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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-499

Filed: 7 April 2020

Mecklenburg County, Nos. 16 CRS 8400, 208832-33

STATE OF NORTH CAROLINA

v.

DARNE NICHOLAS BROWN, Defendant.

Appeal by defendant from judgments entered 4 October 2018 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney Generals Nicholas Vlahos and Benjamin O. Zellinger, for the State.

Kimberly P. Hoppin for defendant-appellant.

BERGER, Judge.

Darne Nicholas Brown (“Defendant”) was found guilty of first-degree murder, murder of an unborn child, and possession of a firearm by a felon. Defendant appeals, arguing the trial court erred when it (1) denied Defendant’s motion to sever the charge of possession of a firearm by a felon, (2) admitted a prejudicial photo into evidence, (3) denied Defendant’s motion to dismiss the murder charges for insufficient

evidence, and (4) failed to instruct the jury on second-degree murder. We find no error.

Factual and Procedural Background

Defendant and the seventeen-year-old victim, Hawa Gabbidon (“Hawa”), had an on-again-off-again relationship. On June 22, 2012, Hawa found out that she was pregnant, and attempted to contact Defendant. After repeated attempts to contact Defendant, he eventually agreed to meet Hawa on July 9, 2012, to discuss the pregnancy. At that time, Defendant had a new girlfriend.

Hawa had taken a bus to meet Defendant. Around 9:30 p.m., Hawa entered a sweepstakes location to charge her phone. While inside, she used the sweepstakes landline to make a call. An employee heard Hawa say, “I don’t want to be walking around this ghetto ass neighborhood.” The State introduced into evidence a text message from 9:24 p.m. that evening in which Defendant stated to Hawa, “Jus (*sic*) start walking 2 my hood. Ima (*sic*) meet u (*sic*).” Hawa left the sweepstakes sometime after 9:35 p.m.

That same night, Ricky Williams (“Williams”) saw Defendant walking by Williams’ home dressed in dark clothing. Williams recognized Defendant, who was dressed in black and was attempting to conceal a .22 rifle. Williams asked Defendant where he was going, and Defendant replied, “I’m going to take care of some business.”

Williams and Defendant had a brief conversation, and Defendant walked in the direction of Elder Park.

Later that night, Dorian McCarter (“McCarter”), Timothy Frazier (“Frazier”), and Kitwon Ellis (“Ellis”) were walking through Elder Park to meet some people when they discovered Hawa’s body. Frazier called 911. McCarter testified that he witnessed Frazier “rummaging around” the body. The police arrived about five to ten minutes later.

Officers located a purse, a blue bag, some dresses, underwear, lingerie, makeup, deodorant, a phone cord, a key, a closed wallet, paperwork, and a pregnancy test around Hawa’s body. The police also recovered a do-rag, t-shirt, bicycle, receipt, and backpack. No cell phones or weapons were located at the scene of the crime.

An autopsy report indicated that Hawa had three gunshot wounds to her head. All three entry wounds demonstrated that the shots took place at close range. The medical examiner recovered three .22 caliber projectiles from Hawa’s head. The autopsy also revealed that Hawa was about five weeks pregnant at the time of her death.

At trial, Defendant did not testify but presented evidence that on July 19, 2012, a search warrant of Frazier’s home was executed. Law enforcement recovered a Stevens .22 Long Rifle in the attic and ammunition from a nightstand. The State introduced rebuttal evidence from a firearms examiner. The examiner testified that

the rifle recovered from Frazier’s home had been tested, and the projectiles recovered from Hawa’s body were not fired from Frazier’s weapon.

Defendant was charged with first-degree murder, murder of an unborn child, and possession of a firearm by a felon. Defendant was tried non-capitally by a jury. The jury found Defendant guilty on each charge, and he received two consecutive sentences of life in prison without parole, and a concurrent sentence of 17 to 30 months in prison for possession of a firearm by a felon. Defendant appeals.

Analysis

I. Joinder of Offenses

Defendant argues the trial court erred when it denied Defendant’s pre-trial motion to sever the charge of possession of a firearm by a felon and granted the State’s motion for joinder. We disagree.

A trial court’s ruling on questions of joinder “is discretionary and will not be disturbed absent a showing of abuse of discretion.” *State v. Carson*, 320 N.C. 328, 335, 357 S.E.2d 662, 666-67 (1987). A trial court will only be reversed for abuse of discretion “upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.” *Id.* at 335, 357 S.E.2d at 667.

“A defendant’s motion for severance of offenses must be made before trial.” N.C. Gen. Stat. § 15A-927(a)(1) (2019). “If a defendant’s pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of

all the evidence. Any right to severance is waived by failure to renew the motion.” N.C. Gen. Stat. § 15A-927(a)(2) (2019). Thus, a defendant’s failure to renew a motion to sever at the close of all evidence will waive any right to have claims severed and limit our review to whether the trial court abused its discretion in ordering joinder at the time of the trial court’s decision to join. *State v. Agubata*, 92 N.C. App. 651, 661, 375 S.E.2d 702, 708 (1989).

Here, the State filed a pre-trial motion to join the offenses for trial. Defendant filed a pre-trial motion to sever, which the trial court denied. Defendant objected to the trial court’s denial of his motion to sever but failed to renew his motion before or at the close of all the evidence. Thus, Defendant has waived any right to severance, and we must determine whether the trial court abused its discretion when it joined the offenses for trial.

“Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.” N.C. Gen. Stat. § 15A-926(a) (2019). A two-part analysis is utilized in ruling upon a motion for joinder: “(1) a determination of whether the offenses have a transactional connection and (2) if there is a connection, a consideration of whether the accused can receive a fair hearing on the consolidated

offenses at trial.” *State v. Jenrette*, 236 N.C. App. 616, 621, 763 S.E.2d 404, 408 (2014) (citations and quotation marks omitted).

In the present case, Defendant does not challenge the transactional connection between the two charges, but argues that joinder unfairly bolstered the State’s case with otherwise inadmissible evidence that Defendant “was an unsavory convicted felon who might have the propensity for criminal behavior in general.” However, this Court has routinely held that there is no “inherent prejudice in joining a charge of firearm possession by a felon with another charge . . . [that] includes the element of a dangerous weapon” even though joinder permits the State to “introduce evidence which would ordinarily not be admissible, *i.e.*, that defendant had a prior felony conviction.” *State v. Cromartie*, 177 N.C. App. 73, 78, 627 S.E.2d 677, 681 (2006).

Moreover, a defendant will not be found to have been prejudiced by the joinder of charges when joinder does “not unjustly or prejudicially hinder defendant’s ability to defend himself or to receive a fair hearing[,] . . . the evidence was not complicated and the trial court’s instruction to the jury clearly separated the two offenses.” *Id.* at 78, 627 S.E.2d at 681. Here, the evidence was not complicated. Defendant received a fair trial, and he was not deprived of his ability to defend the charges. In addition, the record reveals that the trial court clearly separated the offenses in its instructions to the jury. We conclude that the trial court did not abuse its discretion in granting the State’s motion for joinder.

II. Evidentiary Rulings

Defendant also argues the trial court erred when it admitted into evidence a photograph from Defendant's cell phone of him holding a rifle. The rifle depicted in the photograph was similar to the one he had on the night Hawa was murdered. Defendant specifically contends it was irrelevant under Rule 402 of the Rules of Evidence, and any probative value was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403. We disagree.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019) (quotation marks omitted). With some exceptions, "[a]ll relevant evidence is admissible" and "[e]vidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2019). "Although the trial court's rulings on relevancy technically are not discretionary . . . , such rulings are given great deference on appeal." *State v. Stewart*, 231 N.C. App. 134, 139, 750 S.E.2d 875, 878 (2013) (citation and quotation marks omitted).

"When no weapon is found in a defendant's possession at the time of his arrest or thereafter, testimony that defendant had once owned or possessed a weapon becomes especially relevant. By its nature, such evidence is circumstantial, but

circumstantial evidence is proper and sufficient to prove facts at issue in a trial.”

State v. Mlo, 335 N.C. 353, 376, 440 S.E.2d 98, 109 (1994).

Defendant argues that the photo was inadmissible, relying on *State v. Samuel*, 203 N.C. App. 610, 693 S.E.2d 662 (2010) and *State v. Patterson*, 59 N.C. App. 650, 297 S.E.2d 628 (1982). Specifically, Defendant contends the weapon depicted in the photo was not linked to him and was not utilized in the crime.

Here, however, the photograph was relevant to show Defendant had a rifle in his possession which resembled the rifle Williams observed Defendant carrying the night Hawa was murdered. Williams testified that he saw Defendant dressed in dark clothing and that he carried a rifle under his coat. When Williams asked Defendant about the rifle, Defendant replied, “I’m going to take care of some business” and walked towards the park where Hawa’s body was recovered. When asked to describe the weapon, Williams testified that it was “a brownish looking color” and looked like “a Shooting Daisy. One of them little, like, small rifles . . . Like, little .22s that kids used to use and stuff.”

The photo was relevant because the rifle depicted in the photograph was similar to the weapon used to murder Hawa. In addition, the photograph directly contradicted Defendant’s statement to law enforcement that he did not have, own, or possess any firearms. Thus, the trial court did not err when it admitted the photo under Rules 401 and 402.

Having decided the photograph was relevant, we must determine whether it should have been excluded under Rule 403. Defendant contends that the admission of the photo was “highly prejudicial, and had very little probative value.” We disagree.

“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. Gen. Stat. 8C-1, § Rule 403 (2019). We note that “evidence offered by the State will have a prejudicial effect on a defendant; however, the prejudicial effect will vary in degree.” *State v. Golphin*, 352 N.C. 364, 434, 533 S.E.2d 168, 215 (2000). “Such a determination is within the discretion of the trial judge, and his ruling will not be overturned unless the ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Mlo*, 335 N.C. at 375, 440 S.E.2d at 109 (citation and quotation marks omitted).

The probative value of the photograph was not substantially outweighed by any potential unfair prejudice to Defendant. The photograph connected Defendant with a firearm similar to the one used to kill Hawa and contradicted his statement that he did not own or possess a firearm. Defendant was not unfairly prejudiced by

admission of the photograph. Accordingly, the trial court did not abuse its discretion under Rule 403.

III. Motion to Dismiss

Defendant next contends the trial court erred when it denied Defendant's motion to dismiss the charges of first-degree murder and murder of an unborn child. He specifically contends that there was insufficient evidence of motive, opportunity, capability, or identify to infer that Defendant was the perpetrator. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citation omitted).

Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury for a determination of defendant's guilt beyond a reasonable doubt. However, a motion to dismiss should be allowed where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt.

State v. Stone, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citations omitted).

“First-degree murder is the unlawful killing of a human being with malice, premeditation and deliberation.” *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991) (citation and quotation marks omitted). A person may be found guilty of murder of an unborn child if the person does any of the following:

- (1) Willfully and maliciously commits an act with the intent to cause the death of the unborn child.
- (2) Causes the death of the unborn child in perpetration or attempted perpetration of any of the criminal offenses set forth under G.S. 14-17.
- (3) Commits an act causing the death of the unborn child that is inherently dangerous to human life and is done so recklessly and wantonly that it reflects disregard of life.

N.C. Gen. Stat. § 14-23.2(a) (2019).

When the evidence of a defendant's identity as the perpetrator is circumstantial:

[C]ourts often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime. In most cases these factors

are not essential elements of the crime, but instead are circumstances which are relevant to identify an accused as the perpetrator of a crime. . . . While the cases do not generally indicate what weight is to be given evidence of these various factors, a few rough rules do appear. It is clear, for instance, that evidence of *either* motive or opportunity alone is insufficient to carry a case to the jury.

State v. Bell, 65 N.C. App. 234, 238, 309 S.E.2d 464, 467 (1983) (citations omitted) (emphasis in original).

There is no “bright-line test by which it can be accurately and consistently determined when the state has presented sufficient substantial circumstantial evidence of identity of the perpetrator to survive a defendant’s motion to dismiss.” *State v. Bell*, 65 N.C. App. 234, 239-40, 309 S.E.2d 464, 468 (1983). Thus, we assess “in the light of all the circumstances” whether sufficient evidence was presented. *Id.* at 240, 309 S.E.2d at 468.

The State presented sufficient evidence of motive. The State’s evidence tended to show that Hawa and Defendant agreed to meet to discuss the pregnancy. At the time of Hawa’s murder, Defendant had another girlfriend. Defendant admitted to police that he saved Hawa’s contact information in his phone under an alias so that his new girlfriend would not know he was still in contact with Hawa. Defendant also informed the police that he and his new girlfriend had plans to move in together. Thus, because Defendant was possibly the father of Hawa’s child, Defendant did not want his new girlfriend to know about the pregnancy, or that he still communicated with Hawa. It is reasonable to conclude that Defendant had a motive to kill Hawa

and her unborn child so that he could maintain his relationship with his new girlfriend.

The State also presented evidence that Defendant had the opportunity to kill Hawa. “In order for this Court to hold that the State has presented sufficient evidence of defendant’s opportunity to commit the crime in question, the State must have presented at trial evidence not only placing the defendant at the scene of the crime, but placing him there at the time the crime was committed.” *State v. Hayden*, 212 N.C. App. 482, 488, 711 S.E.2d 492, 497 (2011).

The State’s evidence tended to show that Hawa arrived at the sweepstakes before 9:30 p.m. and charged her cellphone. At approximately 9:28 p.m., she used the sweepstakes phone to make a call, during which she stated, “I don’t want to be walking around this ghetto ass neighborhood.” She appeared to have left the sweepstakes at approximately 9:35 p.m. after speaking with Defendant on the phone. Williams testified that later that evening, he saw Defendant walking toward Elder Park, dressed in dark clothing and carrying a rifle. When Williams asked Defendant about the rifle, Defendant replied, “I’m going to take care of some business.” Williams’ testimony identified and placed Defendant near the scene of the crime at the time of the murder while in possession of a rifle similar to the one used to murder Hawa.

Defendant argues the State's circumstantial evidence did not substantially identify Defendant as the perpetrator of Hawa's death and the murder of her unborn child because the State failed to recover the murder weapon, failed to link Defendant to the scene of the crime with physical or DNA evidence, and failed to account for Defendant's exact whereabouts throughout the night in question. However,

The case law clearly shows that no singular combination of evidence, nor any finite, quantifiable amount of evidence constitutes substantial evidence. *See Bell*, 65 N.C. App. at 239, 309 S.E.2d at 468. Once the court has determined that the evidence of motive and opportunity as a whole surmounts the initial benchmark of sufficiency, the task of assessing the value and weight of that evidence is for the jury. Factually, this Court does not interpret a lack of certain types of evidence as somehow negating defendant's guilt.

State v. Miles, 222 N.C. App. 593, 603-04, 730 S.E.2d 816, 825 (2012).

After considering the evidence in the light most favorable to the State, there was substantial evidence to identify Defendant as the perpetrator of Hawa's murder and the murder of her unborn child. Therefore, the trial court did not err when it denied Defendant's motion to dismiss the charges of first-degree murder and murder of an unborn child.

IV. Jury Instructions

Lastly, Defendant argues the trial court erred when it did not instruct the jury on the lesser included offense of second-degree murder. Defendant specifically

contends that the evidence did not give rise to an inference that he acted with premeditation and deliberation. We disagree.

“The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation. The elements of second-degree murder; on the other hand, 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) (citations omitted).

“[Arguments] challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). “An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater.” *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

In determining whether the evidence is sufficient to support the submission of the issue of a defendant’s guilt of a lesser included offense to the jury, courts must consider the evidence in the light most favorable to the defendant. However, the trial court does not err in not instructing the jury on second-degree murder as a lesser included offense of first-degree murder if the evidence is sufficient to fully satisfy the State’s burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant’s denial that he committed the offense.

State v. Broom, 225 N.C. App. 137, 147-48, 736 S.E.2d 802, 810 (2013) (*purgandum*).

Premeditation means that the defendant's act was thought out beforehand for some length of time, however short. Deliberation means an intent to kill, carried out in a cool state of blood to accomplish an unlawful purpose and not under the influence of a violent passion. Premeditation and deliberation are frequently proven through circumstantial evidence, such as lack of provocation on the part of the deceased, the conduct and statements of defendant before and after the killing, ill-will between the parties, and evidence that the killing was done in a brutal manner.

Id. at 148, 736 S.E.2d at 810 (*purgandum*).

In the present case, the State met its burden of proving every element of first-degree murder, including premeditation and deliberation. At a minimum, Defendant had hours to consider and think through a plan to kill Hawa. The evidence tended to show that he did so in the absence of any violent passion. Defendant arranged the meeting with Hawa when his girlfriend was away visiting her son. He convinced Hawa to leave the sweepstakes location and meet him in Elder Park, even though there was evidence she did not feel safe in Defendant's neighborhood. Defendant was subsequently observed in the area with a rifle, and he told Williams that he was "going to take care of some business." Hawa was shot at close range with a rifle similar to the one Williams observed Defendant carrying. Evidence at the crime scene showed there were no signs of a struggle, and Hawa's only injuries were the three gunshot wounds to the head. Viewed in the light most favorable to Defendant, there was sufficient evidence of each element of first-degree murder,

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including premeditation and deliberation, and there was “no evidence to negate these elements other than defendant’s denial that he committed the offense.” *Id.* at 147-48, 736 S.E.2d at 810. Thus, the trial court did not err when it did not instruct the jury on the lesser-included offense of second-degree murder.

Conclusion

Defendant received a fair trial, free from error.

NO ERROR.

Judges DIETZ and BROOK concur.

Report per Rule 30(e).