NO. COA12-413
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

STATE OF NORTH CAROLINA

v. Buncombe County
No. 98 CRS 55373

LUIZ ARRIAGA

Appeal by defendant from judgment entered 15 December 1998 by Judge Beverly T. Beal in Buncombe County Superior Court. Heard in the Court of Appeals 14 November 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant.

ELMORE, Judge.

Luiz Arriaga (defendant) appeals from a judgment entered upon a jury conviction of first-degree murder, sentencing him to life imprisonment without parole. After careful consideration, we conclude that defendant received a trial free from error.

I. Background

Defendant met Mary Hamlin Arriaga (the victim) at a party in 1996. After dating for sometime, the two married in February 1998. Their marriage was not defendant's first. In fact, when he met the victim he was still married to his former wife, Ruth. Defendant and Ruth had a contentious relationship, and in October 1997 Ruth obtained a domestic violence protective order (the DVPO) against defendant. The DVPO ordered defendant to stay away from Ruth and to not buy or possess a firearm for a year. Defendant's relationship with the victim was similarly tumultuous. On 14 April 2008, defendant arrived at the victim's place of work and fatally shot her in the parking lot.

He was arrested on 14 September 1998 and charged with first-degree murder. The case came on for jury trial on 7 December 1998. Prior to trial, defendant filed a motion in limine to exclude evidence of the DVPO. However, the trial court later allowed the DVPO to be admitted during the State's cross-examination of defendant. On 15 December 1998, the jury convicted defendant of first-degree murder, and the trial court entered judgment, sentencing defendant to life imprisonment without parole. Defendant now appeals, arguing 1) that the trial court erred in admitting the DVPO and 2) that the trial

court erred in overruling defendant's objection to a statement made by the prosecutor during the State's closing argument.

II. Analysis

A. The DVPO

Defendant argues that the trial court erred in two ways with regards to the DVPO. First, defendant contends that the trial court erred in allowing the State to use the DVPO during cross-examination of him, in violation of Rules 404(b), 611(b), 608(b), and 403 of the North Carolina Rules of Evidence. Second, defendant contends that the trial court erred by allowing the DVPO to be introduced into evidence as an exhibit. We will address each argument in turn.

i. Cross-examination with the DVPO

We will first address whether the trial court erred in allowing the State to use the DVPO during cross-examination of defendant. We conclude that it did not, as the evidence was admissible under Rules 403 and 404(b).

> [I]t is not always clear whether [evidence of this type] is being offered under 404(b) or under 608(b). Rule 404(b) has been interpreted as applicable only to parties and, in a criminal case, would usually be applicable only to a defendant. Rule 608(b) governs reference to specific instances of conduct only on cross-examination regarding the credibility of any witness and prohibits proof by extrinsic

> evidence. Under Rule 404(b), however, evidence regarding extrinsic acts is not limited to cross-examination and *may* be proved by extrinsic evidence as well as through cross-examination. If the trial judge makes the initial determination that the evidence is of the type and offered for the proper purpose under Rule 404(b), the record should so reflect.

State v. Morgan, 315 N.C. 626, 636-37, 340 S.E.2d 84, 91 (1986) (citation omitted) (emphasis in original).

In its ruling, the trial court determined, in relevant part,

> that the Findings of Fact contained in [the DVPO] constitute evidence of prior acts; that the defendant may be examined by the State in regard to such acts for the purpose of showing ***preparation*** in that in this case it's alleged the he had a firearm at the time of this offense[.]

Rule 404(b) allows evidence of prior acts to be admissible to prove preparation. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b) (2012). Thus, the trial court determined that the evidence at issue was being offered for a proper purpose under Rule 404(b). "We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, ___ N.C. ___, ___, 726 S.E.2d 156, 159 (2012).

Here, the DVPO prohibited defendant from possessing a firearm for a period of one-year, beginning 27 October 1997. The murder at issue occurred on 14 April 1998, within that one-year period. Thus, we agree that evidence that defendant knew

he was prohibited from possessing a firearm when he shot the victim was relevant to show his preparedness for the shooting.

Turning to Rule 403, "[i]f a trial court determines the evidence is admissible under Rule 404(b), the court must still decide whether there exists a danger that unfair prejudice substantially outweighs the probative value of the evidence." *State v. Paddock*, 204 N.C. App. 280, 284, 696 S.E.2d 529, 532 (2010) (quotations and citations omitted). "That determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *State v. Stevenson*, 169 N.C. App. 797, 800-01, 611 S.E.2d 206, 209 (2005) (quotations and citations omitted).

Here, after the trial court determined that the DVPO was admissible, it stated that it would apply a balancing test under Rule 403. The trial court then concluded that "the relevance [of the DVPO] is not outweighed by prejudice; its probative value is higher than any reason for exclusion under Rule 403 and ought to be admitted." In reaching this determination, the trial court also stated that it would "listen for objections and listen to the evidence to see if there is any reason to exclude it and will rule on that as it comes up." The trial court

further guarded against the possibility of unfair prejudice by giving the jury a limiting instruction, stating that the DVPO "may be considered by you in regard to evidence of preparation in regard to committing this crime[,]" but "[o]ther than that, you may not consider if for any purpose[.]" Our Supreme Court has held that "prior misconduct [is] admissible and not unfairly prejudicial under Rule 403 where trial court gave [a] limiting instruction regarding permissible uses of 404(b) evidence[.]" *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 75 (2002) (citation omitted). As such, we are unable to agree that the trial court's ruling was so arbitrary that it could not have resulted from a reasoned decision.

ii. The DVPO as an exhibit

Next, we will address whether the trial court erred in receiving the DVPO as an exhibit. Defendant argues that this issue is governed by our Supreme Court's ruling in *State v. Oakes*, 249 N.C. 282, 106 S.E.2d 206 (1958). We decline to address this argument.

In *Oakes*, the defendant argued on appeal that the trial court erred in admitting a peace warrant, together with an affidavit of the victim, into evidence as an exhibit. The defendant argued that the statements therein were hearsay, and

that he had no opportunity to confront or to cross-examine the declarant. Our Supreme Court agreed.

Here, defendant raised a constitutional challenge to the admission of the DVPO in his pre-trial motion, but he failed to object on constitutional grounds at trial. The record shows that at trial, defendant objected to the DVPO based on relevancy, prejudice, and lack of proof of common plan or scheme, but that he did not make a constitutional objection.

This Court has held that

> constitutional arguments not raised at trial are not preserved for appellate review: [I]n order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court. Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error[.]

State v. Jones, ___ N.C. App. ___, ___, 715 S.E.2d 896, 900-01 (2011) (quotations and citations omitted) (alterations in original). Accordingly, we decline to address defendant's constitutional argument.

B. Closing arguments

Defendant's final argument is that the trial court erred by overruling his objection to the following statement made by the prosecutor during closing arguments for the State: "Of course

she's lucky. I mean, he didn't do anything to her." This statement was made in reference to another woman defendant dated, Donna Smith. Defendant contends that the statement was inflammatory, speculative, and had no basis in the record. Additionally, defendant contends that the statement urged the jury to conclude that he has a propensity for violence against women. We find little merit to these arguments.

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Sanders*, 201 N.C. App. 631, 641, 687 S.E.2d 531, 538 (2010) (quotations and citation omitted). "Abuse of discretion 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). "The arguments of counsel are left largely to the control and discretion of the trial judge, and counsel will be granted wide latitude in the argument of hotly contested cases." *Sanders,* 201 N.C. App. at 640, 687 S.E.2d at 538.

"When applying the abuse of discretion standard to closing arguments, this Court first determines if the remarks were

improper[,]" and "[n]ext, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Sanders*, 201 N.C. App. at 641-42, 687 S.E.2d at 538-39 (quotations and citations omitted). "In determining whether the prosecutor's argument was grossly improper, the Court must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers." *Id.* at 640, 687 S.E.2d at 538.

In support of his argument, defendant directs our attention to our Supreme Court's ruling in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002). There, the prosecutor referenced the Columbine school shooting and the Oklahoma City bombing as national tragedies, and attempted to link those tragedies to the tragedy of the victim's death in that case. Our Supreme Court held that the statement was improper for three reasons: "(1) it referred to events and circumstances outside the record; (2) by implication, it urged jurors to compare defendant's acts with the infamous acts of others; and (3) it attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice." *Id.* at 132, 559 S.E.2d at 107.

We conclude that the statement at issue in this case fails to amount to the highly inflammatory nature of the statements made in *Jones*. Here, when read in context, the statement referenced a matter defendant had testified about the previous day. Thus, the statement did not refer to events outside of the record or urge jurors to compare defendant's acts with acts of others. Further, we are unable to agree that defendant was prejudiced by the statement, as there was overwhelming evidence presented by the State of defendant's guilt.

No error.

Judge STROUD concurs.

Judge BEASLEY concurred in result only, prior to 17 December 2012.

Report per Rule 30(e).