IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-427

Filed: 6 March 2018

Granville County, No. 14 CRS 51118

STATE OF NORTH CAROLINA

v.

ROTONYA RUSSELL

Appeal by defendant from judgment entered 6 October 2016 by Judge G. Wayne Abernathy in Granville County Superior Court. Heard in the Court of Appeals 27 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Heather H. Freeman, for the State.

Kimberly P. Hoppin, for defendant.

ELMORE, Judge.

Defendant Rotonya Russell appeals from a judgment entered after a jury convicted her of second-degree murder for the stabbing death of her husband, Carlos Russell. The State's evidence tended to show that, at approximately 1:30 a.m. on 11 June 2014, after Carlos picked up defendant from Susie Cooper's house and brought her home, Carlos and defendant got into an argument. When Carlos attempted to

leave the residence, defendant demanded that he stay, went into the kitchen, and returned holding a knife. The argument then escalated physically and Carlos was fatally stabbed in his neck during the struggle.

At trial, the State sought to introduce prior-bad-acts evidence under Rule 404(b) concerning three domestic disputes between defendant and Carlos in January 2007, April 2008, and July 2009. Police officers responded to the residence and then generated incident reports after each of these reported domestic disturbances. The State sought to introduce these police incident reports under the business records and present sense exceptions to the rule against hearsay, for the Rule 404(b) purposes of proving motive, absence of mistake, and absence of accident. Defense counsel objected on hearsay and Rule 404(b) grounds.

After a *voir dire* hearing, the trial court ruled that all three police incident reports were admissible under the business records hearsay exception. The trial court then ruled that the evidence of the 2007 incident be excluded as irrelevant and, over objection, that the evidence of the 2008 and 2009 incidents were relevant to show motive, lack of accident, and lack of mistake and were thus admissible under Rule 404(b) for those purposes. After conducting a Rule 403 balancing test, the trial court ruled, over objection, that the probative value of the 2008 and 2009 incidents were not substantially outweighed by unfair prejudice. The police officers who generated

the 2008 and 2009 incident reports that were admitted into evidence read their reports to the jury.

Additionally, the trial court admitted, over objection, testimony by an officer that he was familiar with Cooper's residence, where defendant had been staying immediately before the fatal stabbing, because he had previously investigated a reported shooting assault at Cooper's residence and, on another occasion, had helped execute a warrant to search Cooper's residence for drugs.

On appeal, defendant contends the trial court erred by (1) admitting evidence of the 2008 and 2009 domestic disputes between Carlos and defendant on hearsay and Rule 404(b) grounds; (2) denying her motion to dismiss the second-degree murder charge for insufficient evidence of malice; and (3) admitting evidence of alleged prior criminal activity at Cooper's residence on grounds that it was irrelevant under Rule 401 and inadmissible under Rule 402. We hold that defendant received a fair trial, free of prejudicial error.

I. Background

On 21 July 2014, defendant was indicted for second-degree murder. The State's evidence tended to show that, during the early morning hours of 11 June 2014, Carlos died from a stab wound to the neck which he suffered during a struggle with defendant at their home. At trial, the evidence tended to show the following facts.

Defendant and Carlos started dating shortly after high school. After Carlos separated from first wife, he and defendant rekindled their relationship around 2005, had two children together, and later married in 2010. Defendant also had another daughter from another relationship, Lisa,[1] who also lived with Carlos and defendant. Lisa was the only other person present during the fatal altercation.

Sergeant Greg Williamson of the Granville County Sheriff's Office testified that he was dispatched to Carlos and defendant's home around 2:15 a.m. on 11 June 2014 in response to a 9-1-1 call from Lisa reporting that Carlos had been stabbed. When he arrived, Sergeant Williamson saw Lisa and defendant standing outside. Lisa, "very hysterical, screaming and crying," directed Sergeant Williamson to where Carlos was lying, beside their neighbor's vehicle. Sergeant Williamson saw a wound in Carlos's neck, his "shirt was soaked in blood," and he "appeared to be gasping for air, [with a] real faint heartbeat." Sergeant Williamson and another deputy administered CPR for about 10 minutes before emergency medical services (EMS) personnel arrived. EMS quickly loaded Carlos into an ambulance and transported him to a hospital. Carlos was pronounced dead on arrival. Meanwhile, other deputies had arrived at the scene.

Deputy Tabitha Glasscock of the Granville County Sheriff's Department testified that when she arrived, defendant was "covered in blood[,] . . . acting

[1] A pseudonym is used to protect the minor's identity.

hysterical," trying to make phone calls, and yelling at the officers to help Carlos. Deputy Glasscock directed her attention toward Lisa, defendant's biological daughter and Carlos's step-daughter. Lisa reported that defendant had been drinking at her uncle's house, and that Carlos had not been happy about it. Defendant and Carlos began arguing when Carlos returned home from work. Lisa told Carlos that defendant had been drinking and to let her cool off. Defendant went into the kitchen and was cutting something with a knife when Carlos went in to grab defendant as if he was going to hug her. Lisa reported that defendant got concerned that Carlos may be trying to harm her and "jerked" and then Lisa saw blood. Lisa indicated the stabbing was an accident but never mentioned anything about Carlos falling on the knife.

Deputy Glasscock then turned her attention toward defendant and sat her down, trying to calm her. She saw defendant call someone and heard her state that "they needed to come get the kids, because she was about to go to jail." Defendant reported that she and Carlos had been arguing, and Carlos "tried to jump on her" while she was holding a knife, and "[Carlos] was injured while they were tussling." The officers decided to detain defendant as they completed their investigation.

Detective Todd Wilkins of the Granville County Sheriff's Department testified that he arrived at the scene around 2:50 a.m., after Carlos had been transported by ambulance to the hospital. Detective Wilkins interviewed Lisa for about thirty

minutes and simultaneously handwrote Lisa's account of the incident. After reading his handwritten report to Lisa and asking if she had anything to add, Lisa replied that she did not and signed the report. According to Lisa's report to Detective Wilkins, which was read to the jury, defendant

> had been drinking . . . . [and she] and Carlos . . . were arguing about [defendant] hanging out with friends. Carlos . . . felt that [defendant] would be upset if he had done the same thing. [Defendant] said she wouldn't be upset as long as [Carlos] called.
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> . . . [Defendant] walked in the kitchen and Carlos . . . followed [defendant], while still arguing. [Lisa] told Carlos to stop arguing and let [defendant] cool off.
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> [Lisa] said they were only arguing, not fighting. As Carlos . . . followed [defendant] into the kitchen, [defendant] had a knife in her hand and turned, striking Carlos . . . in the neck. [Lisa] said . . . it looked like [Carlos] was trying to hug [defendant]. [Lisa] feels that it was an accident. [Lisa] said [defendant] had the knife to cut something; unsure. Carlos . . . then grabbed his neck and went outside. . . . [Lisa] . . . was trying to locate her telephone to call for help, 9-1-1. Carlos . . . then walked to the neighbor's home, knocking on the front door. [Defendant] followed Carlos . . . to the neighbor's home. Carlos . . . then fell to the ground in the neighbor's yard. [Defendant] then applied pressure to Carlos's neck and told [Lisa] to call for help. [Lisa] called 9-1-1. . . .

Detective Wilkins also testified that when he returned to the residence the next day, he recovered, *inter alia*, a knife sitting on the kitchen counter with blood covering its five-inch blade.

Lisa, fifteen years old at the time of the fatal stabbing and seventeen years old at the time of trial, was also called to testify. Lisa denied reporting to Detective

Glasscock that defendant was in the kitchen cutting something with a knife and that Carlos went in the kitchen to grab defendant like he was giving her a hug. She also testified that the written statement she signed during her interview with Detective Wilkins was not accurate. Lisa stated that when the officers tried to speak with her, defendant instructed her not to say anything because she was a minor and the officers did not have defendant's permission to speak with her.

According to Lisa's trial testimony, during the afternoon of 10 June 2014, defendant and her cousin went to her Aunt Susie May Cooper's house to throw horseshoes. Carlos returned home from work around 1:00 a.m. and woke Lisa up to ask where defendant was. Lisa told Carlos that he had to pick defendant up from Cooper's house, and that she had called Carlos's cousin to let him know. Carlos left the house and Lisa fell back asleep. Around 2:00 a.m., defendant woke up Lisa looking for her phone, and Lisa could tell that defendant had been drinking. After defendant left Lisa's room, Lisa heard Carlos and defendant arguing. Apparently Carlos was unaware he was supposed to pick defendant up from Cooper's house, and repeatedly stated that if he had been out that late, defendant would be mad. Defendant eventually called Lisa out of her room to confirm that she asked her to call Carlos's cousin to let him know to pick her up, and Lisa confirmed that she did.

Lisa then said she went into the living room, where Carlos was sitting down, playing a videogame and drinking. Carlos and defendant continued arguing. After

Lisa told them both to calm down, defendant went into the bedroom and got quiet. But Carlos kept making remarks to defendant from the living room and they continued arguing. Eventually, Carlos turned off the television, collected his drinks, and stated that he was going to leave. Defendant then went into the kitchen, returned holding a knife, and instructed Carlos that he was not leaving in the truck, since the truck belonged to both of them. Defendant started toward the front door with the knife in her hand; Lisa "guess[ed]" defendant was "going to cut the tires on the truck because, like she said, that's her truck." Carlos then put his "stuff down real fast" and Lisa got in front of him and said, "Dad, leave it alone." Carlos "moved [Lisa] out of the way, and then he went to [defendant] and he grabbed her by her wrists" right by the front door. According to Lisa, as Carlos was holding defendant's wrists, defendant was trying to get loose with the knife still in her hand, and they were "going in a circle." Eventually, defendant "stumbled over her leg, and when she stumbled, she fell back and [Carlos] fell on top of her. And [Carlos] was still holding [defendant's] hands when they fell, and then when he got up, that's when I saw the blood coming out of his neck." Carlos then exited from the front door. Lisa immediately followed Carlos outside, but defendant first "went to the bathroom to get the blood out of her face" before she followed them outside. Carlos eventually collapsed in the neighbor's yard, and defendant instructed Lisa to call 9-1-1.

Dr. Lauren Scott, the medical examiner who autopsied Carlos, explained that the fatal wound was caused by a knife that pierced Carlos's neck and "traveled in a downwards direction, left to right, and very slightly front to back," severing his carotid artery. Although Dr. Scott conceded that "[i]t's possible" the wound "could be" "consistent with someone falling on a knife," she opined it would be "unlikely" given the "downward angle of the wound track[.]" Dr. Scott elaborated that "[i]t would be difficult to get your head twisted in a location so that the knife is pointed up and you're falling on it, and still get that downward angle through the neck."

Defendant presented no evidence, and the jury found her guilty of second-degree murder. The trial court entered a judgment imposing an active sentence of 148 to 190 months in prison. Defendant appeals.

II. Alleged Errors

Defendant contends the trial court erred by (1) admitting, over objection, evidence of two prior domestic disputes between her and Carlos; (2) denying her motion to dismiss the second-degree murder charge for insufficient evidence of the element of malice; and (3) admitting, over objection, irrelevant evidence of alleged prior criminal activity reported to have occurred at Cooper's residence.

III. Admission of Prior Domestic Incidents

Defendant first contends the trial court erred by admitting evidence of two police-reported domestic disputes between defendant and Carlos that occurred in 2008 and 2009 on both hearsay and Rule 404(b) grounds.

A. Hearsay

Defendant contends the trial court erroneously admitted two police incident reports generated after officers responded to a 9-1-1 domestic disturbance call under the business records exception to the rule against hearsay. She argues that our Rules of Evidence specifically exclude from hearsay exceptions "in criminal cases matters observed by police officers and other law-enforcement personnel." *See* N.C. Gen. Stat. § 8C-1, Rule 803(8)(B). The State does not address the merits of defendant's hearsay argument but acknowledges that the trial court ruled that the police incident reports were admissible as business records.

"This Court reviews a trial court's ruling on the admission of evidence over a party's hearsay objection *de novo*." *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015) (citation omitted), *disc. rev. denied*, 368 N.C. 686, 781 S.E.2d 606 (2016). 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) (2013). Hearsay is inadmissible "except as provided by statute or by [the evidentiary] rules," such as under an exception to the rule against hearsay. *Id.* § 8C-1, Rule 802 (2013).

One such exception is the business-records hearsay exception, which provides in pertinent part:

> (6) Records of Regularly Conducted Activity.—A . . . report[ ] . . . of acts, events, conditions, [or] opinions[ ] . . . made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the . . . report[ ] . . . all as shown by the testimony of the custodian or other qualified witness. . . .

Id. § 8C-1, Rule 803(6) (2013). Another exception is the public-records-and-reports hearsay exception, which provides in pertinent part:

> (8) Public Records and Reports.—Records, reports, [or] statements . . . of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding, however, in criminal cases matters observed by police officers* and other law-enforcement personnel[] . . . .

Id. § 8C-1, Rule 803(8)(B) (2013) (emphasis added).

Thus, based on Rule 803(8)(B)'s exclusionary language, "[p]ublic records and reports that are not admissible under Exception (8) are not admissible as business records under Exception (6)." *State v. Forte*, 360 N.C. 427, 436, 629 S.E.2d 137, 144 (2006) (quoting N.C. Gen. Stat. § 8C-1, Rule 803(8) Cmt.). Accordingly, trial and appellate courts "must determine whether [police] reports are admissible under Rule 803(8) before [they] can decide whether they are admissible as business records." *Id.*

Here, the State sought to introduce two police incident reports generated after Detectives Steven Hayes and Brian Michew responded to 9-1-1 calls reporting domestic disturbances at the Russell residence in 2008 and 2009. The State argued the reports were admissible in relevant part under the business-records hearsay exception. The trial court agreed and, over objection, admitted the reports into evidence as business records.

After Detective Hayes authenticated his 2008 incident report, he read it to the jury:

> On April the 17th, 2008, at approximately 17:55 hours, Central Station reported a domestic disturbance at the residence of 4238 Belltown Road, Oxford. S-30 Deputy[,] Deputy McFee assisted me on my arrival.
>
> I spoke with . . . Carlos Russell, who was attempting to leave the residence after a dispute with his girlfriend – [defendant], a 34-year-old black female. Both subjects appeared to have the smell of alcohol about their person. While Carlos attempted to get his keys out of the residence, [defendant] pushed him on his chest area.
>
> [Defendant] was irate and was cursing repeatedly. [Defendant] was told to go in her residence and let Carlos finishing loading his belongings and leave on [sic] his vehicle. [Defendant] went into the house and then returned outside, calling the 9-1-1 center, cursing repeatedly.
>
> Central was advised to disregard the call by S-30 Deputy. After 9-1-1 hung up on her, [defendant] called back again, cursing. [Defendant] was advised to hang up and go back into the residence. [Defendant] continued to remain on the 9-1-1 line and confront Carlos, cursing again. I advised [defendant] she was under arrest and attempted to place handcuffs on her while she resisted. [Defendant] was brought before the magistrate and was

> charged with Resisting a Police Officer.

After Detective Michew authenticated his 2009 incident report, he read it to the jury:

> Carlos Russell called 9-1-1 to report a domestic disturbance between he and his girlfriend, [defendant]. Carlos left prior to my arrival. [Defendant] was running around the yard, cursing, yelling, and belligerent when she saw me pull into the yard. She refused to speak to me and went inside the residence. A bystander identified both parties' names to me.

To the extent these reports contained matters observed by police, they were inadmissible under Rule 803(8)(B). *See State v. Harper*, 96 N.C. App 36, 384 S.E.2d 297 (1989) (holding that an officer's report summarizing two drug transactions with the defendant constituted hearsay inadmissible under Rule 803(8)(B)); *see also State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988) ("The [defendant's exculpatory] statement [recorded in a police report] cannot be admitted under the 'Public Records and Reports' exception of N.C.G.S. § 8C-1, Rule 803(8), since that rule specifically excludes 'in criminal cases matters observed by police officers . . . .' "); *State v. Little*, 191 N.C. App. 655, 666, 664 S.E.2d 432, 439 (2008) (holding a witness statement recorded in an SBI officer's report was inadmissible under Rule 803(8)). Accordingly, the trial court erred by admitting these reports under Rule 803(6)'s exception for business records. *Forte*, 360 N.C. at 436, 629 S.E.2d at 144 ("Public records and reports that are not admissible under Exception (8) are not admissible as business records under Exception (6)." (citation and quotation marks omitted)).

Yet "erroneous admission of hearsay is not always so prejudicial as to require a new trial." *State v. Hickey*, 317 N.C. 457, 473, 346 S.E.2d 646, 657 (1986). As defendant does not argue that the erroneous admission of this hearsay evidence violated her Sixth Amendment rights under the Confrontation Clause, she bears the burden of demonstrating "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" by the jury. N.C. Gen. Stat. § 15A-1443(a) (2013); *see also State v. Wilkerson*, 363 N.C. 382, 420, 683 S.E.2d 174, 197 (2009) (reviewing potential prejudice arising from erroneously admitted hearsay evidence under N.C. Gen. Stat. § 15A-1443(a)'s prejudice standard).

The State's uncontradicted evidence showed that after the parties began arguing, defendant went into the kitchen to grab a knife, a deadly weapon raising the presumption of malice, and then went into the living room where Carlos was standing while holding the knife in her hand. After the argument continued and escalated physically, Carlos was fatally stabbed in his neck. Additionally, the medical examiner who autopsied Carlos opined that, given the downward track of the fatal wound, it was "unlikely" that Carlos simply fell on the knife during the struggle.

Based on the overwhelming evidence of her guilt, and the likelihood the relevant substance of the police reports were admissible through other means not subject to our review based on procedural grounds, we conclude that defendant has

failed to satisfy her burden of demonstrating that the trial court's admission of the police reports under Rule 803(6)'s business records exception prejudiced her.

B. Rule 404(b)

Defendant next contends that the trial court erred by admitting the evidence of the 2008 and 2009 domestic incidents. She argues the evidence was not admitted for a proper Rule 404(b) purpose, was irrelevant under Rule 401, and should have been excluded as unfairly prejudicial under Rule 403.

The State retorts this Rule 404(b) evidence was properly admitted because (1) it was offered solely to show motive, lack of accident, and lack of mistake; (2) it was relevant because it showed "common features in terms of the domestic relationship between the parties involved, [d]efendant's escalation of the arguments with belligerence, cursing, yelling and leading to [Carlos's] attempt or need to leave, and the general nature of both incidents toward [d]efendant's motive of preventing Carlos from leaving the residence on 11 June 2014"; and (3) even if the evidence was erroneously admitted, defendant cannot show prejudice.

"[W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Where, as here, "the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions."

Id. "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." *Id.* Under abuse-of-discretion review, "[t]he trial court may be reversed . . . only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Cook*, 362 N.C. 285, 295, 661 S.E.2d 874, 880 (2008) (citation and quotation marks omitted).

Under Rule 404(b), "[e]vidence 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"; however, such evidence "may[ ] . . . be admissible for other purposes, such as proof of motive, . . . or absence of mistake[ ] . . . or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). Rule 404(b) has been interpreted as a

> general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). "[T]he rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (citations omitted). Yet "remoteness in time between evidence of other crimes, wrongs, or acts and the charged crime is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident." *State v. Parker*, 354 N.C.

268, 287, 553 S.E.2d 885, 899 (2001); *see also id.* ("[R]emoteness in time generally affects only the weight to be given such evidence, not its admissibility.").

"Evidence of a defendant's misconduct toward his [or her spouse] during the marriage is admissible under Rule 404(b) to prove motive[ ] . . . or absence of mistake or accident with regard to the subsequent fatal attack upon [him or] her." *State v. Murillo*, 349 N.C. 573, 586, 509 S.E.2d 752, 759–60 (1998). "[E]vidence of frequent quarrels[ ] . . . and ill-treatment is admissible as bearing on . . . malice[ ] [or] motive[.] . . ." *State v. Scott*, 343 N.C. 313, 331, 471 S.E.2d 605, 616 (1996) (citation omitted). Additionally, "[w]here[ ] . . . an accident is alleged, evidence of similar acts is more probative than in cases in which an accident is not alleged." *Murillo*, 349 N.C. at 594, 509 S.E.2d at 764 (citation and quotation marks omitted).

Here, the State sought to introduce evidence of three domestic disputes between defendant and Carlos that occurred prior to their marriage in 2010 to show motive, absence of mistake, and absence of accident. The 2007 incident report showed that after the dispute, defendant left the residence before Carlos did, and both of them left before the police arrived. The 2008 incident report showed that after the dispute, defendant pushed Carlos in the chest while he was attempting to get his keys and leave the residence, and the responding officer had to instruct defendant to allow Carlos to get his belongings so he could leave. The 2009 incident report showed that after the domestic dispute, Carlos had successfully left the residence before the

officers arrived and defendant was running around the yard, cursing, yelling, and being belligerent.

After a *voir dire* hearing outside the presence of the jury, and after considering both parties' arguments, the trial court admitted the evidence of the 2008 and 2009 incidents but excluded the evidence of the 2007 incident. The trial court found the 2008 and 2009 incidents both showed that after a domestic dispute, Carlos attempted to leave the residence, and defendant attempted to prevent him from leaving, or became irate when Carlos left, which was consistent with Lisa's testimony that, on the night in question, defendant got the knife to attempt to keep Carlos from leaving. Thus, the trial court ruled the 2008 and 2009 incidents were relevant to show "motive, lack of accident, [and] lack of mistake" and were thus admissible under Rule 404(b) for those purposes. However, the trial court excluded evidence of the 2007 incident, finding it did not show that defendant attempted to keep Carlos from leaving after the dispute and thus did not support the State's theory of motive, lack of accident, or lack of mistake.

After the 2008 and 2009 incident reports were admitted into evidence and read to the jury, the trial court instructed the jury to consider that evidence only "for the limited purpose for which it [was] received"—which was to show "a lack of mistake, or lack of accident, or the [defendant] had a motive in this case"—and instructed the jury that it "cannot consider that evidence for any other purpose."

Later at trial, the trial court rendered oral findings and conclusions on the admission of this evidence with respect to defendant's Rule 404(b) objections:

> THE COURT: . . . . The Court just wants to reiterate for the record in reference to . . . [the 2008 incident] report, [it] shows that when [Carlos] . . . was attempting to leave his residence after a dispute with the Defendant, she pushed him in the chest area while he attempted to get his keys out of the residence, and she was irate and cursing repeatedly.
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> [Officer Hayes] had to tell [defendant] to go back in the residence and let [Carlos] finish loading his belongings and leave with his vehicle. And then [defendant] went in the house and she returned and was quite belligerent, and was ultimately arrested for resisting.
>
> The Court finds that that evidence is indicative of a[n] . . . absence of mistake, [an] absence of accident, and noted showing her intent not to let [Carlos] leave when they were having a dispute. And it's a pattern that [defendant] has shown in . . . conjunction with [the 2009 incident report].
>
> The Court has considered this evidence, and the Court notes for the record it did not allow [the 2007 incident report] for the reasons [defense counsel] argued. But the Court does find in this case that the probative value of [the 2008 incident report] outweighs any possible prejudice and is relevant, and the Court did admit that. Then in reference to [the 2009 incident report], the evidence would show that [Carlos] initiated the call to 9-1-1 as result of a domestic disturbance between him and the Defendant, and that [Carlos] left before the officer arrived.
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> And . . . at that point, . . . the Defendant was running around the yard, cursing and yelling and belligerent, which clearly shows that [Carlos], again, . . . attempted to leave and was successful in leaving at this occasion when they'd had a domestic dispute.
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> And the Court considered that in conjunction with [the 2008 incident report] and the other evidence, and the Court finds that it was admitted for the purpose of showing

> motive, . . . absence of mistake[,] and absence of accident.
>
> And that the Court considered the prejudicial value to the Defendant and found that the probative value of these reports showing her past actions in reference to what would occur when these parties had a domestic disturbance was more probative than prejudicial.

As reflected, the trial court's findings were supported by the police incident reports. Because the alleged crime and the 2008 and 2009 domestic incidents contained key similarities, specifically as it related to domestic disputes between the parties, Carlos attempting to leave after the disputes, and defendant attempting to keep Carlos from leaving or acting belligerently when he leaves, the trial court's findings supported its conclusions that this evidence was admissible under Rule 404(b) to show that defendant had a motive for assaulting Carlos to prevent him from leaving after the domestic dispute, which was consistent with Lisa's trial testimony, and to show absence of mistake or accident. Accordingly, the trial court properly admitted this evidence under Rule 404(b) for those purposes.

We next turn to whether the trial court abused its discretion in admitting this evidence after a Rule 403 balancing test. Here, the "record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give a proper limiting instruction to the jury." *State v. Beckelheimer*, 366 N.C. 127, 133, 726 S.E.2d 156, 160–61 (2012) (citation and quotation marks omitted). The trial court first heard the Rule 404(b) evidence outside the presence of the jury, heard arguments from both attorneys and, in ruling on its admissibility, explained: "[T]he

Court considered the prejudicial value to the Defendant and found that the probative value of these reports showing her past actions in reference to what would occur when these parties had a domestic disturbance was more probative than prejudicial." The trial judge here excluded evidence from the 2007 incident, which it concluded "did not share adequate similarity to the charged actions, thus indicating his careful consideration of the evidence." *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161. "Moreover, the judge gave the appropriate limiting instruction." *Id.* Accordingly, we hold that the trial court did not abuse its discretion in determining that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice under Rule 403.

IV. Motion to Dismiss Second-Degree Murder Charge

Defendant contends the trial court erred by denying her motion to dismiss the second-degree murder charge because the State failed to present substantial evidence of the element of malice necessary for second-degree murder. We disagree.

We review *de novo* the denial of a motion to dismiss for insufficient evidence. *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016) (citation omitted). Such a motion is properly denied in relevant part if "there is substantial evidence . . . of each essential element of the offense charged[.] . . ." *State v. Denny*, 361 N.C. 662, 664, 652 S.E.2d 212, 213 (2007) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted). All evidence must be viewed "in the light most favorable to the State and . . . all contradictions and discrepancies [resolved] in the State's favor." *State v. Harris*, 361 N.C. 400, 402, 646 S.E.2d 526, 528 (2007).

The essential elements of second-degree murder are: "(1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citation omitted). "Intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice." *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000). Where, as here, "the killing with a deadly weapon is . . . established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree." *State v. Fisher*, 318 N.C. 512, 525, 350 S.E.2d 334, 342 (1986) (citation and quotation marks omitted).

At trial, the State presented evidence by way of Lisa's testimony that after defendant and Carlos began arguing, Carlos gathered his belongings and stated that he was going to leave. Defendant instructed him not to leave in their truck, went into the kitchen, returned holding a knife, and started toward the front door. After a physical struggle, Carlos was fatally stabbed in his neck. Additionally, medical examiner Dr. Lauren Scott, a board-certified anatomic and forensic pathologist

specializing in forensic pathology who autopsied Carlos, testified that the fatal wound track "traveled in a downwards direction, left to right, and very slightly front to back." Although Dr. Scott conceded that "[i]t's possible" that wound track "could be" "consistent with someone falling on a knife," she opined that it was "unlikely" "given [the] . . . downward angle of the wound track[.]" Dr. Scott explained that "[i]t would be difficult to get your head twisted in a location so that the knife is pointed up and you're falling on it, and still get that downward angle through the neck." When pressed by the defense about why she believed it was unlikely that the fatal wound may have been caused by Carlos falling on the knife, Dr. Scott elaborated:

> [I]t would be difficult to get that downward angle if you're falling on a knife that's standing straight up. As you can see, my finger's already tipping up. You can kind of try that with yourself if you have your hand facing from left to right, right here on your neck at a downward angle. (gesturing) And you can try and twist your neck so it gets in the position where that knife is still pointed downward but also in a position where you're going to be falling on it. It's not impossible, but it is difficult to contort yourself into that position.

When considering the established evidence that Carlos was fatally stabbed with a deadly weapon, and viewing the evidence in the light most favorable to the State, particularly that of Dr. Scott's testimony, substantial evidence was presented to support the element of malice necessary for second-degree murder. We thus hold that the trial court properly denied defendant's dismissal motion.

V. Evidence of Prior Criminal Activity at Cooper's Residence

Defendant contends the trial court erred by allowing, over objection, allegedly irrelevant and prejudicial evidence concerning alleged prior criminal activity that occurred at Cooper's residence, where defendant had been staying immediately before the fatal stabbing. The State does not address the merits of defendant's argument but contends that, "[i]f this Court does find error, . . . any such error was harmless and not prejudicial."

Our Supreme Court has instructed that "[w]e review relevancy determinations by the trial court de novo before applying an abuse of discretion standard to any subsequent balancing done by the trial court." *State v. Triplett*, 368 N.C. 172, 175, 775 S.E.2d 805, 807 (2015) (citation omitted). However, the *Triplett* Court also noted that "[w]e have also said that '[a] trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal.' " *Id.* (citation and quotation marks omitted).

Evidence is irrelevant, and thus inadmissible, where it has no "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." N.C. Gen. Stat. § 8C-1, Rule 401 (2013) (defining relevant evidence); *see also* N.C. Gen. Stat. § 8C-1, Rule 402 (2013) ("Evidence which is not relevant is not admissible.").

Here, over objection, the trial court admitted evidence that Detective Wilkins was familiar with Cooper's residence before he began investigating Carlos's death

because he had previously investigated a reported shooting assault at Cooper's residence, and he had assisted the narcotics unit in executing warrants to search Cooper's residence for narcotics. Although defendant had been staying at Cooper's residence before the fatal altercation, whether Detective Wilkins was familiar with that residence based on prior reported assaults or illegal drug activity is logically irrelevant to any issue concerning whether defendant intentionally or accidentally killed Carlos. Because evidence of prior criminal activity at Cooper's residence was wholly irrelevant to any fact at issue in defendant's trial, it should have been excluded under Rule 402.

Yet "evidentiary error does not necessitate a new trial unless the error was prejudicial." *Wilkerson*, 363 N.C. at 420, 683 S.E.2d at 197 (citation omitted). A defendant must show that, absent the error, "there is a reasonable possibility that . . . a different result would have been reached" by the jury. N.C. Gen. Stat. § 15A-1443(a). While defendant argues this evidence was unfairly prejudicial in the context of a Rule 403 balancing test, she fails to argue its erroneous admission prejudiced her with respect to the jury's verdict. Accordingly, defendant has failed to satisfy her burden of demonstrating how the trial court's evidentiary error was prejudicial.

VI. Conclusion

Although the trial court erred by admitting the 2008 and 2009 police incident reports into evidence under the business records exception to the rule against

hearsay, in light of the overwhelming evidence of defendant's guilt of the crimes charged and likelihood that these reports were admissible through other means, defendant has failed to demonstrate how the erroneous admission of this evidence under that particular hearsay exception prejudiced her.

The trial court properly admitted evidence of the 2008 and 2009 domestic disputes under Rule 404(b) for the relevant purposes of showing motive, lack of accident, and lack of mistake. The trial court properly limited the jury's consideration of this evidence for those purposes and did not abuse its discretion under Rule 403 by concluding that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

Considering the presumption of malice arising from the evidence establishing that Carlos was killed with a deadly weapon, while viewing the evidence in the light most favorable to the State, including Dr. Scott's testimony about the downward track of the fatal stab wound, substantial evidence was presented to support the element of malice necessary for second-degree murder. We thus hold that the trial court properly denied defendant's dismissal motion.

Although the trial court erred by admitting irrelevant evidence of the prior alleged criminal activity at Cooper's residence, defendant failed to satisfy her burden of demonstrating how this evidentiary error prejudiced her.

We therefore hold that defendant received a fair trial, free of prejudicial error.

NO PREJUDICIAL ERROR.

Chief Judge McGEE and Judge MURPHY concur.

Report per Rule 30(e).