NO. COA12-1423
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

STATE OF NORTH CAROLINA

v. Wake County
No. 11 CRS 202639

F. JOHN EVANS

Appeal by Defendant from judgment entered 3 April 2012 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 25 April 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General L. Michael Dodd, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for Defendant.

DILLON, Judge.

John Evans ("Defendant") appeals from a judgment entered following a jury verdict convicting him of first-degree murder, challenging the trial court's denial of Defendant's motion for mistrial and admission of out-of-court statements made by Donna Evans ("victim"). After thorough review of the record, we

conclude Defendant had a fair trial, free from prejudicial error.

The evidence of record tends to show the following: Defendant and the victim were married in 1992. However, their marital relationship began to deteriorate after Defendant was partially disabled from a motor vehicle accident in 2007. Regular arguments and threats to leave one another became a common part of their relationship.

On 16 January 2011, Defendant shot the victim twice in the right side of her chest, underneath her arm. Defendant then turned the gun on himself, shooting himself in the stomach one time. Jamie Brauer, who had been staying in the Evans' home, entered the room shortly after hearing shots and saw the victim lying dead and Defendant wounded.

On 22 February 2011, Defendant was indicted on a charge of first-degree murder. Defendant was tried at the 26 March 2012 Criminal Session of Wake County Superior Court. At trial, the court allowed into evidence, over Defendant's timely objections, out-of-court statements made by the victim. Additionally, during closing arguments, the trial court denied Defendant's motion for mistrial following a sustained objection to an improper statement made during closing arguments by the

prosecutor concerning sentencing. On 3 April 2012, after the jury found Defendant guilty of first-degree murder, the trial court entered a judgment sentencing Defendant to life imprisonment. From this judgment, Defendant appeals.

I. Motion for Mistrial

In Defendant's first argument, he contends the trial court erred by denying his motion for mistrial. We disagree.

A mistrial is "a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Taylor,* 362 N.C. 514, 538, 669 S.E.2d 239, 260 (2008), *cert. denied*, 558 U.S. 851, 175 L. Ed. 2d 84 (2009). "Not every disruptive event which occurs during trial automatically requires the court to declare a mistrial." *Id.* The trial court must declare a mistrial only where the impropriety would "result[] in substantial and irreparable prejudice to the defendant's case." *State v. Allen*, 141 N.C. App. 610, 617, 541 S.E.2d 490, 496 (2000), *disc. review denied*, 353 N.C. 382, 547 S.E.2d 816 (2001). "Generally a motion for mistrial is a matter addressed to the sound discretion of the judge." *State v. Smith*, __ N.C. App. __, __, 736 S.E.2d 847, 853 (2013) (citation and quotation marks omitted).

Further, "[w]hen a court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Dradak*, 330 N.C. 587, 594, 441, S.E.2d. 604, 609 (1992). The timeliness of a curative instructive is important; however, it is not determinative in assessing the instructions effectiveness in removing prejudice. *State v. Griffin*, 136 N.C. App. 531, 547, 525 S.E.2d 793, 805, *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000) (stating that "timeliness of curative instructions is a factor in deciding whether the instruction did in fact cure any error") (citation omitted). The Supreme Court of North Carolina has recognized that "the crucial inquiry is into the nature of the evidence and its probable influence upon the mind of the jury in reaching a verdict," and "the difficulty in erasing it from the mind" of the jury." *Id.* at 547-48, 525 S.E.2d at 805.

Our standard of review from the appeal of a denial of a motion for mistrial is abuse of discretion. *State v. Prime*, 314 N.C. 202, 215, 333 S.E.2d 278, 286 (1985). "Where a trial court sustains an objection to incompetent evidence and instructs the jury to disregard it, the refusal to grant a mistrial based on the introduction of the evidence will ordinarily not constitute

an abuse of discretion." *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986), *overruled on other grounds as stated in State v. Jackson*, 340 N.C. 301, 457 S.E.2d 862 (1995). A trial court will be reversed for an abuse of discretion "only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

In the case *sub judice*, the prosecutor made the following statement during closing arguments:

> And look where we are right now. [The victim] is dead, and [Defendant] is trying to tell you his traumatic brain injury is the excuse to mitigate what he did on that day. Sure, he's come into this courtroom and told you or has admitted that he's guilty of voluntary manslaughter. But in the grand scheme of things, it's a much less crime, carries a couple of years.

Defense counsel objected to the statement and moved to have the statement stricken from the record. Defendant also moved for a mistrial, based on the State's mischaracterization that voluntary manslaughter carried a sentence of only "a couple of years." The trial court sustained the objection and struck the prosecutor's statement from the record. However, the trial court denied Defendant's request for mistrial. Pre-trial, the court instructed the jury as to the effect of granting a motion to strike certain evidence or argument from their consideration.

Defendant now contends that the trial court abused its discretion in refusing to grant a mistrial in response to the prosecutor's improper statement.

Preliminarily, we note that the prosecutor's statement – a voluntary manslaughter carries a sentence of only "a couple of years" – was inaccurate[1], incomplete, and improper. The foregoing notwithstanding, "in the absence of a showing of prejudice, an improper prosecutorial comment does not require reversal." *State v. Lynch*, 343 N.C. 483, 487, 471 S.E.2d 376, 378 (1996).

Here, we do not believe that the trial court abused its discretion to deny Defendant's motion for a mistrial based on this single statement made by the prosecutor, which was immediately struck from the record, where there was plenary evidence to support Defendant's first-degree murder conviction. A reasonable possibility does not exist that the outcome would have been different but for the statement. N.C. Gen. Stat. § 15A-1443(a) (2011). Indeed, Defendant admitted at trial that he shot the victim. The locations of the wounds, entering from the

[1] Voluntary manslaughter is a Class D felony. N.C. Gen. Stat. § 14-18 (2011). The punishment limits of Class D felonies range from 38 to 51 months, in the most mitigated range, to 128 to 160 months, in the most aggravated range. *See* N.C. Gen. Stat. § 15A-1340.17 (2011).

left-side of her back and exiting through the right-side of her chest, indicate that the victim was not facing Defendant at the time of the shooting. These two gunshot wounds were determined, by forensic evidence, to have been fired from a close distance. Ms. Brauer also testified that Defendant did not appear angry or acting out of passion when she encountered Defendant the day of the shooting and did not hear any yelling by Defendant or the victim prior to the gunshots being fired. Additionally, the evidence suggests that immediately after the shooting and before Ms. Brauer entered the room, Defendant placed the murder weapon adjacent to the right hand of *the victim* where she lay dead, and then he laid on the floor with the victim's body between himself and the weapon. When Ms. Brauer came into the room, Defendant told Ms. Brauer that the victim had shot him. The State also introduced, at length, evidence tending to show that the marital relationship between the Defendant and the victim was deteriorating, and that Defendant had made threats to the victim which placed her in fear. Defendant admitted at trial that leading up to the shooting, due to his unemployment, he was concerned about finances if he and the victim were to separate. There was also evidence that Defendant was the beneficiary of the victim's estate but that Defendant would lose this status if

he killed her. From this the jury could have inferred a financial motive not only in the killing but also in the attempted staging of an attempted murder-suicide scene.

We by no means condone the practice of intentionally mischaracterizing the punishments of lesser-included offenses, which, in this case, the prosecutor undoubtedly accomplished. However, in this case, Defendant has failed to demonstrate that the trial court's denial of the motion for mistrial was so arbitrary that it could not have been the result of a reasoned decision or that the prosecutor's impropriety resulted in "substantial or irreparable prejudice to the defendant's case." *Allen*, 141 N.C. App. at 617, 541 S.E.2d at 496.

II: Hearsay Statements

In Defendant's second argument, he contends the trial court erred by admitting the victim's out-of-court statements. We disagree.

"'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) (2011). Hearsay is not admissible except as provided by statute or the Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2011).

"A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition" is not excluded by the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(3) (2011). "Evidence tending to show the victim's state of mind is admissible [as an exception to the hearsay rule] so long as the victim's state of mind is relevant to the case at hand." *State v. Patterson*, 146 N.C. App. 113, 136, 552 S.E.2d 246, 262, *disc. review denied*, 354 N.C. 578, 559 S.E.2d 549 (2001) (citation and quotation marks omitted). "Evidence of the victim's state of mind includes evidence indicating the victim's mental condition by showing the victim's fears, feelings, impressions or experiences." *Id.* (citation and quotation marks omitted). "However, statements relating only factual events and made in isolation, unaccompanied by a description of [the victim's] emotions, generally fall outside the scope of Rule 803(3)." *Id.* (citation and quotation marks omitted) (alteration in original). "Evidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand." *State v. Stager*, 329 N.C. 278, 314, 406 S.E.2d 876, 897 (1991).

"The trial court's determination as to whether an out-of-court statement constitutes hearsay is reviewed *de novo* on

appeal." *State v. Castaneda*, ___ N.C. App. ___, ___, 715 S.E.2d 290, 293, *appeal dismissed and disc. review denied*, 365 N.C. 354, 718 S.E.2d 148 (2011) (citation omitted). The erroneous admission of hearsay "is not always so prejudicial as to require a new trial." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986). Rather, Defendant must show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at . . . trial[.]" N.C. Gen. Stat. § 15A-1443(a) (2011).

In the context of first-degree murder, circumstances that may tend to prove premeditation and deliberation include the following:

> (1) lack of provocation by the intended victim or victims; (2) conduct and statements of the defendant both before and after the . . . killing; (3) threats made against the [victim] . . . by the defendant; and (4) ill will or previous difficulty between the defendant and the [victim][.] . . .

State v. Cozart, 131 N.C. App. 199, 202, 505 S.E.2d 906, 909 (1998), *disc. review denied*, 350 N.C. 311, 534 S.E.2d 600 (1999).

In this case, several witnesses – including Ms. Brauer, Dale Tulloch, Marshall Gay, and Bernice Jordan – testified regarding statements made by the victim. Defendant contends

that these out-of-court statements the victim allegedly made to the foregoing witnesses were inadmissible hearsay statements. We disagree.

Through the testimony of Ms. Tulloch, the victim's sister, the trial court allowed the admission of Exhibit 16, a text from the victim which stated, "I am very nervous around him, and holding my tongue is bottling up stress, and I want to get out from under. I struggle with feeling bad for him. I don't need this life of stress."

Mr. Gay, the victim's realtor, testified that the victim told him a few days before the shooting that Defendant had a gun, and she "laughingly said, 'I think he's going to shoot me and claim insanity.'"

Ms. Jordan, the victim's neighbor, testified that the victim called her within a week of the shooting and said that Defendant had noticed she was not wearing her wedding rings and had asked why not, to which the victim responded, "Because the marriage is over." According to Ms. Jordan, the victim said Defendant responded to her by saying, "What part of 'till death do us part do you not understand?" Ms. Jordan also testified that the victim told her that Defendant had left in the past and had "wiped out their bank account when he left[.]" Ms. Jordan

continued, stating that the victim told her she "had some kind of arrangement with the bank so that he couldn't do that again" because "it was hard for her to pay the bills[.]" The victim described the situation to Ms. Jordan as "difficult," and the victim was "upset" when she shared the foregoing with Ms. Jordan.

Ms. Brauer testified that the victim told her that Defendant owned a gun, that he was very angry, and that she did not know what Defendant was capable of doing. The victim felt that she needed to hide the gun for her own protection. The victim was "in a panic." On the morning of the shooting, the victim told Ms. Brauer that there would be changes in the household, and Defendant was moving out as soon as he had saved some money.

Defendant contends on appeal that all of the foregoing statements by the victim to the foregoing witnesses were not admissible under the exception to the hearsay rule in Rule 803(3) because the statements were "statements of fact recounting and describing factual events which did not concern assertions of then existing state of mind, emotion, or intent." Defendant also contends, even if admissible, the statements "had minimal probative value" and any probative value "was

substantially outweighed by the danger of unfair prejudice" in violation of Rule 403. We find these arguments unpersuasive.

"Statements 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." *State v. Smith*, 357 N.C. 604, 609, 588 S.E.2d 453, 457 (2003), *cert. denied*, 542 U.S. 941, 159 L. Ed. 2d 819 (2004) (citation omitted). "However, where such statements serve . . . to demonstrate the basis for the [victim's] emotions," the statements will be admitted under Rule 803(3)." *Id.* (citation and quotation marks omitted).

In this case, we believe the statements the victim made to the witnesses were admissible under Rule 803(3) because they tended to show that she feared Defendant and that Defendant had threatened her. Any facts related served to demonstrate the basis for the victim's emotions. *See Stager*, 329 N.C. at 314, 406 S.E.2d at 897 (holding that hearsay statements were properly admitted under Rule 803(3), in part, because the statements "b[ore] directly on [the victim's] relationship with the defendant at about the time [the defendant] was alleged to have killed him" and the statements "tend[ed] to show that [the victim] was afraid of the defendant"); *State v. Lathan*, 138 N.C.

App. 234, 237, 530 S.E.2d 615, 618-19, *disc. review denied*, 352 N.C. 680, 545 S.E.2d 723 (2000) (stating that "[s]tatements that relate factual events, where those events tend to show the victim's state of mind at the time the statement is made, are not excluded from the coverage of Rule 803(3) where the facts related serve . . . to demonstrate the basis for the [victim's] emotions"). Further, we believe the statements were admissible under Rule 403. The statements were relevant in that the "victim's state of mind . . . relate[d] directly to circumstances giving rise to a potential confrontation with . . . [D]efendant[,]" *Lathan*, 138 N.C. App. at 237, 530 S.E.2d at 618-19, and we do not believe the probative value of the statements was outweighed by any unfair prejudice. *See Stager*, 329 N.C. at 315, 406 S.E.2d at ___ (1991) (stating that "[w]hether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court" and holding that the admission of certain relevant statements pursuant to Rule 803(3) were not inadmissible under Rule 403, in part, because Defendant "ha[d] not demonstrated any abuse of that discretion"); *see also State v. Smith*, 357 N.C. 604, 613-14, 588 S.E.2d 453, 460 (2003) (stating that "[e]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue[,]" and "[i]n

criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible[;] [t]he weight of such evidence is for the jury").

III: Short-Form Murder Indictment

In Defendant's final argument on appeal, he contends the trial court erred by entering a judgment against him because the "short-form" murder indictment was constitutionally invalid. Defendant admits that this argument is "[f]or preservation purposes to permit further review in federal court, if necessary," and that the North Carolina "Supreme Court has decided this issue against his position[.]"

N.C. Gen. Stat. § 15-144 (2011) provides for a short-form version of an indictment for murder. In *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003), the North Carolina Supreme Court thoroughly addressed the issue of whether short-form indictments pursuant to N.C. Gen. Stat. § 15-144 are constitutional in light of the United States Supreme Court decisions in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002), *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), and *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and held that the short-form indictment for first-degree murder fully comports with the United States Constitution. *Hunt*, 357 N.C. at 265-78,

582 S.E.2d at 599-607. According, this argument is without merit.

NO ERROR.

Judge GEER and Judge ELMORE concur.

Report per Rule 30(e).