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NO. COA02-1403

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

STATE OF NORTH CAROLINA

v.

Robeson County
No. 97 CRS 13787
No. 97 CRS 13788
No. 97 CRS 13789
No. 97 CRS 13790
No. 97 CRS 13791
No. 97 CRS 15355

LEONARD WAYNE HAIR,
Defendant.

Appeal by defendant from judgments entered 15 February 2002 by Judge C. Preston Cornelius in Robeson County Superior Court. Heard in the Court of Appeals 20 August 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General James P. Longest, Jr., for the State.

Hosford & Hosford, P.L.L.C., by Geoffrey W. Hosford for defendant-appellant.

ELMORE, Judge.

Defendant Leonard Wayne Hair appeals from judgments entered upon jury verdicts finding him guilty of two counts of first degree felony murder and one count each of first degree burglary, first degree robbery with a dangerous weapon, first degree arson, and first degree rape. For the reasons stated herein, we conclude that defendant's trial was free of prejudicial error.

On 5 January 1998, true bills of indictment were returned charging defendant with the murders of 57-year-old Forest Samuel Braswell (Mr. Braswell) and 78-year-old Elizabeth Baxley (Ms. Baxley), as well as with robbery with a dangerous weapon, first degree burglary, first degree arson, and first degree rape, arising from events which transpired at Mr. Braswell's home in the early morning hours of 4 June 1997. Defendant was tried at the 22 January 2002 criminal session of Robeson County Superior Court, convicted on all counts, and received consecutive sentences of life imprisonment without parole. Defendant filed notice of appeal on 15 February 2002.

At trial, the State's evidence tended to show that while working as an investigator with the Lumberton Police Department, Dan Russ (Officer Russ) was dispatched to Mr. Braswell's Lumberton home around mid-day on 4 June 1997. Ms. Baxley also lived in the home and assisted with cooking and cleaning. Officer Russ entered through the back door and "noticed there had been some type of fire" in the home. The walls were blackened, and "there was a lot of heat inside." The partially charred bodies of Mr. Braswell and Ms. Baxley lay, bound and gagged, on the floor in the den. Ms. Baxley was unclothed from the waist down. Officer Russ observed that some of the rooms in the house had been ransacked, with drawers pulled out of a dresser in one bedroom and their contents emptied onto the floor. A window beside the back door had been broken. Special Agent Neil Murphy (Agent Murphy), an arson investigator with the State Bureau of Investigation, examined the

scene and concluded that, based on the burn patterns he observed, "an ignitable liquid of some type had been poured on the floor and across the bodies in [the den], and ignited causing the fire."

Dr. Thomas Clark (Dr. Clark), a forensic pathologist employed by the State of North Carolina, performed an autopsy on Mr. Braswell. Dr. Clark testified that he observed three blunt-force injuries to Mr. Braswell's head, which in his opinion were inflicted with "a hammer or object very much like a hammer with a rounded, heavy surface." Dr. Clark testified that, in his opinion, Mr. Braswell died of carbon monoxide poisoning caused by smoke inhalation, although he "could and would have" died from his head injuries absent the fire.

Dr. John Butts (Dr. Butts), Chief Medical Examiner for the State of North Carolina, performed an autopsy on Ms. Baxley. Dr. Butts testified that Ms. Baxley suffered a fractured skull, broken jaw, and other head injuries "consistent with her having been struck with a blunt object" and "characteristic of the kind of fracture that one sees if an individual is struck with . . . a hammer," and that in his opinion these injuries caused her death. After noting bruising and tearing around and inside Ms. Baxley's vagina and finding sperm therein, Dr. Butts collected a sexual assault evidence kit. Special Agent Mark Boodee (Agent Boodee) of the SBI's DNA Unit tested the sperm collected from Ms. Baxley's vagina, compared it with a DNA sample collected from defendant, and testified that it was "scientifically unreasonable to think that it could have come from anyone other than" defendant.

Defendant was questioned about the murders on 5 June 1997 and subsequently left the state. Defendant was thereafter located in South Carolina and returned to Lumberton, where he was interviewed again by Officer Russ on 25 July 1997. During this interview defendant gave a statement, reduced to writing by Officer Russ and signed by defendant, which included the following: defendant and Ricky Harden (Harden) went to Mr. Braswell's house around 7:00 p.m. on 3 June 1997, where Mr. Braswell and Harden went into one room and Mr. Braswell paid defendant to have sex with Ms. Baxley in another room. Defendant and Harden then left and bought powder cocaine and crack cocaine from local dealers, which they proceeded to use. Defendant and Harden went to defendant's mother's house, where they were joined by Tommy Musselwhite (Musselwhite), and drank alcohol for awhile before deciding to drive around. After procuring and using more drugs, defendant, Harden, and Musselwhite drove to Mr. Braswell's house "to steal money." Defendant dropped Harden and Musselwhite off at Mr. Braswell's house, then parked the car in a lot down the street and walked to Mr. Braswell's house. Defendant entered the house and saw Mr. Braswell and Ms. Baxley lying on the floor; Harden was tying up Mr. Braswell, and Musselwhite was standing over them holding a hammer. Defendant then removed several beers from the refrigerator, walked outside, and drank them, wiping his fingerprints off the cans with his shirt before discarding the cans in the yard. Defendant then went through Mr. Braswell's car looking for valuables and removed a pouch containing paperwork pertaining to the car. Harden and

Musselwhite emerged from the house, each wearing socks on his hands, with Musselwhite still holding the hammer. Defendant saw what appeared to be flames inside the house. As defendant, Harden, and Musselwhite walked down the street towards the car, Musselwhite placed the hammer and the pouch defendant had taken from Mr. Braswell's car in a storm drain. Defendant, Harden, and Musselwhite then returned to defendant's mother's home. In a subsequent interview on 28 July 1997, defendant told Officer Russ that he also "went through the dresser drawers looking for something to steal" in a bedroom, and that he went to South Carolina after initially being questioned about the murders because "he was running from a parole violation and also from the murders coming down."

Detective Johnny Barnes (Detective Barnes) of the Lumberton Police Department testified that he collected Mr. Braswell's driver's license and credit cards, documents and items from Mr. Braswell's car, two socks, and a hammer from a storm drain near Mr. Braswell's house. Special Agent Jennifer Elwell (Agent Elwell), a forensic serologist with the SBI, testified that she performed a DNA test on blood found on the hammer, compared it to blood samples from Mr. Braswell and Ms. Baxley, and determined that the blood found on the hammer was "consistent with a mixture of the two victims[' blood]."

Detective Barnes also testified that he arrested defendant on 27 June 1996, approximately one year prior to the murders, after Ms. Baxley reported that defendant had stolen her purse. Regarding

that incident, Detective Barnes testified that Ms. Baxley identified defendant after he drove defendant to Mr. Braswell's house, whereupon defendant "yelled . . . at Ms. Baxley and Mr. Braswell that, if he went to jail, he would get both of them." Defendant was thereafter incarcerated until approximately three months before Mr. Braswell and Ms. Baxley were murdered.

Defendant testified at trial, and his testimony regarding the evening in question was generally consistent with his 25 July 1997 statement to Officer Russ. Both Harden and Musselwhite are related to defendant's stepfather, and defendant testified he considered them friends. Defendant testified that Harden introduced him to Mr. Braswell when defendant was a teenager, and that defendant thereafter went to Mr. Braswell's house "lots of times . . . [t]o let [Mr. Braswell] perform oral sex on [defendant] for money." Defendant testified he met Ms. Baxley in 1996, and that Mr. Braswell paid him to have sex with her "four or five times," including on 3 June 1997. Defendant admitted stealing Ms. Baxley's purse on 27 June 1996 but denied telling Mr. Braswell and Ms. Baxley that he would "get" them if he went to jail for it, testifying that he instead "hollered up at Mr. Braswell . . . that, if he didn't straighten [this] out, . . . I was going to tell about what was going on up in . . . the house and stuff." Defendant testified that he was referring to sexual contact which had occurred in Mr. Braswell's home between Mr. Braswell and young men and boys in the neighborhood.

Defendant testified that after he, Harden, and Musselwhite returned to his mother's house following the murders, he removed, without Harden's or Musselwhite's knowledge, a gold signet ring inscribed with the letter "B" from Harden's car. Defendant testified the ring had not been in the car before he, Harden, and Musselwhite went to Mr. Braswell's house that evening. Defendant sold the ring the next day, and later took police to the buyer's home, where they recovered the ring. At trial, Mr. Braswell's sister identified the ring as having belonged to her brother.

Harden and Musselwhite were each called as witnesses by defendant, and each denied going to Mr. Braswell's house on the night of the murders. Harden and Musselwhite each testified that defendant's behavior the day after the murders caused them to suspect defendant was involved, and they went together to the police department and shared their suspicions with Officer Russ on 5 June 1997. Officer Russ testified that Harden and Musselwhite were suspects in the investigation's early stages, but they were eventually excluded "through alibi's [sic] and polygraphs." The trial court sustained defense counsel's objection and motion to strike "as to any polygraphs" and instructed the jury to "disregard any statement made by the witness about any polygraph."

Defendant brings forth eight assignments of error on appeal, asserting the trial court erred by: (1) denying defendant's motion to dismiss the charges for insufficient evidence; (2) denying defendant's request for a jury instruction on mere presence; (3) admitting into evidence certain crime scene and autopsy

photographs; (4) allowing Mr. Braswell's sister to identify autopsy photographs of the victims; (5) admitting, through Detective Barnes' testimony, evidence of defendant's threats against the victims following his arrest for stealing Ms. Baxley's purse in 1996; (6) having inappropriate contact with a juror during a break in the proceedings; (7) denying defendant's motion for a mistrial; and (8) failing to consider any mitigating factors in sentencing defendant on the rape, arson, and robbery with a dangerous weapon convictions. We address each of these arguments in turn.

By his first assignment of error defendant challenges the sufficiency of the evidence presented in support of his first-degree murder charges, arguing the State presented insufficient evidence of his involvement in the murders. To survive a motion to dismiss, the State must offer substantial evidence of each essential element of the offense and substantial evidence that defendant is the perpetrator. *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). Our appellate courts have defined substantial evidence as "relevant evidence which a reasonable mind could accept as adequate to support a conclusion." *Id.* When deciding whether substantial evidence exists, "the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom." *State v. Gainey*, 355 N.C. 73, 89, 558 S.E.2d 463, 474, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). Circumstantial evidence may be sufficient to withstand a motion to dismiss and support a conviction, even when the evidence does not rule out

every hypothesis of defendant's innocence. *State v. Haselden*, 357 N.C. 1, 18, 577 S.E.2d 594, 605 (2003). Because defendant in the present case elected to offer evidence, he waived his motion to dismiss made at the close of the State's evidence, and we therefore consider only defendant's motion to dismiss made at the close of all the evidence. *State v. Pleasant*, 342 N.C. 366, 373, 464 S.E.2d 284, 288 (1995).

In the present case, defendant was convicted of two counts of first-degree murder under the felony murder rule and one count each of first-degree burglary, first-degree robbery with a dangerous weapon, first-degree arson, and first-degree rape. The essential elements of first-degree felony murder are a "killing . . . committed in the perpetration . . . of any arson, rape . . . , robbery, . . . burglary, or other felony committed . . . with the use of a deadly weapon." N.C. Gen. Stat. § 14-17 (2001). Our Supreme Court has held that a conviction for first-degree rape, *State v. Richmond*, 347 N.C. 412, 431, 495 S.E.2d 677, 687, cert. denied, 525 U.S. 843, 142 L. Ed. 2d 88 (1998), or robbery with a dangerous weapon, *State v. Covington*, 290 N.C. 313, 327, 226 S.E.2d 629, 640 (1976), may properly serve as the predicate felony supporting a felony murder conviction, so long as "the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction." *State v. Thomas*, 329 N.C. 423, 434-35, 407 S.E.2d 141, 149 (1991).

"A person is guilty of rape in the first degree if the person engages in vaginal intercourse[] . . . with another person by force

and against the will of the other person[] and[] . . . inflicts serious personal injury upon the victim" N.C. Gen. Stat. § 14-27.2(a)(2)(b) (2001). Defendant's sperm was found in the vagina of the 78-year-old Ms. Baxley, and her autopsy revealed bruising and tearing inside and around her vagina. Dr. Butts testified that it appeared from his examination of Ms. Baxley's genital area that she had not "regularly engaged in sexual activity . . . in recent years" at the time of her death. Defendant presented no evidence to corroborate his testimony that he ever engaged in consensual sex with Ms. Baxley, including on the night she was killed. Viewing the evidence, as we must, in the light most favorable to the State, we conclude that a rational trier of fact could find that defendant raped Ms. Baxley, and that the rape occurred as part of a single transaction with her murder.

Moreover, the essential elements of robbery with a dangerous weapon are (1) the possession, use or threatened use of a dangerous weapon; (2) threatening or endangering the life of a person; (3) while taking or attempting to take personal property; (4) from another or from a residence or any other place where there is a person in attendance, at any time, day or night; (5) or aiding or abetting others in the commission of such a crime. N.C. Gen. Stat. § 14-87(a) (2001). The State presented evidence that Mr. Braswell and Ms. Baxley were beaten with a hammer, causing skull fractures and other injuries which caused or contributed to their deaths, and that the hammer was found, along with documents and other items belonging to Mr. Braswell which defendant admitted taking, in a

drainage ditch near the victims' residence. Defendant stated to Officer Russ that he, Harden, and Musselwhite went to the victims' residence "to steal" on the night of the murders, and the next day defendant sold a ring which had belonged to Mr. Braswell. Viewing this evidence in the light most favorable to the State, we conclude that a rational trier of fact could conclude that defendant robbed or participated in the robbery of Mr. Braswell, and that the robbery occurred as part of a single transaction with his murder.

We hold that the State presented substantial evidence (1) of each essential element of both first-degree rape and robbery with a dangerous weapon, and (2) that defendant was the perpetrator of these offenses. Because conviction of either of these offenses may properly serve as the predicate felony supporting a felony murder conviction, defendant's first assignment of error is overruled.

By his second assignment of error, defendant contends the trial court erred by denying his request for a jury instruction on mere presence. Defendant did not request a mere presence instruction in the charge conference, nor did defendant object to the trial court's entire charge, which included the pattern instruction on acting in concert, prior to the jury beginning its deliberations. Defendant's request for a mere presence instruction came only after the jury submitted two questions to the trial court which appeared to seek clarification on the acting in concert instruction. The trial court denied defendant's request and re-instructed the jury on acting in concert. Defendant renewed his

request for a mere presence instruction following a third jury question, and it was again denied.

The Rules of Appellate Procedure prohibit assignment of error to "any portion of the jury charge or omission therefrom unless [appellant] objects thereto before the jury retires to consider its verdict," N.C.R. App. P. 10(b)(2) (2004), except in criminal cases "where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(c)(4) (2004); *see also State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999) (finding no error where defense counsel did not object when given the opportunity at the charge conference or after the charge was given). Neither defendant's argument on this issue nor the assignment of error on which it is based "specifically and distinctly" contend that the trial court's failure to give a mere presence instruction was plain error, and we therefore decline to review it.

We note, however, that the trial court's denial of defendant's request for a mere presence instruction was not plain error. A plain error is one so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it would have reached absent the error. *State v. Carroll*, 356 N.C. 526, 539, 573 S.E.2d 899, 908 (2002), *cert. denied*, ___ U.S. ___, 156 L. Ed. 2d 640 (2003). Even assuming *arguendo* that the trial court's failure to give the mere presence instruction was error, which we do not hold, "[t]he adoption of the

'plain error' rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Moreover, "even when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *Id.* at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)). Given the presence of defendant's semen in Ms. Baxley's vagina, the bruises and tearing around her genital area, and defendant's possession and subsequent sale of a gold ring belonging to Mr. Braswell the day after the murders, we are unable to conclude that the trial court's refusal to instruct on mere presence "tilted the scales" in favor of defendant's conviction. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983).

By his third assignment of error defendant identifies twenty-seven photographs depicting the crime scene, the victims' bodies, and their autopsies and argues the trial court erred by admitting them into evidence, contending the photographs are so "gruesome" and "repetitive" that the trial court abused its discretion in failing to exclude them under N.C. Gen. Stat. § 8C-1, Rule 403 (2001). However, defendant has failed to bring forward the challenged photographs with the record on appeal, thereby failing to comply with the requirement that exhibits offered as evidence and necessary for understanding the appellant's assignments of error be filed with this Court. N.C.R. App. P. 9(d)(2) (2004). We

are therefore unable to review the challenged photographs, along with the several which were admitted without objection, to determine whether they are so gruesome and repetitive as to require exclusion under Rule 403. We hold that defendant has "failed to bring forward a record sufficient to allow proper review of this issue and has failed to overcome the presumption of correctness at trial," and this assignment of error is without merit. *State v. Ali*, 329 N.C. 394, 412, 407 S.E.2d 183, 194 (1991); see also *State v. Jeffries*, 55 N.C. App. 269, 281, 285 S.E.2d 307, 315 (1982) (holding trial court did not abuse its discretion in allowing challenged photographs into evidence where none of the photographs were filed with this Court for our review).

By his fourth assignment of error, defendant asserts the trial court erred by admitting into evidence two autopsy photographs of the victims through the testimony of Mr. Braswell's sister Bess Herrington (Herrington), and by allowing Herrington to identify Mr. Braswell and Ms. Baxley from these photographs, marked State's exhibits one and two. Defendant argues that because Herrington neither identified the bodies nor took the photographs in question, admission of the challenged "gory" photographs and Herrington's testimony identifying the victims was intended "solely to inflame the passions of the jury early in the trial" and should have been excluded under Rule 403. As noted above, because defendant has failed to file the challenged photographs with this Court, he has failed to bring forward a record sufficient to allow proper review of the photographs and has failed to overcome the presumption that

the trial court correctly allowed them into evidence. See N.C.R. App. P. 9(d)(2); *State v. Ali*, 329 N.C. at 412, 407 S.E.2d at 194; *State v. Jeffries*, 55 N.C. App. at 281, 285 S.E.2d at 315. This assignment of error is overruled with respect to the admission of State's exhibits one and two into evidence.

Regarding Herrington's identification of the victims through their autopsy photographs, our review of the transcript reveals that Herrington's testimony was very brief and was limited to her identification of the victims and, also through photograph, of a ring which belonged to Mr. Braswell. As Mr. Braswell's sister, Herrington was familiar with both victims' appearance. There is no indication on the face of the transcript that Herrington became upset or overly emotional while testifying. Defendant concedes in his brief that the State "could have presented these photographs through another witness," and both Dr. Butts and Dr. Clark, the medical examiners who performed the autopsies, testified later in the trial. We hold that defendant has not carried his burden by showing that even if the trial court abused its discretion by allowing Herrington's identification testimony, a different result would have been reached at trial had the trial court not committed this error. See N.C. Gen. Stat. § 15A-1443(a) (2001); *State v. Williams*, 355 N.C. 501, 577, 565 S.E.2d 609, 653 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

Defendant's fourth assignment of error is overruled.

By his fifth assignment of error, defendant contends the trial court erred by allowing Detective Barnes to testify about the June

1996 incident in which defendant was jailed for robbing Ms. Baxley of her purse. Following *voir dire* on the challenged evidence, the trial court allowed Detective Barnes to testify that after Ms. Baxley identified defendant as the robber, defendant "yelled . . . at Ms. Baxley and Mr. Braswell that, if he went to jail, he would get both of them." Detective Barnes later recorded defendant's statement in his report on the 27 June 1996 incident. The trial court ruled this evidence was admissible "under 404(b) for the purpose of showing intent or proof of motive and knowledge of the victims."

Rule 404(b) provides that while evidence of a person's prior bad acts is not admissible to prove character in order to show the person acted in conformity therewith, such evidence "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) (2001). Our Supreme Court has characterized Rule 404(b) as a "rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002) (emphasis in original).

In the present case, the challenged evidence tended to show that approximately one year before the murders, defendant stole Ms. Baxley's purse and, after she identified him, threatened to "get"

her and Mr. Braswell if he went to jail. Defendant was thereafter jailed for the next several months, and Mr. Braswell and Ms. Baxley were murdered approximately three months after defendant's release. The medical examiners' testimony tended to show that Ms. Baxley's blunt-force head injuries were more numerous and severe than Mr. Braswell's, and that they were the direct cause of her death, indicating that she was beaten more severely and giving rise to an inference that Ms. Baxley was the killer's primary intended victim. Based on this record, we discern no error in the trial court's conclusion that the challenged evidence was admissible under Rule 404(b) because of its substantial probative value as to defendant's knowledge of the victims, his intent to kill them, and his motive for doing so.

Also by his fifth assignment of error, defendant excepts to the trial court's ruling which prohibited defendant from cross-examining Detective Barnes regarding defendant's explanation of what he meant by threatening "to get" Mr. Braswell and Ms. Baxley if he went to jail. On *voir dire*, Detective Barnes testified that as they drove to the police station following Ms. Baxley's June 1996 show-up identification of defendant, defendant stated that Mr. Braswell "was a homosexual and, if [defendant] was going to jail, he was going to tell everything he knew on Braswell." Detective Barnes also recorded this statement in his report on the 27 June 1996 incident. In denying defendant's request to cross-examine Detective Barnes about this statement, the trial court ruled that "the intent of this evidence would be to inflame the jury in

regards to [the] sexual preference of [Mr. Braswell] . . . and the State may or may not have the opportunity to cross-examine . . . defendant as to that statement[. . . .]" Defendant argues that this ruling was error because it violated the common-law "rule of completeness" codified in N.C. Gen. Stat. § 8C-1, Rule 106, and also because it forced defendant to testify in order to explain his statement.

"When part of a recorded statement is introduced by a party, Rule 106, known as the 'rule of completeness,' allows an opposing party to introduce any other part of that statement 'at that time . . . which ought *in fairness* to be considered contemporaneously with it.'" *State v. Lloyd*, 354 N.C. 76, 96, 552 S.E.2d 596, 612-13 (2001) (quoting N.C. Gen. Stat. § 8C-1, Rule 106 (2001)) (emphasis added). Exclusion of evidence under Rule 106 and Rule 403 is within the trial court's sound discretion. *State v. Fowler*, 353 N.C. 599, 621, 548 S.E.2d 684, 699 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002). "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 scope of cross-examination rests within the sound discretion of the trial court. *State v. Davis*, 353 N.C. 1, 20, 539 S.E.2d 243, 257 (2000), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001). Based on this record, we cannot conclude the trial court abused its discretion by prohibiting defendant from cross-

examining Detective Barnes regarding those portions of defendant's statements to him dealing with Mr. Braswell's alleged homosexual activities. Moreover, defendant has cited no authority in support of his assertion that the trial court's ruling constituted reversible error by forcing defendant to present evidence in his own defense, and this argument is therefore deemed abandoned. *State v. Bonney*, 329 N.C. 61, 82, 405 S.E.2d 145, 157 (1991).

Defendant's fifth assignment of error is without merit.

By his sixth assignment of error, defendant asserts the trial judge, by engaging in a brief, unrecorded conversation with a juror during a break about a book the juror was reading, committed reversible error. The mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication. *Rushen v. Spain*, 464 U.S. 114, 125-26, 78 L. Ed. 2d 267 (1983) (Stevens, J., concurring in judgment).

When asked about the conversation by defense counsel, the trial judge stated as follows:

THE COURT: The conversation I had with the juror is he was simply coming out, and I said, "Is that a good book?" He had a book in his hand. It was a management book. He told me some of the aspects of the book, had absolutely nothing to do with this case, just simply inquired about the book and whether he enjoyed the book. That's the extent of it.

Defense counsel declined the trial judge's offer to question the juror about the conversation. Based on this record, we conclude that defendant has failed to meet his burden of establishing any constitutional error. *State v. Upchurch*, 332 N.C. 439, 457, 421 S.E.2d 577, 587 (1992). Moreover, even assuming there was error in the trial judge's contact with the juror, the error was harmless beyond a reasonable doubt. *Id.* Defendant's sixth assignment of error is overruled.

By his seventh assignment of error, defendant excepts to the trial court's denial of his motion for a mistrial, made after Officer Russ mentioned "polygraphs" in response to the prosecutor's question concerning Officer Russ' reasons for excluding Harden and Musselwhite as suspects. Defendant correctly notes the trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2001). However, "[w]hether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial judge, and a mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982) (internal citations omitted). Every reference to a polygraph does not necessarily result in prejudicial error requiring a mistrial. *State v. Montgomery*, 291 N.C. 235, 244, 229 S.E.2d 904, 909 (1976).

The transcript in the present case reveals the following exchange between the prosecutor and Officer Russ:

Q. Likewise, you talked to Tommy Musselwhite and Ricky Harden?

A. Yes, sir.

Q. Were they suspects in the early stages of this investigation?

A. Yes, sir.

Q. Were they eventually excluded?

A. Yes, sir.

Q. Can you tell us why?

A. They were excluded through alibi's [sic] and polygraphs.

MR. THOMPSON: Well ---

Q. Did you ----

MR. THOMPSON: ---- object and move to strike as to any polygraphs.

THE COURT: Objection sustained. Members of the jury, disregard any statement made by the witness about any polygraph.

The prosecutor then continued his re-direct examination of Officer Russ and called two more witnesses before defendant moved for a mistrial the following day.

Based on this record, we are unable to conclude that the trial court abused its discretion by failing to find that defendant suffered substantial and irreparable prejudice from Officer Russ' mention of "polygraphs" in his testimony and denying defendant's motion for a mistrial. The trial court granted defendant's motion to strike that portion of Officer Russ' testimony, gave a curative

instruction, and offered to give an additional instruction if requested by defendant to do so. Jurors are presumed to heed a trial judge's cautionary instruction to disregard all testimony about a polygraph. *State v. Rogers*, 355 N.C. 420, 452-53, 562 S.E.2d 859, 880 (2002). Defendant's seventh assignment of error is without merit.

Defendant's brief contains a heading purporting to bring forth an eighth assignment of error. However, because defendant's brief contains no reason or argument in support thereof, we deem this assignment of error to be abandoned. See N.C.R. App. P. 28(b)(5) (2004).

No prejudicial error.

Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).