NO. COA12-510
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

STATE OF NORTH CAROLINA,
Plaintiff,

v. Edgecombe County
No. 09 CRS 52989

ANTWAN MAURICE PITTMAN,
Defendant.

Appeal by defendant from judgment entered 29 September 2011 by Judge Cy A. Grant, Sr. in Edgecombe County Superior Court. Heard in the Court of Appeals 24 October 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General John H. Watters, for the State.

Anne Bleyman for defendant.

ELMORE, Judge.

On 9 September 2011, judgment was entered against Antwan Maurice Pittman (defendant) for the offense of first-degree murder pursuant to N.C. Gen. Stat. § 14-17. The trial court sentenced defendant to life imprisonment without parole. Defendant gave notice of appeal in open court. After careful

consideration, we find that defendant received a trial free from error.

I. Background

On 7 March 2009, the body of Tara Nicholson (the victim) was discovered off the side of the road in a remote, wooded location in Edgecombe County. The victim was found nude except for socks and a bra pulled up over her breasts. An autopsy revealed that the victim had been strangled. The victim's body had sustained numerous injuries, including bruising, a fractured hyoid bone, a subdural hemorrhage, and scratches on her abdomen. Because the body was in the woods for several days before it was recovered, an exact time of death could not be determined.

At trial, defendant admitted to soliciting sex from the victim on 1 March 2009. According to defendant, he took the victim to the Carolina Inn where they engaged in consensual sex for which he paid the victim $20.00. Defendant then alleged that he drove the victim to the library near a local homeless shelter before returning home. He denied physically assaulting the victim.

The State called Erin Ermish (Ermish), a forensic scientist at the North Carolina State Crime Laboratory; she was admitted by the trial court as an expert in the field of forensic serology and biology. The State also called Brian Wraxall

(Wraxall), a forensic serologist and Executive Director of the Serological Research Institute, who was admitted by the trial court as an expert in the field of forensic serology. Both Ermish and Wraxall testified that the victim likely died less than 24 hours after defendant's spermatozoa were deposited in her vagina. In order to discern a time of deposit, both experts examined the vaginal smear to see how many spermatozoa remained intact, meaning the tails were connected to the bodies.

Darlena Moore (Moore) and Lakisha Worsley (Worsley), former prostitutes in Rocky Mount, also testified to similar, independent sexual encounters with defendant. Each woman agreed to have sex with defendant. Defendant drove each to a secluded location and strangled her.

Defendant moved to dismiss for insufficiency of the evidence at the close of the State's evidence, and at the close of all the evidence. The trial court denied each of defendant's motions.

I. Expert Testimony

Defendant first argues that the trial court erred in admitting the expert testimony about the presence and condition of defendant's spermatozoa as evidence of the time of the

victim's death on the basis that the experts' proffered method of proof was not sufficiently reliable. We disagree.

The record indicates that defendant failed to object to the scientific validly of the experts' opinions at trial. As such, defendant is entitled only to review for plain error. Our Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

> In this capacity, trial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion.

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations and quotations omitted). In *State v. Goode*, this Court set forth a three step inquiry to help the trial court determine when to admit expert testimony pursuant to

Rule 702. 341 N.C. 513, 461 S.E.2d 631 (1995). That test requires the trial court to first discern whether the expert's proffered method of proof is sufficiently reliable as an area for expert testimony. When considering whether an expert's proffered method of proof is sufficiently reliable, "a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two. Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Howerton*, 358 N.C. at 459, 597 S.E.2d at 687 (citations and quotations omitted).

Here, defendant specifically argues that the expert's proffered method of proof is not sufficiently reliable, asserting that the expert witnesses' testing procedures amount to "novel methodology." Defendant acknowledges that other jurisdictions have allowed similar testimony indicating an approximate time of deposit; however, he contends that such methodology is not sufficient for determining a *time of death*.

A search of relevant case law from other jurisdictions shows that experts commonly provide their opinion as to the time spermatozoa may have been deposited in a woman's vagina. *See*

e.g. Lowe-Bey v. State, 272 S.W.3d 378, 380 (Mo. Ct. App. 2008) (testifying expert provided that tails break off from the sperm within about twenty-four hours after intercourse.); *Commonwealth v. Jewett*, 813 N.E.2d. 452, 457 (Mass. 2004) (testifying expert provided that the presence of intact tails indicates that the sperm was deposited "more recently as opposed to a longer period of time[.]"). Accordingly, precedent suggests that the methodology of examining whether spermatozoa remain intact in order to discern the time of deposit is sufficiently reliable. This supports a conclusion that the trial court did not abuse its discretion in determining that the testimony was admissible.

Defendant contends that the expert testimony was offered about the time of death. However, our review of the record reveals that the expert witnesses only testified about the time of deposit; thus defendant's argument is based upon a misperception of the testimony. Here, both Ermish and Wraxall testified that their methodology included a visual inspection of vaginal smears to see whether defendant's spermatozoa remained intact. Ermish stated that in her opinion the "semen was *deposited* less than 24 hours before [the victim] was deceased." (emphasis added). Similarly, Wraxall concluded that defendant's spermatozoa was deposited up to 24 hours before death. As such,

the experts opined about *time of deposit* and not the victim's *time of death*. Defendant has acknowledged that such testimony about the time of deposit of spermatozoa is sufficiently reliable, and we agree.

We can conclude that the trial court had sufficient information to make a reasoned decision that the experts' proffered method of proof was sufficiently reliable as an area for expert testimony. Thus, we cannot see how the trial court can be seen to have abused its discretion in admitting the expert testimony.

II. Motion to Dismiss

Defendant next contends that the trial court improperly denied his motions to dismiss as being against the greater weight of the evidence. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526

S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

When ruling on a motion to dismiss, the trial court must determine "whether a *reasonable inference* of the defendant's guilt of the crime charged may be drawn from the evidence." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (citation omitted). "Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." *Fritsch,* 351 N.C. at 379, 526 S.E.2d at 455 (citations and quotations omitted) (alterations in original). "In order to convict a defendant of premeditated, first-degree murder, the State must prove (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007).

Here, the State presented the following evidence tending to show defendant's guilt. First, the State introduced expert testimony that defendant's spermatozoa, complete with attached tails, were found in the victim's vagina but was not found on her panties. Next, defendant's computer had been used to search for articles pertaining to the victim's death and to access pornographic websites that depicted rape scenarios. Finally, Moore and Worsley testified that defendant had taken them to secluded locations, attacked, and strangled them.

We conclude that this evidence was sufficient to support a reasonable inference of defendant's guilt. Accordingly, we are unable to agree that the trial court erred in denying defendant's motions to dismiss.

III. Indictment

Finally, defendant argues that his short-form indictment was insufficient to sustain the first-degree murder verdict and sentence as it failed to allege the elements of the offense. We disagree.

"This issue has been decided by our Supreme Court which has consistently held that the 'short-form indictment is sufficient to charge a defendant with first-degree murder.'" *State v. Coleman*, 161 N.C. App. 224, 236, 587 S.E.2d 889, 897 (2003)

(quoting *State v. Barden*, 356 N.C. 316, 384, 572 S.E.2d 108, 150 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074, 123 S. Ct. 2087 (2003).

The short form indictment was sufficient, and accordingly, defendant's final issue is without merit.

IV. Conclusion

In sum, the trial court did not abuse its discretion in admitting the expert testimony and properly denied defendant's motions to dismiss. Further, defendant's short form incitement was sufficient. Accordingly, defendant received a trial free from error.

No error.

Judges STROUD and BEASLEY concur.

Report per Rule 30(e).