for children, the court took the necessary steps to ensure compliance with Rule 603. Before testifying, the trial court allowed the State to demonstrate the credibility of the child witness by purposefully misidentifying various objects in the room and thereafter asking J.A.P. if the information provided was truthful. After each question, the child witness properly identified the false information. Moreover, the child witness stated that he understood that it was wrong to tell a lie and promised to tell the truth. Our courts have upheld similar methods of determining child credibility. *See State v. Huntley*, 104 N.C. App. 732, 735-37, 411 S.E.2d 155, 157-58 (1991), *disc. review denied*, 331 N.C. 288, 417 S.E.2d 258 (1992); *See also State v. Jones*, 310 N.C. 716, 722-23, 314 S.E.2d 529, 533 (1984). Accordingly, we hold that the trial court took the necessary steps to ensure that the child witness was credible and did not commit plain error.

No Error.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).