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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-110

Filed 19 December 2023

Mecklenburg County, No. 17 CRS 210128

STATE OF NORTH CAROLINA

v.

JOSE AUGUSTO GARCIA, Defendant.

Appeal by Defendant from judgment entered 14 February 2022 by Judge W. Todd Pomeroy in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Heidi M. Williams, for the State.

Kimberly P. Hoppin, for Defendant-Appellant.

CARPENTER, Judge.

Jose Augusto Garcia (“Defendant”) appeals from judgment after a jury convicted him of conspiracy to commit robbery with a dangerous weapon. On appeal, Defendant argues the trial court erred by admitting certain text messages and a photograph into evidence. After careful review, we disagree with Defendant and find no error.

I. Factual & Procedural Background

On 16 March 2017, Froylan Perdomo (“Victim”) was shot and killed in his apartment in Charlotte, North Carolina. On 27 March 2017, a Mecklenburg County grand jury indicted Defendant with one count of first-degree murder, three counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a dangerous weapon. Beginning on 24 January 2022, the State tried Defendant in Mecklenburg County Superior Court.

Evidence at trial tended to show the following. On the night of the shooting, three men were in Victim’s apartment: Victim, Victim’s cousin, and Victim’s friend. After all three went to sleep, two intruders entered the apartment, holding handguns and demanding money. When Victim insisted that \$300 was all he had, one intruder shot Victim in the head, killing him.

After a preliminary investigation, police obtained search warrants for Defendant’s cellphone, as well as the cellphones of his alleged co-conspirators. The State entered Exhibit 60, a spreadsheet containing text messages between Defendant and his alleged co-conspirators. The messages were sent and received on the night of the murder, and they contained logistical correspondence concerning Victim’s apartment. The correspondence included statements about Victim’s address and Victim’s location within his apartment.

Defendant objected to the admission of Exhibit 60 based, in part, on hearsay, but the trial court overruled Defendant’s objections. The trial court reasoned that

the text messages in Exhibit 60 were not being offered for their truth, but rather the messages were “evidence of identity and effect on the receiver.”

The State also entered Exhibit 68O, a 3 November 2016 photograph of Defendant holding a handgun. The State never recovered the handgun used to murder Victim, but the State did recover an empty gun holster from the home of Defendant’s girlfriend. The trial court admitted the photograph over Defendant’s objection based on relevance.

On 14 February 2022, the jury convicted Defendant of conspiracy to commit robbery with a dangerous weapon, but the jury acquitted him of first-degree murder and all counts of robbery. The trial court entered judgment that same day, sentencing Defendant to a minimum of twenty-three and a maximum of forty months of imprisonment. Defendant filed written notice of appeal on 22 February 2022.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

The issues on appeal are whether the trial court erred in admitting into evidence: (1) Exhibit 60, which included text messages between Defendant and his alleged co-conspirators; and (2) Exhibit 68O, a picture of Defendant holding a handgun.

IV. Analysis

A. Text Messages

In his first argument, Defendant asserts the trial court erred by allowing Exhibit 60 into evidence because it contains inadmissible hearsay. After careful review, we disagree.

We review a trial court's hearsay rulings de novo. *State v. Miller*, 197 N.C. App. 78, 87–88, 676 S.E.2d 546, 552 (2009). Under a de novo review, “the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

“Hearsay” is generally inadmissible. N.C. Gen. Stat. § 8C-1, Rule 802 (2021). 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.” *Id.* § 8C-1, Rule 801(c). Said another way: Hearsay is “(1) an out-of-court statement (2) offered for proof of the matter asserted.” *State v. Kelly*, 75 N.C. App. 461, 465, 331 S.E.2d 227, 231 (1985).

But statements concerning a common plan, if they are offered only to prove the existence of the plan, are not hearsay because they are not offered for the truth of the matter asserted. *See State v. Valentine*, 357 N.C. 512, 524, 591 S.E.2d 846, 856 (2003). The out-of-court statements in *Valentine* were details of a common plan, which were offered to show the *existence* of the plan. *See id.* at 522–24, 591 S.E.2d at 855–56. Whether the statement details were “true” was irrelevant—the State offered

the statements to show that the alleged co-conspirators shared and received them. *See id.* at 524, 591 S.E.2d at 856. Thus, even if there was an applicable hearsay exception, the *Valentine* Court “conclude[d] that the statements were not hearsay.” *See id.* at 524, 591 S.E.2d at 856.

Here, the State offered text messages between Defendant and his alleged co-conspirators. These messages were sent and received on the night of the murder, and the messages contained logistical correspondence concerning Victim’s apartment. This correspondence included statements about Victim’s address and Victim’s location within his apartment. The State offered these messages to prove the existence of a common plan between Defendant and his alleged co-conspirators.

Because the State offered the messages to show the existence of a common plan between Defendant and his alleged co-conspirators, the messages were not offered for their truth. *See id.* at 524, 591 S.E.2d at 856. The truth of Victim’s stated address, for example, was irrelevant; it was offered to prove the existence of a common plan, not to prove the accuracy of the address. And so, the messages within Exhibit 60 were not hearsay. *See Kelly*, 75 N.C. App. at 465, 331 S.E.2d at 231. Accordingly, the trial court did not err by admitting these messages into evidence. *See id.* at 465, 331 S.E.2d at 231.

B. Photograph

In his second argument, Defendant asserts the trial court erred by allowing Exhibit 680 into evidence because the photograph was irrelevant, and even if it was

relevant, any probative value was substantially outweighed by the risk of unfair prejudice. After careful review, we disagree.

1. Rule 401

Although the “trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.” *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991); *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (“[T]he appropriate standard of review for a trial court’s ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard . . .”).

Evidence is relevant 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. Gen. Stat. § 8C-1, Rule 401 (2021). Irrelevant evidence is inadmissible. *Id.* § 8C-1, Rule 402.

In *State v. Samuel*, this Court addressed the relevance of firearms recovered from the defendant’s home. 203 N.C. App. 610, 618–21, 693 S.E.2d 662, 667–69 (2010). In *Samuel*, “there was not a scintilla of evidence linking either of the guns to the crimes charged[,]” yet the trial court admitted evidence of the guns. *Id.* at 621, 693 S.E.2d at 669. We reversed because “the evidence about the guns was wholly irrelevant and, thus, inadmissible.” *Id.* at 621, 693 S.E.2d at 669. The recovered guns did not match the testimonial descriptions of the gun used during the alleged

crime, and no other evidence linked the recovered guns to the alleged crime. *See id.* at 621, 693 S.E.2d at 669.

Here, Victim was murdered with a handgun, but the State never recovered the handgun. The State, however, offered an empty handgun holster from the home of Defendant's girlfriend, and the State offered Exhibit 680, a 3 November 2016 picture of Defendant holding a handgun. This case is distinguishable from *Samuel* in two ways. Whereas the State recovered two guns in *Samuel*, the State did not recover a gun in this case. *See id.* at 619–20, 693 S.E.2d at 668. Second, there is no conflicting testimony in this case concerning the gun used during the robbery and murder; testimony showed the perpetrator used a handgun. Conversely, there was conflicting testimony concerning the guns described in *Samuel*. *See id.* at 621, 693 S.E.2d at 669 (“The victims’ description of the gun used in the attack did not match either of the guns found Furthermore, neither witness identified either gun as the gun used in the robbery.”).

In this case, Defendant's possession of a handgun is a fact of consequence because Victim was killed by a handgun, which was never recovered. *See* N.C. Gen. Stat. § 8C-1, Rule 401. And a photograph of Defendant holding a handgun makes Defendant's possession of the missing handgun more probable, especially as the State recovered an empty handgun holster from the home of Defendant's girlfriend. *See id.* Therefore, the photograph of Defendant holding a gun was relevant, and the trial

court did not err by allowing the State to admit the photograph into evidence. *See id.* § 8C-1, Rule 402.

2. Rule 403

We review a trial court's ruling under Rule 403 for abuse of discretion. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 285, 372 S.E.2d at 527.

Under Rule 403, 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 (2021).

Here, the challenged photograph is relevant, but Defendant argues the photograph's relevance "was prejudicial and likely affected the jury's verdict in an otherwise close case, and deprived [Defendant] of a fair trial." Defendant, however, offers no reasoning to support this proposition. Because the photograph was relevant, and because Defendant offers no reasoning to show why the photograph's relevance was "substantially outweighed by the danger of unfair prejudice," the trial court's decision to overrule Defendant's Rule 403 objection was not arbitrary or unsupported by reason. *See id.*

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Accordingly, the trial court did not abuse its discretion by allowing the challenged photograph into evidence. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

V. Conclusion

We conclude that the trial court did not err by admitting Exhibits 60 or 68O because Exhibit 60 did not contain hearsay, and Exhibit 68O was relevant, and its relevance was not substantially outweighed by the danger of unfair prejudice.

NO ERROR.

Judges GORE and FLOOD concur.

Report per Rule 30(e).