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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1356

Filed: 18 December 2018

Cleveland County, No. 15 CRS 54509

STATE OF NORTH CAROLINA

v.

TIMOTHY JOHN CLARK, Defendant.

Appeal by Defendant from judgment entered 15 May 2017 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 7 August 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.*

*Anne Bleyman, for defendant-appellant.*

MURPHY, Judge.

Defendant, Timothy John Clark, learned that Travis Wallace (“Mr. Wallace”) was selling methamphetamine from a hotel room in Shelby. Defendant believed Mr. Wallace had previously arranged a transaction where police would be present to capture Defendant when he attempted to purchase methamphetamine from Mr. Wallace. Upon learning of Mr. Wallace’s current location, Defendant wanted revenge

by taking Mr. Wallace's guns, drugs, and money. Defendant, along with several accomplices, travelled from South Carolina to Mr. Wallace's hotel room and entered wearing masks and carrying guns. Defendant demanded that Mr. Wallace give him the drugs and money located in the hotel room and threatened to shoot him if he did not. Mr. Wallace stated there were no drugs or money, and Defendant fatally shot Mr. Wallace in the chest. Defendant was charged with attempted robbery with a dangerous weapon and first-degree murder. A jury convicted Defendant on both charges.

Defendant appeals the judgment entered against him, contending the trial court erred in admitting four autopsy photographs of Mr. Wallace and that the short-form indictment for first-degree murder was facially invalid. A trial court does not abuse its discretion in admitting photographs from a homicide victim's autopsy where the photographs have a probative illustrative purpose and are not unfairly prejudicial or aimed solely at inflaming the passions of the jury. Furthermore, short-form indictments for first-degree murder that comport with N.C.G.S. § 15-144 are not facially invalid and will support a conviction for first-degree murder. Accordingly, we find that Defendant received a fair trial, free from prejudicial error.

### **BACKGROUND**

On 11 October 2015, Defendant was at his home in Buffalo, South Carolina, with Willa Hucks ("Hucks") and Karrie Roach ("Roach"). Hucks and Roach informed

Defendant that Mr. Wallace had rented hotel rooms where he was selling methamphetamine. Defendant informed Hucks and Roach that he had previously attempted to buy drugs from Mr. Wallace, but when he was on the way to make the purchase, “the police were everywhere and . . . he had to turn around.” Defendant stated he “had been looking for [Mr. Wallace]” and “I’m going to get him. I’m going to get everything he’s got.” The three then devised a plan to go to Mr. Wallace’s hotel room and take all of the money, drugs, and “everything that [Mr. Wallace] had.”

The three learned that Mr. Wallace’s hotel room was at the Super 8 Motel in Shelby, so Defendant borrowed a Chevrolet Monte Carlo to drive to Shelby. Defendant and his accomplices, armed with a handgun and bandanas and scarves to cover their faces, left Buffalo, South Carolina for Shelby that same day. While en route to Shelby, Defendant picked up a friend in Spartanburg, South Carolina to drive the Monte Carlo while the three carried out their plan. Now with four people in the Monte Carlo, the group stopped at the South Carolina-North Carolina border to meet Brint Davis (“Davis”) and Michael Dinneen (“Dinneen”). Davis and Dinneen had been in Mr. Wallace’s hotel room in Shelby earlier that day and brought methamphetamine purchased from Mr. Wallace back with them to South Carolina. Because Davis had been in Mr. Wallace’s hotel room earlier that day, Defendant wanted him to come with the group to knock on the hotel room door so that “they

would open the door to him without any problem.” At this time, Defendant also got a second handgun from Dinneen.

Upon arriving in Shelby, Defendant decided that he, Hucks, and Davis would go into the hotel room, while Defendant’s friend stayed in the Monte Carlo and Roach and Dinneen stayed in Dinneen’s Honda Accord. Once at Mr. Wallace’s hotel room, Defendant held one of the guns up to Davis’s head as a ruse to get Mr. Wallace or one of his friends to open the door when Davis knocked. When a friend of Mr. Wallace opened the door, Defendant and Davis entered, with Hucks right behind them. While Hucks retrieved a rifle that was in the bathroom, Defendant pointed his gun at Mr. Wallace and demanded that Mr. Wallace “[g]ive me your dope. Give me your money. Give me everything you’ve got.” Mr. Wallace told Defendant that he had sold the last of the drugs, to which Defendant responded, “[g]ive me your dope, give me your money or I’m going to fucking shoot you.” Mr. Wallace stated, “Well, shoot me, motherfucker,” and Defendant fired the gun and shot Mr. Wallace in his chest.

Defendant, Davis, and Hucks immediately ran out of the hotel room and jumped into the Monte Carlo that Defendant’s friend was driving. The vehicle drove away, outrunning nearby officers who noticed the vehicle’s high rate of speed. The vehicle caught fire after hitting a dip in the road, causing the four occupants to stop the car in a field. The group ran through the field to a parking lot, where Dinneen and Roach were parked in Dinneen’s Honda Accord. All six members of the group

then drove back to South Carolina in the Honda Accord. Once back in South Carolina, Defendant admitted to shooting Mr. Wallace to Roach and Dinneen.

Mr. Wallace had already died when first responders arrived at the hotel room about 10 minutes after the incident. The forensic pathologist who performed an autopsy on Mr. Wallace later testified that Mr. Wallace suffered a gunshot wound to the left chest, fracturing his left second rib and severing his main pulmonary artery and left main pulmonary vein. Police located Defendant in South Carolina and arrested him, along with Davis, Hucks, and Dinneen. Defendant was charged with attempted robbery with a dangerous weapon and first-degree murder. A jury convicted Defendant on both charges.

## **ANALYSIS**

### **A. Autopsy Photographs**

During the testimony of Dr. James M. Sullivan (“Dr. Sullivan”), the forensic pathologist who performed Mr. Wallace’s autopsy, the State introduced four photographs from Mr. Wallace’s autopsy. Exhibit 17-1 depicted only Mr. Wallace’s face. Exhibit 17-2 depicted Mr. Wallace’s face and upper chest, including the gunshot wound. Exhibit 17-3 was a closely taken photograph of the gunshot wound. Exhibit 17-4 was a closely taken photograph of a cluster of skin abrasions on Mr. Wallace’s scalp. Defendant contends that the trial court erred in admitting these photographs, as the probative value of the photographs was substantially outweighed by the

danger of unfair prejudice. The State argues that this objection was not made at trial and is thus waived on appeal. We conclude that the objection properly preserved the issue for appeal, but find no error in the trial court's admission of Exhibits 17-2 and 17-3 and no prejudicial error in the admission of Exhibits 17-1 and 17-4.

### **1. Preservation of Issue on Appeal**

We first address the State's argument that Defendant failed to properly preserve his assignment of error to the trial court's admission of the autopsy photographs.

Generally, when a defendant does not properly object at trial to preserve an issue for appeal, we have the ability to review that issue under a plain error standard.

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2017). However, "plain error review is inapplicable to discretionary decisions of the trial court, such as a decision to exclude evidence under Rule 403." *State v. Santillan*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 815 S.E.2d 690, 695 (2018) (citing *State v. Cunningham*, 188 N.C. App. 832, 836-37, 656 S.E.2d 697, 700 (2008)). Thus, in order to reach the merits of Defendant's argument, Defendant must have properly preserved the issue for appeal by specifically or apparently objecting to the evidence under Rule 403.

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*Opinion of the Court*

“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1) (2017). Here, the transcript shows Defendant’s objection did not specifically state that relevance was the basis for the objection:

State: The State would move to introduce State’s 17-1 through 17-4 for *illustrative purposes*.

Defense’s Counsel: Your Honor, we would object in regards to – Death is not the issue. I believe –

Judge: Well, let me see the photographs.

Defense’s Counsel: I do believe they’re unneeded.

Judge: The Court will overrule the objection.

(emphasis added). However, the meaning of the objection is apparent when examined in light of the testimony, the evidence itself, and the statements made during the objection. Dr. Sullivan testified as to the nature of the victim’s wounds and the cause of his death. The State then introduced photos of Mr. Wallace’s face, wound, and scalp as he lay on the autopsy table. Viewed in context, Defendant’s objections that “[d]eath is not the issue” and that the photos are “unneeded” demonstrates that he was challenging the relevancy and potential prejudice of the photos given Dr.

Sullivan's previous undisputed testimony as to the cause of death. Defendant has, therefore, properly preserved this issue for appeal and we review it on the merits.

## **2. Relevance and Rule 403**

"The admissibility of evidence is governed by a threshold inquiry into its relevance." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (internal quotation marks and citation omitted). Evidence is relevant and generally admissible if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2017); *see also* N.C.G.S. § 8C-1, Rule 402 (2017). Photographs and other pictorial representations are relevant evidence when they illustrate the testimony of the witness and "enable the jury to understand the oral testimony and to realize more completely its cogency and force." *Williams v. Bethany Volunteer Fire Dep't.*, 307 N.C. 430, 434, 298 S.E.2d 352, 354 (1983); *see also* N.C.G.S. § 8-97 (2017) ("This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness.").

However, Rule 403 allows a trial court to exclude evidence even if it is relevant:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.



N.C.G.S. § 8C-1, Rule 403.

“We 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 [under Rule 403].” *State v. Triplett*, 368 N.C. 172, 175, 775 S.E.2d 805, 807 (2015). Subsequent Rule 403 determinations “are discretionary, and a trial court’s decision on motions made pursuant to Rule 403 are binding on appeal, unless the dissatisfied party shows that the trial court abused its discretion.” *State v. Chapman*, 359 N.C. 328, 348, 611 S.E.2d 794, 811 (2005) (citation omitted). Abuse of discretion occurs when the trial 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). “Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.” *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

Photographs of homicide victims are relevant and may be introduced to “illustrate testimony as to the [victim’s] cause of death” and “the manner of killing so as to prove circumstantially the elements of murder in the first degree . . . .” *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526. A defendant’s stipulations as to the cause of death and identity of the victim do not preclude introduction of such photographs or diminish their relevancy. *Id.*; *State v. Skipper*, 337 N.C. 1, 35, 446 S.E.2d 252, 270

(1994). “Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, *so long as* they are used for illustrative purposes and *so long as* their excessive or repetitious use is not aimed solely at arousing the passions of the jury.” *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526 (emphasis added). “[W]hen the use of photographs that have inflammatory potential is excessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury.” *Id.* In determining whether photographs of a homicide victim are admissible under Rule 403, the trial court is “to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation.” *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

a. *Exhibits 17-1, 17-2, and 17-3*

Exhibits 17-2 and 17-3 were relevant and had probative value, as they illustrated and assisted in explaining Dr. Sullivan’s testimony. Preceding the State’s introduction of the autopsy photographs, Dr. Sullivan testified that Defendant sustained a gunshot wound below his left clavicle and described the entrance wound as typical, with a round shape and a circumferential margin of abrasion. Dr. Sullivan then testified that the bullet continued through Mr. Wallace’s chest, fracturing his left second rib and severing his left main pulmonary artery and left main pulmonary vein, causing a hemorrhage in the left pleural cavity and left lung. Exhibit 17-2, the

photograph of Mr. Wallace's face and chest, thus tended to illustrate Dr. Sullivan's testimony regarding the location of the gunshot wound Mr. Wallace sustained in relation to other parts of his body. Exhibit 17-3, the close-up photograph of the gunshot wound, also illustrated Dr. Sullivan's testimony as to the entrance and pathway of the bullet that caused Mr. Wallace's death. *See State v. Chapman*, 359 N.C. 328, 351, 611 S.E.2d 794, 813 (2005) (holding that autopsy photographs illustrating the location of a gunshot wound and the cause of death were relevant evidence and had probative under a Rule 403 determination).

Similarly, the trial court did not err in finding that Exhibit 17-1 was relevant and had probative value. Dr. Sullivan testified, albeit briefly, that he received the body of Travis Wallace to perform an autopsy. Thus, Exhibit 17-1 illustrated Mr. Wallace's identity as the deceased. *See State v. Moseley*, 338 N.C. 1, 39, 449 S.E.2d 412, 435 (1994) ("Instead the photographs and slides of [victim] were used to identify her as the deceased . . ."). Affording the trial court's relevance determination great deference, we find that it did not err.

The probative value of these illustrative photographs was not eclipsed by unfair prejudice. The photographs served a limited purpose as discussed above to illustrate Dr. Sullivan's testimony and were not used excessively or repeatedly so as to exceed this illustrative purpose. Moreover, "the record demonstrates that the challenged photographs were not introduced *solely* to inflame the passions of the

jury.” *Chapman*, 359 N.C. at 351, 611 S.E.2d at 813 (emphasis in original). Accordingly, the photographs were not unfairly prejudicial. We find no error in the trial court’s admission of Exhibits 17-2 and 17-3 into evidence.

b. *Exhibit 17-4*

We note at the outset that, the cluster of skin abrasions on Mr. Wallace’s scalp depicted in Exhibit 17-4 was a topic that was not revisited in Dr. Sullivan’s testimony outside of his identification of the photograph. Dr. Sullivan never testified about the cause or clinical significance of the cluster of skin abrasions as to indicate why the photograph was relevant to illustrate his testimony. Because the relevancy of illustrative evidence lies in its function of assisting the jury in understanding oral testimony, such evidence should be excluded when there is no testimony for the evidence *to illustrate*. See *Williams*, 307 N.C. at 434, 298 S.E.2d at 354. However, we need not determine whether the trial court erred in admitting Exhibit 17-4, as Defendant fails to show that the result of his trial would have been different absent this error. *Ferguson*, 145 N.C. App. at 307, 549 S.E.2d at 893. The photograph of the small cluster of skin abrasions on Mr. Wallace’s scalp was taken closely and did not depict any subject matter likely to inflame the passions of the jury. Thus, even if improperly admitted, Exhibit 17-4 did not depict any subject matter that would prejudice Defendant so as to influence the result of the trial.

**B. Indictment**

Defendant challenges the first-degree murder indictment as facially invalid, contending that the short-form indictment did not allege the elements of first-degree murder, but, rather, the elements of second-degree murder. We disagree.

“A facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case.” *State v. McKoy*, 196 N.C. App. 650, 654, 675 S.E.2d 406, 410 (2009) (citation and internal quotation marks omitted). We review indictments alleged to be facially invalid de novo. *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008) (citation omitted). Our General Assembly has authorized the State to use short-form indictments for first-degree murder charges:

In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment “with force and arms,” and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law . . . .

N.C.G.S. § 15-144 (2017). Defendant concedes that our Supreme Court has held that “[a]n indictment that complies with the requirements of N.C.G.S. § 15-144 will support a conviction of both first-degree and second-degree murder.” *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000). Accordingly, we find this argument without merit and hold that the indictment here sufficiently alleges the elements of first-degree murder and is not facially invalid.

**CONCLUSION**

After a thorough review, we hold that the trial court did not abuse its discretion in admitting State's Exhibits 17-1, 17-2, and 17-3, as the photographs were probative and were not introduced solely to inflame the passions of the jury. Assuming, without deciding, that the admission of Exhibit 17-4 was error, this error was not prejudicial. Furthermore, the short-form indictment for first-degree murder was not facially invalid and supported the conviction. Accordingly, we find no error in part and no prejudicial error in part.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judges CALABRIA and ARROWOOD concur.

Report per Rule 30(e).