IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-895

Filed 7 November 2023

Wake County, No. 20 CRS 866

STATE OF NORTH CAROLINA

v.

BRIAN SLUSS

Appeal by defendant from judgment entered 28 April 2022 by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 23 August 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marissa K. Jensen, for the State.

Mark L. Hayes for defendant-appellant.

ZACHARY, Judge.

Defendant Brian Sluss appeals from a judgment entered upon a jury's verdict finding him guilty of first-degree murder. After careful review, we conclude Defendant received a fair trial, free from error.

I. Background

On 5 May 2020, a Wake County grand jury indicted Defendant for the murder of his girlfriend Monica Moynan. The matter came on for trial in Wake County Superior Court on 11 April 2022. At trial, the State presented considerable testimony from individuals who came into contact with Defendant and Ms. Moynan during the course of their relationship, including family, friends, coworkers, and law enforcement officers.

Ms. Moynan's mother testified that Ms. Moynan met Defendant when she was seventeen years old and interviewed for a job at OfficeMax. Defendant hired her there. Eventually, Ms. Moynan told her mother that Defendant "had an interest in her and she thought he was very nice and she wanted to date him." Defendant was thirty-two years old but lied about his age and was already married with two children when he began the relationship with Ms. Moynan. When Ms. Moynan turned eighteen in 2014, she moved out of her parents' home and into Defendant's; she wanted to "live with him[] because [her parents] refused to approve of the relationship and he was not welcome at [her parents'] home." Shortly after moving in with Defendant, Defendant impregnated Ms. Moynan and the child was born in September 2015.

The evidence presented by the State chronicled a long history of domestic violence beginning shortly after the child was born. Notably, in May 2016, Ms. Moynan filed a complaint seeking a domestic violence protective order ("Protective Order") against Defendant. In support, Ms. Moynan alleged that Defendant "punched

[her] in the head and choked [her] against a wall[,]" and that Defendant "tackled, thr[ew], and hit" her on another occasion.

After a hearing on 26 May 2016, the trial court concluded that "[D]efendant ha[d] committed acts of domestic violence against [Ms. Moynan], [and] there is danger of serious and immediate injury to [her] and the minor child[.]" The trial court entered the Protective Order, requiring that "[D]efendant shall stay at least 100 yards away from [Ms. Moynan] at all times" until the Protective Order expired on 26 May 2017.

In December 2016, Holly Springs Police Department officers responded to a call that Defendant was violating the Protective Order. Ms. Moynan reported Defendant was standing in front of her apartment and sending text messages to her. When officers arrived, they could not locate Defendant.

The next month, in January 2017, officers responded to a domestic disturbance call at Ms. Moynan's apartment. Ms. Moynan stated to officers that she was "choked by [Defendant] on the floor, that she was in fear of her life." At the time, Defendant had an active arrest warrant for a separate 2016 violation of the Protective Order, based on Defendant's alleged stalking of Ms. Moynan. Defendant was placed "under arrest for the domestic violence incident that night and for the open warrant," and, in early January 2019, Defendant pleaded guilty in Wake County District Court to assault on a female.

Defendant and Ms. Moynan reconciled and the pair had a second child in August of 2018, after which the domestic violence escalated. In early 2019, officers

responded to another domestic disturbance call involving Defendant and Ms. Moynan. Ms. Moynan told officers that Defendant "pushed her down to the floor in the kitchen" and "punched her in the left side of her head with his right fist."

A manager at the restaurant at which Ms. Moynan worked testified to various incidents that Ms. Moynan reported occurred in early 2019, including that Ms. Moynan "got beat up [by Defendant on] Valentine's Day[,]" and that by late March, "[t]he bruises got bigger, more widespread, [and] harder for her to hide." The manager also testified Defendant began physically and verbally abusing Ms. Moynan at work, in front of her. She testified that Ms. Moynan told her not to intervene, because it would make matters worse.

On the evening of 6 April 2019, Ms. Moynan was last seen leaving a tavern in Fuquay Varina. Text message records indicated that she arrived home in the early morning hours of 7 April 2019. She was not heard from or seen thereafter. A neighbor testified that "two or three days" after 7 April, "around 3:00-something in the morning," she saw Defendant "coming in and out [of Ms. Moynan's apartment] with a big black trash bag."

After receiving the report that Ms. Moynan was missing, one investigator testified that it "stood out" that Defendant "was in possession of [Ms. Moynan's] car, her phone, [and] her two children." During their investigation, officers determined that: the curtains had been replaced in Ms. Moynan's apartment between 2 April and 13 April 2019; the ABC mats in Ms. Moynan's apartment had been changed, despite

Defendant's insistence to the contrary; Defendant's cell phone records reflected that he was present on 11 April 2019 at a Walmart in Holly Springs at which ABC mats were purchased for cash; and when officers conducted a chemical test on the floor tiles of Ms. Moynan's apartment, there was a positive reaction for the existence of blood.

Investigators removed the reactive floor tiles and observed on the undersides a dark-red stain, which was determined to be blood. Subsequent DNA testing conducted on a sample taken from the tiles revealed that "[i]t is 433 million times more likely that" the source of the sample "was the biological child of [Ms. Moynan's mother] rather than being an unrelated individual selected at random from the U.S. population."

Defendant testified in his own defense at trial. On 28 April 2022, the jury found Defendant guilty of first-degree murder. Defendant timely entered oral notice of appeal in open court.

II. Discussion

On appeal, Defendant argues that he received ineffective assistance of counsel because his defense attorney "repeatedly failed to object to hearsay statements attributable to an unavailable declarant." We disagree.

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). "Deficient

performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *Id.* (cleaned up). "Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (cleaned up).

A. Testimony Regarding Ms. Moynan's Prior Statements

Defendant first takes issue with the admission of "evidence of Ms. Moynan's prior statements which were not the product of her own sworn testimony[,]" particularly the prior statements that Defendant had choked or strangled her. Defendant then identifies 18 of Ms. Moynan's prior statements, which formed the basis of eight witnesses' testimony at trial, and argues that "[a]ll of these statements . . . were hearsay and, upon a timely objection, should have been excluded." We disagree as to all 18 statements.

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) (2021). Hearsay is inadmissible at trial, with limited exceptions. *Id.* § 8C-1, Rule 802. Rule 803(3) of the North Carolina Rules of Evidence is one such exception, and allows for the admission of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition[.]" *Id.* § 8C-1, Rule 803(3).

"It is well established . . . that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant," and are therefore admissible into evidence. *State v. Alston*, 341 N.C. 198, 230, 461 S.E.2d 687, 704 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). Our Supreme Court "has repeatedly held that testimony about a defendant-husband's arguments with, violence toward, and threats to his wife are properly admitted in his subsequent trial for her murder." *State v. Thibodeaux*, 352 N.C. 570, 579, 532 S.E.2d 797, 804 (2000) (cleaned up), *cert. denied*, 531 U.S. 1155, 148 L. Ed. 2d 976 (2001), *superseded on other grounds by statute*, Act of May 21, 2003, ch. 101, 2003 N.C. Sess. Laws 127, 127, *as stated in State v. Augustine*, 359 N.C. 709, 731, 616 S.E.2d 515, 531 (2005).

Moreover, our Supreme Court "consistently ha[s] allowed evidence spanning the entire marriage when a husband is charged with murdering his wife in order to show malice, intent, and ill will toward the victim." *Id.* at 578, 532 S.E.2d at 804 (cleaned up). "Therefore, evidence of the entire pattern and history of violence between [the] defendant and the victim [i]s relevant." *Id.* (citation omitted).

Here, Defendant alleges that counsel failed to object to the admission of portions of the testimony of several witnesses that he contends were hearsay, including by Ms. Moynan's mother that Ms. Moynan "explained that, you know, [Defendant] was choking her[,]" and strangling her, and by Officer Sean Pearson that Ms. Moynan said that Defendant "tackled her to the ground . . . [and] put her in . . .

a type of choke hold," that "she was just screaming for him to stop choking her[,]" and that during the prior choking incident Defendant "used both arms and his legs to squeeze her until she was hurting and couldn't breathe." The State also presented testimony from five other witnesses to the effect that Ms. Moynan told them Defendant had "choked her" or "strangled [her] before" on at least two different occasions, including "that her shirt had been yanked up around her neck and knotted behind her throat," at which point "she was choked with it so violently" that Ms. Moynan stated "she saw the lights going out." Officer Mitchell Ham also testified that one witness's "statement said [Ms. Moynan] came into work on March 26th, but she stated [Defendant] choked her with her shirt and it ripped."

We conclude that these statements and conversations "related directly to" Ms. Moynan's fear of Defendant and that the statements "were properly admitted pursuant to the state of mind exception to the hearsay rule to show the nature of [Ms. Moynan's] relationship with [Defendant] and the impact of [Defendant's] behavior on [Ms. Moynan's] state of mind prior to her murder." *Alston*, 341 N.C. at 231, 461 S.E.2d at 704. Accordingly, defense counsel did not commit ineffective assistance of counsel by failing to object to the admission of this testimony, and the trial court did not err in admitting it.

B. Ms. Moynan's "Open Letter to Evil"

Defendant next contends that a letter on Ms. Moynan's blog post titled "Open Letter to Evil" was inadmissible hearsay and that his counsel erred by failing to object to the letter's admission into evidence at trial. This argument is also without merit.

As discussed above, "[i]t is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant[,]" and are therefore admissible into evidence. *Id.* at 230, 461 S.E.2d at 704.

In *Alston*, our Supreme Court addressed the admissibility of a letter the murder victim sent to her congressman, in which she described in detail the defendant's violent acts toward her. *Id.* at 227–28, 461 S.E.2d at 702–03. Concluding that the letter was admissible under the state-of-mind exception to the hearsay rule, our Supreme Court explained that "the letter . . . shows that at the time it was written, the victim feared the defendant[,]" and that "a victim's statements of fear are admissible and relevant to show the status of the victim's relationship with the defendant." *Id.* at 232, 461 S.E.2d at 705. "Thus, the letter was properly admissible under the state-of-mind exception to the hearsay rule found in [Rule 803(3)]." *Id.*

In the present case, Ms. Moynan's letter likewise falls within the state-of-mind hearsay exception because it "show[s] the nature of [her] relationship with [Defendant] and the impact of [Defendant's] behavior on [her] state of mind prior to her murder." *Id.* at 231, 461 S.E.2d at 704. Ms. Moynan stated in the letter: "You soon turned into such an angry and mean man. Resorting to violence when caught in lies

and unsure of your next move. I'll always remember the night of our anniversary. The first night you laid your hands on me." The letter continued: "Our relationship was rocky and messy . . . after that[,]" and talks about one evening where she "almost died" after being "choked out, laying on my living room floor, gasping for air or help. That was the closest I'd ever been to death. All I could think about was my baby. And I wasn't about to let YOU of all people take my life away from me."

These statements "show the nature of [Ms. Moynan's] relationship with [Defendant] and the impact of [Defendant's] behavior on [Ms. Moynan's] state of mind prior to her murder." *Id.* at 231, 461 S.E.2d at 704. "Thus, the letter was properly admissible under the state-of-mind exception to the hearsay rule found in [Rule 803(3)]." *Id.* at 232, 461 S.E.2d at 705. Accordingly, defense counsel did not provide ineffective assistance of counsel by failing to object to, and the trial court did not err in admitting, this testimony.

C. Evidence of Defendant's Prior Assaults on Ms. Moynan

Finally, Defendant contends that "defense counsel also erred in failing to object to the evidence of choking based on Rule 404(b)" because "[t]he only purpose of that evidence was to prove that [Defendant] had a propensity to violence by choking, and that he therefore must have choked Ms. Moynan again." We disagree.

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person . . . to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). The evidence of past wrongs

or acts "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." *Id.*

In applying Rule 404(b), our Supreme Court "has repeatedly held that a defendant's prior assaults on the victim, for whose murder [the] defendant is presently being tried, are admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim." *Alston*, 341 N.C. at 229, 461 S.E.2d at 703. Evidence of a defendant's prior assault on the victim likewise "tends to establish malice, intent, premeditation and deliberation, all elements of first-degree murder. The evidence also tends to establish the defendant's ill will toward the victim. Thus, the evidence is relevant to an issue other than [the] defendant's character." *Id.*

In the present case, the evidence that Defendant previously choked Ms. Moynan was in fact admissible under North Carolina Rules of Evidence 803(3) and 404(b). "[E]ven if defen[se] counsel had objected to admission of the . . . testimony . . . which [D]efendant argues should not have been admitted, the trial court would have properly overruled the objections" because the challenged testimony was admissible under exceptions to the hearsay rule. *State v. Boyd*, 209 N.C. App. 418, 428, 705 S.E.2d 774, 781, *disc. review denied*, 365 N.C. 188, 707 S.E.2d 239 (2011). "Thus, [D]efendant has not demonstrated that the trial would have had a different outcome

in the absence of such assistance." *Id*. (cleaned up). Accordingly, Defendant's argument that he received the ineffective assistance of counsel fails.

III. Conclusion

Where there has been no error, there can be no deficient performance, as is required under the first prong of the *Strickland* test for ineffective assistance of counsel. *See Allen*, 360 N.C. at 316, 626 S.E.2d at 286. Because Defendant has failed to demonstrate deficient performance of his defense counsel by failing to object to admissible evidence, Defendant's claim for ineffective assistance of counsel is without merit.

NO ERROR.

Judges DILLON and WOOD concur.

Report per Rule 30(e).