IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-231

Filed: 5 June 2018

Wake County, No. 14CRS007299

STATE OF NORTH CAROLINA

v.

EDWIN CHRISTOPHER LAWING, Defendant.

Appeal by defendant from judgment entered on or about 29 February 2016 by Judge Michael J. O'Foghludha in Superior Court, Wake County. Heard in the Court of Appeals 18 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholaos G. Vlahos, for the State.

Rudolph Widenhouse, by M. Gordon Widenhouse, Jr., for defendant-appellant.

STROUD, Judge.

Defendant appeals his conviction for first degree murder arguing the trial court erred by denying his motion to continue and his motion to dismiss and by allowing in evidence of a prior altercation with LaCoy McQueen, the deceased. After careful review, we determine that the trial court did not abuse its discretion by denying defendant's motion to continue. Although much of the evidence is circumstantial,

there was substantial evidence to support defendant's conviction of first degree murder and the trial court correctly denied defendant's motion to dismiss. In addition, the trial court did not err by allowing evidence of defendant's prior assault on LaCoy McQueen.

I. Background

The State's evidence showed that in 1996 defendant was a student at North Carolina State University ("NC State") who had sexual relationships with a series of women. Defendant's former roommate at NC State described the situation as defendant "trying to remember girls' names. He's trying to remember when they're coming over, who's coming over. I mean, I saw on several occasions one girl walk out of the room and another one walk in right behind her." One of these women was LaCoy McQueen. LaCoy was a student at a nearby college, Shaw University. LaCoy considered herself to be defendant's "girlfriend." In the spring of 1996, LaCoy became pregnant.

LaCoy often talked to defendant on a speakerphone and her roommate listened to some of her conversations with him about the pregnancy. Defendant told LaCoy having the baby would "ruin his life" because he wanted to go into the military, and he did not want his child to be "knock-kneed and pigeon toed" like LaCoy who "appeared to be disabled because" her knees and toes turned inward. Defendant

offered to pay for an abortion if she would allow him to make a video recording of the procedure so the two of them could watch it later.

On 9 May 2016, defendant moved into a new dorm room. On 16 May 1996, LaCoy took a bus to meet defendant at NC State's Bell Tower and to walk around Pullen Park; LaCoy told her friends she was going to tell defendant she had decided to keep the child. LaCoy never returned from her meeting with defendant. LaCoy's roommate and another friend repeatedly paged defendant that night, but he never responded. They also called LaCoy's mother and "security at Shaw" about LaCoy's failure to return.

The next day, LaCoy's roommate continued trying to contact defendant and also learned from LaCoy's brother she had not contacted her family. About 11:00 a.m., defendant called LaCoy's phone in her dorm room and her roommate answered. Defendant asked to speak to LaCoy, but her roommate told him she was not there and believed LaCoy was with him. Defendant tried to end the conversation, but LaCoy's roommate asked for defendant's phone number because she had only his pager number. LaCoy's roommate tried to call the number, but it did not work. Later, still on May 17, defendant called LaCoy's phone again and this time her friend answered; defendant asked to speak to LaCoy and then said he was in Virginia or on his way there. Thereafter on May 17, LaCoy's friend made a missing person report to both Shaw security and the Raleigh Police Department.

On 18 May 1996, defendant called LaCoy's dorm room again and her roommate answered; she questioned defendant about where LaCoy was, why he did not return her pages, and why he gave her a "bogus" phone number. Defendant hung up. LaCoy's roommate and others began searching for her, including organizing search parties in multiple locations and putting up fliers. Defendant did not help.

While investigating LaCoy's disappearance, law enforcement learned that on 16 May 1996 around 5:30 pm, defendant's roommate saw him with a woman in the room they shared. Defendant asked his roommate to leave, and the roommate left. Defendant later told his roommate the woman was "Stephanie," but his roommate did not think this was true because he knew Stephanie and would have greeted her if she was in the room. After 6:00 p.m., Stephanie showed up at defendant's dorm because defendant had paged her. Defendant said he needed to borrow Stephanie's car. Stephanie loaned him the car, and defendant left sometime after 6:00 p.m. Stephanie testified that she believed defendant came back after 8:30 p.m., but a mutual acquaintance, Rodney, was waiting for defendant to get a ride to work in Stephanie's car, and he testified he did not see defendant until around 10:00 p.m. Stephanie did not talk to defendant after he returned her car because she was angry at him for taking so long to return it.

On 23 May 1996, law enforcement executed a search warrant on defendant's dorm room. During the search, defendant's roommate stayed for a while but seemed

to get bored and left. But defendant was agitated and nervous, visibly shaking to the extent that law enforcement described it as a "tremor" and pacing back and forth. During the search defendant told law enforcement that LaCoy had never been in his dorm room. A blood stain was found in defendant's room, and the DNA was later determined to be consistent with LaCoy's DNA profile. Officers also took defendant's boots found in his room as evidence.

Defendant told law enforcement several versions of what happened on 16 May 1996, once claiming he had not seen LaCoy since 10 May 1996 and then stating they did meet on 16 May 1996 at Pullen Park. In the Pullen Park version of events, defendant claimed LaCoy got into a car but it was too far away to see anything, and then he later claimed that she got in a blue car with two black men. Defendant also at one point told officers he wanted to keep the baby, but LaCoy did not, and later defendant said they were arguing because he wanted to film the abortion.

About a year after LaCoy's disappearance, in March of 1997, LaCoy's remains were found in an area near Raleigh in a geological formation known as the Rolesville batholith. The doctor who performed the autopsy on LaCoy explained,

> "Although a specific cause of death was not determined, the sudden, unexpected disappearance and subsequent discovery of the remains of a healthy young adult in a relatively isolated wooded area is mostly compatible with a homicidal manner of death." So meaning that, when a young healthy woman is found in a relatively isolated area after having been missing for some time and there's no explanation for how she might have died or how she might

> have gotten there, the likely -- the likely explanation is that she was the victim of a homicide. And then the body in the relatively isolated area is potentially the result of somebody attempting to conceal the death.

Later, the State did additional testing of rock fragments from the soles of defendant's boots seized from his dorm room, and a geologist determined the rock fragments were consistent with the Rolesville batholith, but not with NC State's campus.

On or about 15 December 2014, defendant was indicted for first degree murder. On 22 February 2016, defendant's jury trial started and lasted until 29 February 2016 when defendant was ultimately found guilty of first degree murder. The trial court sentenced defendant to life imprisonment without the possibility of parole. Defendant appeals.

II. Motion to Continue

About two months before defendant's trial was to begin, on 11 December of 2015, the State notified defendant it would present expert testimony in geology regarding the rock fragments from defendant's boots. On 9 February 2016, about two weeks before the scheduled trial date, defendant's attorney moved for a continuance of the trial date set for 22 February 2016. Defendant's attorney informed the court of an issue with an investigator's retirement and defendant's struggle to hire an investigator because the Capital Defender had not approved her request for funding the expense. Defendant's counsel explained that the State's geologist had been unwilling to speak with her; "the majority of geologists [she'd] looked at worked" with

the State's geologist and could not work for defendant; and the geologists at NC State were problematic because the "alleged murder took place" there. Defendant's counsel then explained why defendant needed two separate geologists and funding for them.

The trial court and defendant's counsel then had a lengthy discussion and the trial court specifically asked, "[Y]ou said that the main thing is the geologist. And so I know nothing other than what you're telling me and I need some information to --" The trial court, defendant's counsel, and the State's attorney then had further discussion, but ultimately defendant's counsel's reiterated her need for funding to be able to retain appropriate experts to review the evidence. Eventually, the trial court agreed that the rock fragment was "a crucial piece of evidence[,]" and gave defendant's counsel two more days before ruling.

On 11 February 2016, defendant's counsel reported to the trial court that her funding issue was resolved and that she had spoken with nine geologists, but none could be retained as experts due to their association with the State's expert. Defendant's counsel then stated she would need an expert from out of state. The trial court ruled on the motion, denying it:

> There's been actually no motion made for independent testing under 15A-903. The only motion that's before the Court is a motion to continue on a generalized hope that perhaps some expert could be found in the future. And no expert's been identified, so there's been no actual motion for independent testing.
>
> Therefore, this is simply a motion to continue based on a generalized hope that at some point an expert might

appear.

The trial court then clarified it would approve funds for Defendant's counsel to speak to someone so she could prepare for cross-examination of the State's expert.

Defendant argues "the trial court erred in denying the motion to continue where additional time was needed to secure experts in geology to counter the prosecution's proffered expert testimony about the type of rock fragment[]s found on Chris Lawing's boots."

> Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal. Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error.

State v. Taylor, 354 N.C. 28, 33-34, 550 S.E.2d 141, 146 (2001) (citations omitted). Defendant made no constitutional argument before the trial court but argues here that his constitutional right to properly investigate was violated. But even if we assume *arguendo* defendant properly preserved a constitutional issue, we ultimately conclude the trial court did not err in denying his motion to continue.

Defendant argues, "[t]his case is very similar to, if not controlled by, *Barlowe*." In *State v. Barlowe*, this Court granted the defendant a new trial upon determining his constitutional rights had been violated when the trial court did not allow his

motion to continue to evaluate, prepare for cross-examination, and provide contradictory evidence on a State's expert witness testimony regarding a bloodstain. 157 N.C. App. 249, 578 S.E.2d 660 (2003). Our Court first quoted our Supreme Court to provide the analytical framework,

> An inquiry into alleged constitutional error by a trial court in denying a motion to continue requires scrutiny of the record and consideration of the circumstances of the individual case. The North Carolina Supreme Court has summarized the analysis applied by federal courts in reviewing refusals to grant a continuance where a constitutional right is implicated:
>
> > Courts have discussed numerous factors which are weighed to determine whether the failure to grant a continuance rises to constitutional dimensions. Of particular importance are the reasons for the requested continuance presented to the trial judge at the time the request is denied.
> >
> > A continuance in a criminal trial essentially involves a question of procedural due process. Implicitly, the courts balance the private interest that will be affected and the risk of erroneous deprivation of that interest through the procedures used against the government interest in fiscal and administrative efficiency.
> >
> > When the individual interest at stake is the defendant's life or liberty, the individual interest is especially compelling. An interest such as defendant's life is factored heavily into the analysis.
> >
> > On the other side of the scale, the government has an interest in procuring testimony within a reasonable time.
>
> North Carolina courts have followed suit in analyzing similar alleged violations under our state

> constitution. Some of the factors considered by North Carolina courts in determining whether a trial court erred in denying a motion to continue have included (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance.

Id. at 253–54, 578 S.E.2d at 663 (citations and ellipses omitted).

In *Barlowe*, the alleged offense took place in September of 2000 and the defendant's clothes were taken for evidence. *See id.* at 254, 578 S.E.2d at 663. In January of 2001, the defendant made a request for voluntary discovery and was provided with a three-page physical evidence log which noted green pants with bloodstains. *See id.* at 255, 578 S.E.2d at 663-64. In May of 2001, the defendant moved to compel discovery and for production of exculpatory evidence, which included a request for the blood stain test results. *See id.* at 255, 578 S.E.2d at 664. The trial court heard the May 2001 motion but the defendant did not specifically mention the pants. *See id.*

> On 13 September, defendant served a Motion to Continue asserting that the State had, on 10 September, delivered to defense counsel a report containing Agent Garrett's findings from his bloodstain pattern analysis of the green pants and that since receiving the report defense counsel had made diligent efforts to identify potential experts in this field. Defense counsel explained that the one expert with whom contact had been made would not be able to do the analysis and prepare counsel for cross-

examination or be available to give testimony by 19 September, the day trial was scheduled to start. The motion also stated the potential experts that have been identified by defense counsel are located outside of North Carolina, and there is currently no commercial air traffic in the United States due to the events of 11 September 2001 by which evidence and documents may be delivered to and from the expert that defendant selects. After hearing the motion on 13 September, the trial court declined to grant a continuance.

On 17 September, defendant submitted a Renewed Motion to Continue, supported with affidavits by defense counsel and three potential expert witnesses. The affidavit by defendant's counsel indicated that he had, on 13 September, presented to the trial court copies of two reports which he had received from the State. One report, prepared on 27 April 2001 and provided to the district attorney, detailed inspection of the crime scene and seizure of items, including the pants, indicating the search and collection of evidence that had taken place on 24 September and 5 October 2000. According to the affidavit and the State's response to the motion to continue, defendant was provided with this report on 27 or 28 August 2001. The report itself mentions the discovery of small stains on the garage floor characteristic of impact spatter and the collection of green pants with visible stain. The other report, which defense counsel claims was disclosed on 10 September, was Agent Garrett's bloodstain analysis, indicating the discovery of about 36 stains that appeared to be blood spatter on the front right knee and rear of the pants. This report indicated that the analysis had been performed on 20 August 2001 and typed on 21 August, with copies sent to the District Attorney. *In his affidavit, counsel went on to detail his efforts to locate an expert witness* in the days following 10 September:

> In summary, counsel has consulted with a number of experienced members of the criminal defense bar around the state, and all of those attorneys have identified only three expert witnesses in this subject matter:

> Marilyn T. Miller, Barton P. Epstein, and Stuart H. James. Two of the witnesses state that they are familiar with the identity of other experts in their field, and that there are none currently in North Carolina outside of law enforcement employees. None of these witnesses is reasonably available to become prepared to testify on behalf of the defendant on such short notice.
>
> Defense counsel also indicated that his law partner had contacted two potential expert witnesses in North Carolina, but neither was qualified to conduct bloodstain pattern analysis. In both the motions and the affidavit, defense counsel urged the importance of an expert witness on this issue in light of the mandatory life sentence without parole for which defendant was at risk. *All three of the experts mentioned by counsel submitted affidavits regarding their availability, the earliest of which would have been mid-October 2001 and the latest, November 2001*. The resumes each expert attached evidenced extensive experience, publications, and study on the subject.

Id. at 255–56, 578 S.E.2d at 664 (emphasis added) (quotation marks, ellipses, and brackets omitted).

This Court agreed with the defendant:

> Considering all of the factors which our courts have said are relevant to a determination of whether the denial of a motion to continue implicates constitutional guarantees, we are compelled to hold the denial of defendant's motion to continue in this case was error and violated her constitutional rights to confront her accusers, to effective assistance of counsel, and to due process of law. It is clear that the blood spatter evidence was critical to the State's case against defendant because it was the only physical evidence potentially placing her at the scene at the time of the murder. Aside from any conclusions the jury might draw from that aspect alone, evidence of the

presence of impact spatter also is contradictory of defendant's testimony that she was not in the garage during the murder and corroborative of Dunlap's testimony that she was present and, in fact, handed him the flashlight. In a case largely dependent on the credibility of the two, the potential harm to the defense due to the lack of opportunity to refute this evidence by informed cross-examination of Agent Garrett, rebuttal of his testimony by someone qualified to express an opinion, or to provide other explanations for the presence of blood spatter on the pants, is palpable.

Moreover, it does not appear that defendant unreasonably delayed discovery efforts, and even assuming the State is correct in its assertion that defense counsel was provided a draft of Agent Garrett's analysis report on 27 August, defendant has shown that none of the experts contacted by her counsel would have been available for trial even if they had been contacted immediately upon defendant's receipt of the report. If, as claimed by defense counsel, the report was not received until 10 September, the delay between its receipt and the 13 September motion to continue is not unreasonable, considering the distractions imposed upon nearly all of our citizens and the difficulties likely to have been encountered in contacting and communicating with potential expert witnesses due to the tragic events in New York City and Washington, D.C. on 11 September 2001. Lastly, *unlike many cases in which the defendant did not indicate to the trial court the names of witnesses or the substance of testimony they hoped to obtain by virtue of a continuance*, defense counsel in the present case provided such information both orally and in writing. Given the materiality of the issue on which defendant sought expert advice and testimony and the potential penalty faced by defendant if convicted, we can find no sound reason within the record for the denial of her motion for a continuance, and the State has not carried its burden of showing the court's ruling was harmless beyond a reasonable doubt. Because defendant's constitutional rights were violated by the trial court's ruling on this issue, we hold that defendant is entitled to a new trial.

Id. at 257–58, 578 S.E.2d at 665–66 (emphasis added) (citations and quotation marks omitted).

Three important factors distinguish this case from *Barlowe*: (1) In *Barlowe*, defendant had less than a month to procure expert witnesses, but here, defendant had more than two months, (2) the chaos and travel difficulties after September 11 are not a factor, and (3) defendant provided no affidavit detailing her efforts to find an expert, what experts might be available to testify, and when they could be available. *Contrast id.* Nonetheless, we will use the analysis as directed by *Barlowe*.

First, "[o]f particular importance" we consider "the reasons for the requested continuance presented to the trial judge at the time the request is denied." *Id.* at 254, 573 S.E.2d at 663. Defendant's counsel informed the trial court she needed a geological expert witness to address the rock fragment evidence which placed defendant where LaCoy's body was found. The rock fragments were, as the trial court noted, crucial evidence. Defendant's attorney explained the State's geological expert would not communicate with her and she was having difficulty finding other experts because they had worked with the State's witness.

North Carolina courts specifically often consider "the diligence of the defendant in preparing for trial and requesting the continuance." *Id* at 254, 578 S.E.2d at 663. Although the State notified defendant of its geological evidence about two months before trial, defendant filed no motion to continue until about two weeks before trial.

During that two months, defendant had identified no expert who could potentially be willing or available to testify, but had only determined that the local experts could not assist defendant. After the hearing on the motion to continue started, the trial court gave defense counsel two extra days to continue her search, but still no potential witnesses were identified.

This case differs greatly from *Barlowe* on the next two factors, "the detail and effort with which the defendant communicates to the court the expected evidence or testimony" and "the materiality of the expected evidence to the defendant's case[.]" *Id.* Defendant did not submit affidavits or any other information addressing the substance of "the expected evidence[,]" *id.*, and how it would be material to defendant's case. Defendant explained that the local experts were not available for various reasons and that an expert from out of state would be required, but she did not explain when or where an out of state expert may be found. At the most, the trial court, and this Court, would have to assume that if defendant found an expert who could refute the State's expert witness, that evidence would be material to defendant's case, since the rock fragments were a key piece of evidence linking defendant to the location where LaCoy's remains were found.

Another factor to consider is "the gravity of the harm defendant might suffer as a result of a denial of the continuance." *Id.* Based on the limited information presented to the trial court, it is difficult to say that defendant would suffer

substantial harm from denial of the continuance. As the trial court noted, defendant's motion was based upon a "generalized hope that perhaps some expert could be found in the future. And no expert's been identified, so there's been no actual motion for independent testing." There was no reason for the trial court to believe that additional time would be helpful in finding an expert.

In evaluating these factors, we must balance "the private interest that will be affected and the risk of erroneous deprivation of that interest through the procedures used against the government interest in fiscal and administrative efficiency." *Id.* "When the individual interest at stake is the defendant's life or liberty, the individual interest is especially compelling. An interest such as defendant's life is factored heavily into the analysis[,]" and "[o]n the other side of the scale, the government has an interest in procuring testimony within a reasonable time." *Id.* Here, defendant's liberty was at stake, as it would be in any first degree murder case. But "fiscal and administrative efficiency" are also compelling interests since a young woman was murdered. *Id*. There had already been a long delay between LaCoy's death and defendant's arrest and trial, but that delay does not eliminate the State's interest in trying the case while its witnesses are still available with sufficient memories to testify. Both defendant and the State have valid reasons for and against continuing the trial to give defendant more time to find an expert.

The trial court determined, and we agree, that the deciding factor here is that

although defendant had over two months to procure an expert, or at least to identify potential experts, defendant still could identify no one who might be able to testify. It is possible that review by another geologist may have been helpful to defendant's case, but there was no evidence presented, such as the affidavits in *Barlowe*, to show that defendant was likely to find one within a reasonble time. *See id.* at 256, 573 S.E.2d at 665. Defendant's counsel was diligent in contacting many potential experts, and she explained to the trial court her efforts to find an expert, but there was simply no reason to believe that she would be likely to find one if the trial court granted the motion to continue, since she had had ample opportunity. Defendant has failed to show that the denial was erroneous, so even if we assume defendant preserved his constitutional argument, on *de novo review*, we conclude the trial court did not err in denying defendant's motion to continue. *See Taylor*, 354 N.C. at 33-34, 550 S.E.2d at 146. This argument is overruled.

III. Motion to Dismiss

During his trial defendant moved to dismiss the charges against him and the trial court denied his motion. Defendant contends the trial court erred in denying his motion to dismiss because the evidence failed to show premeditation and deliberation.

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might

> accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted). The "evidence may be direct, circumstantial, or both. Circumstantial evidence alone may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (citations and quotation marks omitted). "First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Thomas*, 350 N.C. 315, 346, 514 S.E.2d 486, 505 (1999).

Defendant contends that "because the evidence unerringly failed to show that . . . [he] killed LaCoy McQueen after premeditation and deliberation, the conviction for first degree murder must be vacated[.]" (Original in all caps.)

> Premeditation and deliberation generally must be established by circumstantial evidence, because they ordinarily are not susceptible to proof by direct evidence. "Premeditation" means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. "Deliberation" means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to

> accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.
> Circumstances that may tend to prove premeditation and deliberation include:
> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulties between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Bedford, 208 N.C. App. 414, 417-18, 702 S.E.2d 522, 527 (2010) (citations omitted).

Defendant summarizes the evidence as follows,

> [T]here was some evidence of motive based on McQueen being pregnant and unwilling to have an abortion. There was some evidence of opportunity as McQueen went from Shaw University to N.C. State to meet Mr. Lawing and some people saw her with him the last time she was seen alive. But no evidence showed a planned killing; no evidence showed premeditation; no evidence showed deliberation. If, as the evidence may have suggested and as the prosecutor argued, Mr. Lawing and McQueen had a heated disagreement when she voluntarily went to and met with him at North Carolina State, and he killed her during this emotional confrontation, the result would be second degree murder.

Defendant mainly relies on *State v. Corn*, wherein the defendant was convicted

of first degree murder and the defendant argued that his motion to dismiss should have been granted because the evidence of premeditation and deliberation was insufficient. *See Corn*, 303 N.C. 293, 296, 278 S.E.2d 221, 223 (1981). The *Corn* opinion is brief, and after explaining the law of motions to dismiss and defining premeditation and deliberation, much as we have here, the Court engaged in a three paragraph analysis:

> After carefully considering the evidence presented in the case *sub judice* in the light most favorable to the State, we find that the State has failed to show by substantial evidence that defendant killed Lloyd F. Melton with premeditation and deliberation. The shooting was a sudden event, apparently brought on by some provocation on the part of the deceased. The evidence is uncontroverted that Melton entered defendant's home in a highly intoxicated state, approached the sofa on which defendant was lying, and insulted defendant by a statement which caused defendant to reply "you son-of-a-bitch, don't accuse me of that." Defendant immediately jumped from the sofa, grabbing the .22 caliber rifle which he normally kept near the sofa, and shot Melton several times in the chest. The entire incident lasted only a few moments.
>
> There is no evidence that defendant acted in accordance with a fixed design or that he had sufficient time to weigh the consequences of his actions. Defendant did not threaten Melton before the incident or exhibit any conduct which would indicate that he formed any intention to kill him prior to the incident in question. There was no significant history of arguments or ill will between the parties. Although defendant shot deceased several times, there is no evidence that any shots were fired after he fell or that defendant dealt any blows to the body once the shooting ended.
>
> All the evidence tends to show that defendant shot Melton after a quarrel, in a state of passion, without

> aforethought or calm consideration. Since the evidence is insufficient to show premeditation and deliberation, we find that the trial court erred in instructing the jury that they could find defendant guilty of first degree murder and defendant is awarded a new trial for a determination of whether or not defendant is guilty of second degree murder, voluntary manslaughter or not guilty.

Id. at 296–98, 278 S.E.2d at 223–24. Other than the procedural posture and argument on appeal, defendant's case is almost entirely different than *Corn*, particularly regarding the evidence of premeditation and deliberation. *See id.*

In *Corn*, the evidence showed a sudden quarrel arose, and the defendant grabbed a nearby gun "in a state of passion" and shot the victim. *See id.* at 297-98, 278 S.E.2d at 234-34. Here, unlike *Corn*, there is evidence to support premeditation and deliberation. *Contrast id.* The evidence includes "the conduct and statements of the defendant before and after the killing," *Bedford*, 208 N.C. App. at 417, 702 S.E.2d at 527, that he was upset with LaCoy for being pregnant with a child he did not want, both because he did not want to have children specifically with her due to her appearance of having a disability and because he did not want a baby derailing his future plans. After going to meet with defendant to tell him she was going to keep the baby, LaCoy disappeared. Besides the life-altering dispute about keeping a child, there was additional evidence of "ill-will or previous difficulties between the parties," as we will discuss in more detail when addressing the next issue. *Id.*

Also, on the day LaCoy disappeared, defendant asked his roommate to leave

their room and lied about the identity of the woman in the dorm room. Shortly thereafter defendant borrowed a vehicle for at least two, but possibly up to four hours. Blood consistent with LaCoy's DNA was later found in defendant's room though defendant denied LaCoy had ever been in his new dorm room where he had lived only eight days before LaCoy disappeared, and rocks were found in defendant's boots consistent with those where LaCoy's body was found. Defendant also told law enforcement officers many versions of what happened on the day of LaCoy's disappearance. Viewing "the evidence in the light most favorable to the State[,]" *Johnson*, 203 N.C. App. at 724, 693 S.E.2d at 148, it does not tend to indicate defendant killed LaCoy "in a state of passion, without aforethought or calm consideration[,]" *Corn* at 298, 278 S.E.2d at 234, but rather with premeditation and deliberation. As there was sufficient evidence of premeditation and deliberation, the trial court did not err in denying defendant's motion to dismiss. This argument is overruled.

IV. Evidence of Prior Altercation

Defendant made a motion in limine to suppress statements by two witnesses who testified they had seen defendant grab and push LaCoy during an argument.[1] Defendant's counsel argued,

> the use of all of this would just go to prove he has a violent character and acted in conformity with that character,

[1] One of the witnesses testified only about defendant grabbing LaCoy and the other testified that defendant grabbed and then pushed LaCoy.

> which is forbidden under 404b. I can't think of any valid use for this information other than to show that he's a violent person and acted in conformity, which is the forbidden use of this information. So we would ask to exclude this.

The State argued the evidence showed "motive, intent, premeditation and deliberation and malice aforethought[.]" After further discussion, Defendant's counsel clarified, "Your Honor, I do not contend it's irrelevant. I rather contend that it's more prejudicial than it is probative." The trial court allowed the motion in part, and denied it in pertinent part for purposes of this appeal by stating,

> I do believe under 404b, it does not – it's not admissible to prove that he acted in conformity with a particular character. However, it is admissible for purposes of the motive, intent, knowledge, identity, and absence of mistake or accident. So I do think its relevant under 404b, and I don't think its prejudicial effect, its prejudicial -- I don't think its relevance is substantially outweighed by its prejudicial effect under 403. So I do believe it's admissible.

During trial defendant objected to the testimony, and the trial court overruled the objections.

On appeal, defendant argues the evidence provided "an impermissible inference of a propensity for anger and violence, which was otherwise inadmissible and unfairly prejudicial." Defendant also contends the evidence was irrelevant, although he already specifically conceded before the trial court the relevancy of the evidence. Even if we assume *arguendo* that defendant properly preserved the issue of relevancy we have already noted that "ill-will or previous difficulties between the

parties" is relevant to show the elements of premeditation and deliberation. *See Bedford*, 208 N.C. App. at 417, 702 S.E.2d at 527; *see generally* N.C. Gen. Stat. § 8C-1, Rule 401 (2015) ("'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.").

As to the 404(b) evidence and whether it was unfairly prejudicial under Rule 403,

> We first address the appropriate standard of review for a trial court's decision to admit evidence under Rule 404(b). The Court of Appeals has consistently applied an abuse of discretion standard in evaluating the admission of evidence under Rules 404(b) and 403. Though this Court has not used the term de *novo* to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of probative value and unfair prejudice under Rule 403. For the purpose of clarity, we now explicitly hold that when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 158–59 (2012) (citations omitted).

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015).

Specifically, this Court has stated,

> In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of the defendant's feelings. Specifically, evidence of frequent quarrels, separations, reconciliations, and ill-treatment is admissible as bearing on intent, malice, motive, premeditation, and deliberation.

State v. Scott, 343 N.C. 313, 331, 471 S.E.2d 605, 616 (1996) (citations, quotation marks and brackets omitted). The evidence of defendant's ill-treatment of LaCoy and quarrels with her tend to show motive and intent just as the trial court determined along with evidence of premeditation and deliberation. *See* N.C. Gen. Stat. § 404(b); *Scott*, 343 N.C. at 331, 471 S.E.2d at 616.

We next turn to the trial court's Rule 403 determination and review for abuse of discretion. *See Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. "An abuse of discretion results only where a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *State v. Black*, 197 N.C. App. 731, 733, 678 S.E.2d 689, 691 (2009) (citation and quotation marks

omitted). On the trial court's Rule 403 determination we note that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, 403 (2015). The evidence has substantial probative value, since it tends to show the nature of defendant's relationship with LaCoy and malice. The trial court did not abuse its discretion by determining the evidence was not unfairly prejudicial. This argument is overruled.

V. Conclusion

We conclude there was no error.

NO ERROR.

Judges HUNTER and TYSON concur.

Report per Rule 30(e).