IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-325

No. COA20-628

Filed 3 May 2022

Martin County, No. 16CRS50059

STATE OF NORTH CAROLINA

v.

TRAVIS LAMONT DAVENPORT, Defendant.

Appeal by defendant from judgments entered 3 May 2019 by Judge Cy A. Grant Sr. in Martin County Superior Court. Heard in the Court of Appeals 10 August 2021.

Attorney General Joshua H. Stein, by Deputy Chief of Staff David L. Elliott, for the State-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

GORE, Judge.

¶ 1 On 29 April 2019, Travis Davenport ("defendant") was tried on indictments alleging first-degree murder, robbery with a dangerous weapon, and attaining habitual felon status. On 3 May 2019, a jury returned guilty verdicts against defendant for first-degree murder and robbery with a dangerous weapon. The State dismissed the habitual felon indictments. The trial court sentenced defendant to imprisonment for life without possibility of parole for murder and a consecutive 97-

129 months' imprisonment for robbery. Defendant entered oral notice of appeal in open court. Upon review, this Court reverses the trial court's denial of defendant's motion to dismiss the charge of robbery with a dangerous weapon and concludes that defendant is entitled to a new trial for the charge of first-degree murder.

I. Background

A. Missed Medical Appointment

¶ 2 On the morning of 19 January 2016, Mike Griffin[1] had a medical appointment at a DaVita dialysis center in Williamston, North Carolina. Mike was a diabetic and dialysis patient, and had never missed a dialysis appointment. Craig Daniels drove a van part-time for Martin County public transportation and arrived at Mike's home at around 5:20 a.m. to pick him up. When Daniels arrived, a black man wearing dark clothing came out and said, "didn't need a ride."

¶ 3 When Mike missed his appointment, a concerned DaVita employee called the police to conduct a well-being check. A police officer arrived at Mike's home at approximately 9:30 a.m., checked around the house, spoke with neighbors, and then conducted a forced entry by kicking in the front door. Officers found Mike dead on the front room floor covered in blood. Mike's home was mostly neat and orderly, with few signs of a struggle beyond the area where his body was. Mike's wallet and

[1] In keeping with designations established by both parties' briefs, people will generally be referred to by their first names for clarity and ease of reading unless otherwise indicated.

cellphone were not found at the scene.

¶ 4 As people gathered outside, Mike's niece, Mooncey Griffin, approached officers and identified defendant as a suspect. She believed that defendant killed her uncle Mike because defendant and Mike were in a volatile romantic relationship, and there had been recent domestic issues between the two men.

B. The Day Before and Early Morning

¶ 5 William Thomas Edwards ("Tommy"), occasionally drove people around town for extra money. The day before Mike's death on 18 January 2016, Tommy picked up Mike between 3:00 p.m. and 4:00 p.m. to run errands. At about 7:30 p.m., Tommy brought Mike to Mooncey's house so Mike could give her money to buy lottery tickets. Mike gave Mooncey ten dollars, and she observed he had a lot of money in his wallet. Mike later called Mooncey between 9:00 p.m. and 9:30 p.m. and said, "Dianne to the house," then quickly ended the conversation. At trial, Mooncey said "Dianne" was a codename for defendant, because "[defendant] was on probation and didn't like for people to know he was in town."

¶ 6 Officers later learned that Mike allegedly conducted a drug deal between 9:00 p.m. and 9:30 p.m. that night. Mike was a known drug dealer in Williamston, and officers found what appeared to be cocaine in Mike's dialysis bag, sock, and the bread box in Mike's kitchen.

¶ 7 At about 9:40 p.m., Mike received a call from defendant's telephone number.

At 10:00 p.m., Mike called Tommy and asked him to pick up a man from Mike's house. Tommy later told the State Bureau of Investigation ("SBI") that when he arrived at Mike's house, it appeared that Mike and the man were arguing. Tommy observed the man was a black male a little larger than himself, with tattoos all over his face, and he was wearing a "nice jogging suit, white, trimmed in red, with a hood on it." Tommy took the man to a trailer park off U.S. 64.

¶ 8 Around midnight, Tommy received multiple calls from Mike and a telephone number unfamiliar to him. Between 12:09 a.m. and 12:39 a.m. on 19 January 2016, records showed multiple calls between Mike and defendant's telephone number. Tommy spoke to the man calling from defendant's telephone number and agreed to take him to Mike's house. Tommy arrived at 1:15 a.m., and the man was still wearing a white jogging suit. The man told Tommy that he had been incarcerated for thirteen years. Tommy testified he saw Mike and the man arguing after he dropped him off but could not hear what they were saying. Tommy did not identify the man in a lineup and did not identify defendant in court as the person he picked up or dropped off at Mike's house.

¶ 9 Defendant told police that he was at his mother's house the night Mike was killed, and that it had been a month since he had contact with Mike. Defendant's mother and sister told police that they saw defendant in his bedroom at around midnight, and he was there when they woke up at about 6:00 a.m. on the morning

Mike was killed.

C. Gang Involvement, Prior Incarceration, and Tattoos

¶ 10 At trial, Mike's other niece, Marion Knight, testified that defendant told her he had been in prison in Virginia. The trial court overruled defense counsel's objection to this testimony on grounds that it was "offered simply for the purposes of identification to be established later" and that the jury was "not to hold the fact against [defendant] that he may or may not have been in prison." Marion testified that defendant had tattoos on his face, but she did not describe them. Photos of defendant's tattoos, including enlarged photos, were admitted into evidence. Using a projector, the State displayed a photo of one tattoo located on defendant's nose that read, "fuck you." The State presented additional photos of tattoos located on defendant's arms, legs, back, neck, and chest.

¶ 11 Mooncey testified that at one point, defendant and Mike had "got into a little fuss and a little fight." The two men were arguing and got into a physical altercation, and Mike pulled a knife on defendant. Mooncey later called defendant at the behest of her uncle Mike. She recalled that defendant said, "That mother fucker pulled a blade on me, and I am Blood. I'm not the same Travis I used to be, and that's against my gang religion, someone pulling a weapon on me[.]" Defendant further remarked, "If I had my banger I would've did that mother fucker dirty." Mooncey stated that the word "banger" is the slang term for "gun." Defendant said, "If that mother fucker pull

out a blade on me again I will do that mother fucker dirty." Mooncey understood the term, to "do him dirty," meant to "kill him." However, Mooncey never witnessed any violence between Mike and defendant.

D. Other Evidence at Trial

¶ 12 Mike's autopsy revealed "multiple sharp force injuries of the neck, and he had approximately eight stab wounds in the face and neck," along with additional superficial incised wounds on his face, hands, chest, and abdomen. Mike died from a stab wound that went through his cheek and severed the left common carotid artery. The medical examiner was unable to determine the precise time of death but estimated it was 2-4 hours before Mike's body was found. Investigators found a knife soaking in the kitchen sink but were unable to determine whether it was the murder weapon. A bloody fingerprint was found in the kitchen, but it lacked sufficient detail for comparison. Defendant's DNA was not found in Mike's house, and no one witnessed the murder.

E. Jailhouse Snitch

¶ 13 Jeffery Harrison was serving a prison sentence at Central Prison where he met defendant. Harrison was a habitual felon with multiple infractions including "possession of stolen goods, forgery and uttering, obtaining property with false pretense, and assault on a government official." Harrison testified that he asked defendant, "You the one that killed my friend, Mike Griffin?" Harrison had previously

bought cocaine from Mike, informed on him, and they spent time together in prison.

¶ 14 Harrison wrote to the prosecutor in a letter dated 30 October 2016, "I am writing you with information. I am roommates with the man that killed Michael Griffin. This man gave me detailed information concerning this murder. Set up a visit with me, and I will provide you this information." In another letter dated 28 November 2016, Harrison wrote again stating, "I am willing to testify against [defendant]." Harrison wanted to facilitate a transfer to another prison closer to where his mother could visit him, but he testified that the prosecutor did not assist him with a transfer in exchange for testifying against defendant.

¶ 15 Harrison did not provide specific details about Mike's death. He testified that defendant was having sex with Mike to steal $10,000 and buy a kilo of cocaine. Defendant allegedly returned from purchasing the drugs and discovered that Mike was cheating on him with another man. However, the timing of the drug purchase was unclear, as Harrison later testified that defendant went to Virginia to buy a kilo of cocaine after Mike was found dead, not before.

¶ 16 An SBI agent testified that during an interview, Harrison said that defendant said, "I killed the faggot, but I'm going to beat it due to Martin County not liking Mike because he's a faggot and a drug dealer." While Harrison testified that defendant never told him how Mike was killed, he knew that defendant killed Mike with his bare hands. Harrison further testified that defendant was both "glad that he did it,"

but also remorseful in that "[h]e stated that he wished he hadn't killed Mike." Harrison stated that he could hear defendant screaming in his cell every night.

II. Motions to Dismiss

¶ 17 Defendant first argues the trial court erred in denying his motions to dismiss the charges for robbery and first-degree murder. We address these arguments in turn.

A. Standard of Review

¶ 18 "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) (citation omitted).

¶ 19 "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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "The law will not allow a conviction on evidence that merely gives rise to suspicion or conjecture that the defendant committed the crime. However, a motion to dismiss must be denied if there is substantial evidence—direct, circumstantial, or both—that the defendant committed the crime." *State v. Lambert*, 341 N.C. 36, 42, 460 S.E.2d 123, 127 (1995) (citations omitted).

¶ 20 "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C.

102, 108, 347 S.E.2d 396, 399 (1986) (citations omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). If the trial court determines that circumstantial evidence gives rise to a reasonable inference of defendant's guilt, then "it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (*purgandum*).

1. Robbery with a Dangerous Weapon

¶ 21 In this case, the indictment alleged that defendant committed robbery with a dangerous weapon under N.C. Gen Stat. § 14-87. The elements of robbery with a dangerous weapons are: "1) the unlawful taking or attempt to take personal property from the person or in the presence of another; 2) by use or threatened use of a firearm or other dangerous weapon; 3) whereby the life of a person is endangered or threatened." *State v. Wiggins*, 334 N.C. 18, 35, 431 S.E.2d 755, 765 (1993) (citation omitted). Specifically, the indictment states that defendant stole Mike's "cell phone, wallet, and jewelry . . . by means of an assault consisting of having in his possession and threatening the use of . . . a knife, whereby . . . [Mike's life] was threatened and endangered."

¶ 22 The State must present substantial evidence of each essential element of the crime charged and of defendant being the perpetrator of the offense. *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455. While Mike's wallet and cellphone were missing, the State presented no evidence those items were in defendant's possession. There was no evidence that Mike was missing any jewelry or that any of his jewelry was found in defendant's possession. There was no evidence that defendant had $10,000 in cash, or that he possessed any quantity of drugs. The prosecutor only speculated that the knife found soaking in the kitchen sink was the dangerous weapon used to perpetrate both crimes charged. There was no evidence connecting defendant to that knife or any other dangerous weapon.

¶ 23 The State presented circumstantial evidence of defendant's motive or opportunity to perpetrate the armed robbery. Harrison testified about defendant's intent to rob Mike, Tommy dropped off a man at Mike's house who matched defendant's description, and phone records established numerous calls between defendant and Mike before the alleged visit but not after. However, these factors are relevant to defendant's identity as the perpetrator and are not essential elements of the offense charged. *State v. Bell*, 65 N.C. App. 234, 238, 309 S.E.2d 464, 467 (1983) (citation omitted).

¶ 24 When the charge for robbery with a dangerous weapon is viewed in isolation, "[o]nly by indulging in speculation and assuming facts not in evidence can the

inference be drawn that" defendant stole Mike's cell phone, wallet, and jewelry by threatening Mike's life with a knife. *State v. Lee*, 34 N.C. App. 106, 108, 237 S.E.2d 315, 317 (1977). "Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do." *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976).

¶ 25 Thus, we conclude defendant's motion to dismiss the charge for robbery with a dangerous weapon should have been granted.

2. First-Degree Murder

¶ 26 Next, we address defendant's motion to dismiss the charge for first-degree murder. In this case, the jury returned guilty verdicts based upon theories of both felony murder and "malice, premeditation, and deliberation."

> The elements of felony murder are (1) that a defendant, or someone with whom the defendant was acting in concert, committed or attempted to commit a predicate felony under N.C. Gen. Stat. § 14-17(a) ([2019]); (2) that a killing occurred "in the perpetration or attempted perpetration" of that felony; and (3) that the killing was caused by the defendant or a co-felon.

State v. Maldonado, 241 N.C. App. 370, 376, 772 S.E.2d 479, 483-84 (2015) (citation omitted).

¶ 27 The predicate felony in this case was the robbery with a dangerous weapon, applicable pursuant to § 14-17(a), and the State presented both charges as a single transaction. Without the predicate felony, the State cannot proceed on a theory of

felony murder. Accordingly, we address the remaining theory upon which the State could obtain a conviction: murder with malice, premeditation, and deliberation.

¶ 28 "In any prosecution for a homicide the State must prove two things: (1) that the deceased died by virtue of a criminal act; and (2) that the act was committed by the defendant." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971) (citation omitted). Pursuant to § 14-17:

> A murder which shall be perpetrated by means of . . . poison, lying in wait, imprisonment, starving, torture, or by *any other kind of willful, deliberate, and premeditated killing*, . . . shall be deemed to be murder in the first degree . . . .

N.C. Gen. Stat. § 14-17(a) (2019) (emphasis added).

¶ 29 The indictment alleged that defendant killed Mike "unlawfully, willfully, and feloniously" with "malice aforethought." "Factors the jury may consider in determining the existence of premeditation and deliberation include: (1) conduct and statements of the defendant both before and after the killing, and (2) threats made against the deceased by the defendant." *State v. Misenheimer*, 304 N.C. 108, 114, 282 S.E.2d 791, 796 (1981) (*purgandum*).

¶ 30 Here, Mike was found dead with multiple lacerations and stab wounds inflicted on his body. The State offered evidence tending to show defendant was in a contentious and volatile relationship with Mike. Defendant previously made comments to Mooncey that he would kill Mike if he ever pulled a knife on him again.

Phone records established that numerous calls were made from defendant's telephone number to Mike immediately preceding the murder, but not afterwards. Tommy testified he saw a man matching defendant's description arguing with Mike the night of the murder. Tommy did not definitively identify defendant as the man he drove to and from Mike's house. However, Tommy stated the man had distinctive facial tattoos and clothing that were consistent with defendant's description. Furthermore, defendant allegedly confessed to Harrison that he perpetrated the killing.

¶ 31 The evidence presented is highly circumstantial, but the State is given the benefit of all reasonable inferences to be drawn from that evidence, and "in borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Jenkins*, 167 N.C. App. 696, 701, 606 S.E.2d 430, 433 (2005) (*purgandum*). "[A] reasonable inference of defendant's guilt can be drawn from a combination of the circumstances . . . ." *State v. Thomas*, 296 N.C. 236, 245, 250 S.E.2d 204, 209 (1978). The State presented substantial evidence of all material elements of first-degree murder and defendant as the perpetrator of that murder. Therefore, the trial court did not err by denying defendant's motion to dismiss the charge for murder.

III. Admissibility of Evidence Under Rule 404(b)

¶ 32 Defendant argues the trial court erred by allowing inadmissible character evidence of his prior incarceration, gang affiliation, and tattoos under Rule 404(b).

A. Preservation

¶ 33 The trial court denied defendant's motion *in limine* to exclude evidence of his prior incarceration on grounds that it was admissible to prove identity, and defendant subsequently objected to some witness testimony about his prior incarceration, gang affiliation, and tattoos. However, defendant concedes he failed to object to the evidence at issue as it was repeatedly introduced at trial. A motion *in limine* alone is insufficient to preserve for appeal the question of the admissibility of evidence; the defendant must further object to that evidence at the time it is offered at trial in order to preserve the issue for appellate review. *State v. Patterson*, 194 N.C. App. 608, 615, 671 S.E.2d 357, 361 (2009) (*purgandum*). Additionally, "[w]here evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Brooks*, 83 N.C. App. 179, 191, 349 S.E.2d 630, 637 (1986) (citation omitted).

¶ 34 Defendant acknowledges these issues may not be preserved for appellate review, and in the alternative, specifically and distinctly alleges plain error. *See* N.C.R. App. P. 10(a)(4). We conclude that these issues were not properly preserved, and thus, our review is limited to plain error.

B. Standard of Review

¶ 35 "[T]he essence of the plain error rule is that it be obvious and apparent that the error affected defendant's substantial rights." *State v. Holbrook*, 137 N.C. App.

766, 769, 529 S.E.2d 510, 511 (2000).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings . . . .

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (internal quotation marks and citations omitted).

¶ 36 "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." *State v. Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (2012). Additionally, "[i]n order to prevail under a plain error analysis, the defendant must show that (1) there was error and (2) without this error, the jury would probably have reached a different verdict." *Bidgood*, 144 N.C. App. at 271, 550 S.E.2d at 201 (quotation marks and citation omitted).

¶ 37 We note, a trial court's Rule 403 determination is discretionary, and discretionary rulings are generally not subject to plain error review. *See State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) (quotation marks and citation omitted) ("we do not apply plain error to issues which fall within the

realm of the trial court's discretion."). Ordinarily, plain error applies to only unpreserved instructional and evidentiary errors. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333. However, issues of admissibility under Rule 404(b) have repeatedly been subject to plain error review by both our Supreme Court and by this Court. *See, e.g., State v. Maready*, 362 N.C. 614, 622, 669 S.E.2d 564, 569 (2008) (applying plain error review to prior-traffic related convictions admitted under Rule 404(b)); *State v. Lee*, 348 N.C. 474, 483, 501 S.E.2d 334, 340 (1998) (holding that the admission of prior bad acts under Rule 404(b) did not amount to plain error); *State v. Bowman*, 188 N.C. App. 635, 645, 656 S.E.2d 638, 646-47 (2008) (holding that improper admission of Rule 404(b) evidence did not amount to plain error); *State v. Jones*, 176 N.C. App. 678, 686, 627 S.E.2d 265, 270 (2006) (applying plain error analysis to evidence of the defendant's involvement in a second robbery admitted under Rule 404(b)).

¶ 38 We review defendant's Rule 404(b) arguments for plain error.

C. Discussion

¶ 39 "Evidence 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. It 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.R. Evid. 404(b). It is well established that "Rule 404(b) is a clear

general rule of *inclusion." Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (citation omitted) (emphasis in original).

> Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried.

State v. Bagley, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (quotation marks and citation omitted) (emphasis in original). "Rule 404(b) evidence, however, should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused. " *State v. al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (citations omitted).

¶ 40 In determining whether evidence was properly admitted under Rule 404(b) the ultimate test of is whether the evidence is "sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of Rule 403." *State v. Williams*, 232 N.C. App. 152, 169, 754 S.E.2d 418, 429 (2014) (cleaned up). Further, to be successful under plain error review, defendant must show that the evidence was improperly admitted under Rule 404(b) and that in light of all other evidence admitted at trial, the evidence at issue had a probable impact on the jury's determination of guilt. *Id.* at 170, 754 S.E.2d at 430.

1. Prior Incarceration

¶ 41 "In a criminal case, the identity of the perpetrator of the crime charged is always a material fact." *State v. Jeter*, 326 N.C. 457, 458, 389 S.E.2d 805, 806 (1990) (citation omitted). As defendant acknowledges, the State used evidence of his prior incarceration for the purpose of establishing identity, because the identity of the perpetrator was specifically at issue in this case. The man that Tommy transported to Mike's house the evening of the murder stated that he had been incarcerated the same amount of time as defendant and had "just got out of prison." As identity was at issue, evidence of defendant's prior incarceration was relevant for the purposes of Rule 404(b).

¶ 42 Defendant concedes that while evidence of his prior incarceration may be admissible under Rule 404(b) to provide identity, he argues it was unduly prejudicial because it allowed the jury to convict him because of his prior conviction and incarceration, not because his identity as Mike's killer was established.

¶ 43 The record indicates the trial court was aware of the potential danger of unfair prejudice to defendant, ruling the State could present evidence of defendant's incarceration for a period of thirteen to fifteen years, but not the conviction itself. "Evidence of incarceration may, in fact, be more prejudicial where, as here, the jury is left to speculate as to the seriousness of the offense . . . ." *State v. Rios*, 251 N.C. App. 318, 323, 795 S.E.2d 234, 237 (2016).

¶ 44 The probative value obtained from multiple references to defendant's prior

incarceration, unrelated to the crimes charged, was minimal contrasted with defendant's distinct appearance for the purpose of establishing identity. Tommy did not definitively identify defendant as the man he picked up and dropped off at Mike's house but did specify that the man had distinctive tattoos covering his face. Several witnesses referenced the bare fact of defendant's prior incarceration, which served only as a continuous reminder to the jury that defendant had been convicted and incarcerated for an unspecified and unrelated crime. We conclude that evidence of defendant's prior incarceration should have been excluded.

2. Gang Involvement and Tattoos

¶ 45 Defendant next argues evidence of his gang involvement and gang tattoos was irrelevant character evidence. Additionally, defendant concedes the facial tattoos were probative of his identity as the alleged perpetrator but argues the substance of those facial tattoos and the tattoos on other parts of his body were irrelevant and inadmissible.

¶ 46 "Evidence of gang membership is generally inadmissible unless it is relevant to the issue of guilt." *State v. Privette*, 218 N.C. App. 459, 480, 721 S.E.2d 299, 314 (2012) (citation omitted). Gang-related evidence is also inadmissible where the only probative value is "to portray defendant as a gang member." *State v. Gayton*, 185 N.C. App. 122, 125, 648 S.E.2d 275, 278 (2007). Evidence of defendant's gang affiliation is only relevant and material to the crimes charged if there is "a *reasonable*,

or *open and visible* connection, rather than one which is remote, latent, or conjectural, between the evidence presented and the fact to be proved by it . . . ." *State v. Covington*, 290 N.C. 313, 335, 226 S.E.2d 629, 645 (1976) (citation omitted) (emphasis in original).

¶ 47 At trial, witnesses made multiple references to defendant being "Blood" and to "gang religion." The State admitted nine photographs of defendant's tattoos, which were published to the jury. Witnesses testified about where the tattoos were located and the words in the tattoos. Enlarged photographs depicted tattoos on defendant's face and hand that read "fuck you," "MOB," and "Gangsta Life."

¶ 48 The State does not argue that this evidence was relevant and admissible, but instead contends that defendant fails to demonstrate prejudice**.** We agree that evidence of defendant's gang affiliation and gang related tattoos were irrelevant to the crimes charged. A gang-related motive for the robbery and murder was conjectural, and there was no further testimony about gang affiliation to substantiate this theory. "The only effect of the trial court's decision to allow the admission of this evidence was to depict a 'violent' gang subculture of which [defendant] was a part and to impermissibly portray [defendant] as having acted in accordance with gang-related proclivities." *Privette*, 218 N.C. App. at 481, 721 S.E.2d at 314-15.

¶ 49 Furthermore, the substance of defendant's tattoos was also irrelevant for the purposes of Rule 404(b). Photos of defendant's chest, back, and legs were not relevant

to identification. Tommy testified that the man he transported to and from Mike's house had facial tattoos, but he did not provide details about the substance of those tattoos. The enlarged photographs at issue were not helpful for the stated purpose of identification. They were, however, far more suggestive of defendant's propensity to commit the crimes charged.

¶ 50 Defendant must also demonstrate a reasonable probability the admission of this irrelevant evidence both "affected the outcome at trial . . . [and] seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 515-16, 723 S.E.2d at 332-33 (quotation marks and citations omitted). As we have noted, the State's evidence in this case was circumstantial and far from overwhelming. When arguing against defendant's motion to dismiss on the issue of premeditation and deliberation, the State asserted that "[defendant's] stewing over what just happened. He's mad. He's a Blood. He ain't going to let him disrespect him again." Again, during closing arguments, the State recounted:

> "I ain't the same person I was eighteen years ago. I got 600 tattoos. I'm—I'm a bad you know what. He pulled a blade on me once. That violated my gang religion because I didn't retaliate." If you're in a gang and somebody pulls a weapon on you, you're a sissy. You violate the gang religion if you don't retaliate back, and what does he say to Mooncey? "He better not pull a blade on me again, or I'm going to kill that M.F. If I'd had my—burner that night, my banger"—whatever you want to call it—"if I had my gun that night I would have killed him then."

¶ 51 The State's evidence about defendant's "gang religion" and the substance of his gang-related tattoos did not establish identity or motive. Instead, it gave the jury an alternative basis to convict defendant as a violent and vengeful gang member with a propensity to commit the offense charged. This character evidence was irrelevant for the purposes of Rule 404(b), and we think defendant has met his burden in arguing this error fundamentally affected the fairness of the proceedings and had a probable impact on the outcome at trial.

¶ 52 Thus, the cumulative effect of the improperly admitted evidence regarding defendant's prior incarceration and his gang involvement and tattoos amounted to plain error. When considering the sum of the improper evidence we cannot reach a conclusion other than that the cumulative effect of the evidence which should have been excluded had a probable impact on the jury's determination of guilt. Defendant is entitled to a new trial on the charge of first-degree murder based upon these errors. Because of the likelihood to be raised again upon a new trial, we consider defendant's remaining arguments on appeal.

IV. Limiting Instruction

¶ 53 Defendant next argues the trial court plainly erred by failing to instruct the jury on the limited use of Harrison's prior statements. We disagree.

¶ 54 At trial, an SBI agent repeated Harrison's out of court statements without objection, recounting that defendant said, "I wished I hadn't killed [Mike]" and "I

killed the faggot, but I'm going to beat it due to Martin County not liking [Mike] because he's a faggot and a drug dealer." The State argued in closing that Harrison's statements were substantive evidence of defendant's guilt. Defendant contends the use of Harrison's statements should have been limited to impeachment or corroboration purposes, and the trial court's failure to instruct on the limited use of these prior statements was prejudicial. We review for plain error.

¶ 55 "The law is well-settled in North Carolina that prior inconsistent statements are not admissible as substantive evidence, but may be introduced for the jury's consideration in determining the witness's credibility." *State v. Allen*, 92 N.C. App. 168, 174, 374 S.E.2d 119, 122-23 (1988) (quotation marks and citation omitted). "The trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes." *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 513 (1998). However, "the rule has long been that an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such instruction." *State v. Isenberg*, 148 N.C. App. 29, 40, 557 S.E.2d 568, 575 (2001) (quotation marks and citation omitted).

¶ 56 Here, defendant acknowledges he failed to object and failed to specifically request a limiting instruction at the time the evidence was admitted. "Since defendant did not request such a limiting instruction and since this evidence was admissible for a proper purpose, any error in instructing the jury was not so

fundamental as to have a probable impact on the verdict." *State v. Sneeden*, 108 N.C. App. 506, 511, 424 S.E.2d 449, 452 (1993); *see also State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted) (under plain error review, defendant must show a fundamental error, one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."). We conclude that the trial court did not commit plain error by failing to give a limiting instruction on the use of Harrison's prior statements.

¶ 57 In the alternative, defendant argues his trial counsel's failure to request a limiting instruction constituted ineffective assistance of counsel. Considering our resolution of this matter on the merits of defendant's other claims, it is unnecessary to address this issue.

V. Hearsay Statement

¶ 58 Defendant argues the trial court erred by admitting Mike's hearsay statement "Dianne to the house." We agree.

¶ 59 As a preliminary matter, the State argues that defendant fails to cite any authority in support of his claim that an improper hearsay statement was allowed into evidence, and this issue is necessarily dismissed. *See* N.C.R. App. P. 28(b)(6). However, a review of defendant's brief reveals citations to the pertinent Rules of Evidence and N.C. Gen. Stat. § 15A-1443(a).

¶ 60 "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).

¶ 61 "'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). "Hearsay is not admissible" unless it falls within a recognized exception. N.C. Gen. Stat. § 8C-1, Rule 802; *see* Rules 803, 804 (hearsay exceptions).

¶ 62 Mooncey testified that she spoke to Mike on the evening of 18 January 2016, and he said, "Dianne to the house." She testified that "Dianne" was a codename for "defendant," and Mike used this codename because defendant didn't want people to know he was in town as he was on probation. The trial court overruled a hearsay objection to this testimony.

¶ 63 Mike's statement was offered to prove that defendant went to his house the night Mike was murdered. The State does not argue otherwise. Accordingly, the trial court erred by overruling defendant's objection and admitting the statement. Because we have already concluded that defendant is entitled to a new trial on the charge of first-degree murder based on the analysis above, we decline to consider whether this error was prejudicial.

VI. Conclusion

¶ 64 For the foregoing reasons, we conclude defendant is entitled to a new trial consistent with this opinion on the charge of first-degree murder.

NEW TRIAL.

Judge DIETZ and COLLINS concur.

Report per Rule 30(e).