No. COA99-981 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	From Guilford County
v.	)	Nos. 97 CRS 39580; 23654;
	)	98 CRS 23485
RONNIE LEE KIMBLE	)	

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BRIEF FOR THE STATE

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STATEMENT OF THE FACTS

Defendant's Statement of the Facts is incomplete and argumentative. Most egregious is the defendant's failure to summarize, except in the most cursory fashion, the testimony of Mitch Whidden, to whom the defendant confessed his involvement in Patricia Kimble's murder and his motivation therefor, greed. However, as defendant does not contend that the evidence is insufficient to convict him of murder and arson, and as Whidden's testimony is summarized in detail in the State's First Argument, the State will not recite all of the evidence here.

ARGUMENT

I. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMITTING CERTAIN HEARSAY STATEMENTS OF CO-CONSPIRATOR, TED KIMBLE.

ASSIGNMENT OF ERROR NO. 2

(R.p. 83)

Defendant first complains that the trial court permitted two witnesses, Robert Nicholes and Patrick Pardee, to testify about statements defendant's brother, Ted, made to them in which Ted implicated himself in the murder of Ted's wife, Patricia. Ted's statement to Pardee also implicated defendant. Defendant alleges that this evidence was inadmissible hearsay and that its admission denied him the right of confrontation, as Ted exercised his Fifth Amendment Right to refuse to testify.

The State contends, in view of Ted's unavailability as a witness, that these statements were properly admitted as statements against Ted's penal interest made under circumstances that indicate their trust-worthiness with sufficient force to meet the second prong of the test enunciated in *Ohio v. Roberts*, 448 U.S. 56,66, 100 S. Ct. 2531, 2539, 65 L. Ed. 2d 597, 608 (1980) (the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly rooted hearsay exception" or

(2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability). Assuming, *arguendo*, that the admission of these statements was erroneous, the State contends that the error was harmless beyond reasonable doubt, because there was other, overwhelming evidence of defendant's guilt, especially defendant's own confession to his friend, Mitch Whidden.

Nicholes' Testimony

Nicholes worked for Ted from September, 1996 (i.e., beginning eleven months after Patricia's death) until April, 1997. (Vol. VI, T.p. 1027.) He was in school and worked for Ted part-time. *(Id.)* He and Ted began stealing construction materials from job sites. (Vol. VI, T.p. 1028.) On some occasions Patrick Pardee joined them. *(Id.)* Ted stored the stolen goods and resold some of them. (Vol. VI, T.pp. 1028-29.)

Nicholes was charged in April, 1997, with multiple counts of breaking and entering and larceny. In a plea agreement dated April 18, 1997, he agreed to testify truthfully in the case against defendant and the State agreed that it would recommend a probationary sentence for Nicholes.(Vol. VI, T.pp. 1029-30,1038.)

There came a time in Nicholes' employment by Ted, around the first anniversary of Patricia's murder,[1] that Nicholes learned about the murder when news crews came around. (Vol. VI, T.p. 1031.) Nicholes became interested in the murder and, for his "own well-being," began to ask Ted about it. At first Ted denied involvement. However, one night, while they were on the way to carry out one of their theft jobs, Nicholes asked Ted "flat out" if he had killed his wife. Ted answered "no," but admitted that he had something to do with the murder. However, he refused to give more details, saying: "Ask me no questions and I'll tell you no lies." Ted became "very upset" and cried and talked about his father drinking and hitting him and his brother and Mom when he was young. (Vol. VI, T.pp. 1031-33.) Ted told Nicholes that he had forged his wife's signature on the life insurance policy. (Vol. VI, T.p. 1033.)

Ted threatened to kill Nicholes if he ever said anything. (Vol. VI, T.p. 1032.) Ted carried a pistol all the time and said that he could kill Nicholes and get away with it if Nicholes ever talked, just as he had gotten away with his wife's murder - it was a year later and the law hadn't caught him. He also said how stupid the law was, that they never realized that the stuff that was

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[1] Patricia was murdered on October 9, 1995.

listed as stolen from the Kimble house (at the time of the murder) was never stolen. (Vol. VI, T.p. 1034.)

Pardee's Testimony

Patrick Pardee knew Ted through church. (Vol. VII, T.p. 1109.) Pardee had known Ted from before the murder and gone shopping with Ted for guns before her death. (Vol. VII, T.pp. 1124-25.) He also met defendant several times. (Vol. VII, T.p. 1110.) Pardee frequently spent time at Ted's company, Lyles Building Supply, though he never was formally employed there. Early in 1997, Pardee began to assist Ted and Nicholes in stealing building materials. (Vol. VII, T.pp. 1111-13.) Pardee was compensated by Ted for participating in the thefts. (Vol. VII, T.p. 1113.) Ted was arrested for the thefts on April 1, 1997, and Pardee was arrested the following day. Pardee began cooperating with the police soon after. (Vol. VII, T.p. 1120.) He was eventually charged and reached a plea agreement with the State similar to Nicholes'. (Vol. VII, T.p. 1111.)

In late January, 1997, before the arrests, Ted and Pardee were unloading lumber and Ted appeared bothered. Ted said he felt the police were closing in on him, and he later added that it was for the death of his wife. Pardee asked if he "did it" and Ted replied no, his brother Ronnie (the defendant) did it. (Vol. VII, T.p. 1121.)

Ted told Pardee that he had been at his part-time job, after closing up Lyles, and said that he got the part-time job so he would have an alibi. (Vol. VII, T.p. 1122.) He also said that his brother, defendant, had gone to the house, shot Patricia in the head and then poured gasoline on her body and set it afire. Ted said the murder was committed for the insurance money. He later told Pardee that he wished the insurance policy had been in effect, and that it was not because his wife did not get the necessary physical. (Vol. VII, T.p. 1122.) Ted told Pardee that the murder was committed with his Glock .45 pistol, which Pardee had seen before the murder. (Vol. VII, T.p. 1123.)

The Trial Court's Ruling

The trial court ruled that Ted's statements to Pardee and Nicholes were admissible pursuant to Rule 804(b)(3) of the North Carolina Rules of Evidence. (Vol. VI, T.pp. 1025-1026.) The court cited as a second basis for denying defendant's motion *in limine*, the exception for statements made during the course of a conspiracy and in furtherance of the conspiracy. (Vol. VI, T.p. 1026.) The State concedes that there is little basis for arguing that the statements were made during the course and in furtherance of the defendant's conspiracy with Ted to murder Patricia for her life insurance. However, the State believes that the statements were

properly admitted as statements against Ted's penal interest, because the circumstances in which they were made provided the requisite guarantees of their trustworthiness.

N.C.G.S. § 8C-1, Rule 804(b) lists several exceptions to the rule against hearsay evidence in circumstances where the declarant is unavailable as a witness.[2] Among them is paragraph(3), Statement Against Interest:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render in valid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

N.C.R. EVID. 804(b)(1999). The trial court specifically found that the evidence of the circumstances in which the statements were made supported their trustworthiness.(Vol. VI, T.p. 1026.)

In *Lilly v. Virginia*, 527 U.S. 116,___ at n. 5, 119 S. Ct. 1887, 1899 at n.5, 144 L. Ed. 2d 117, 133 at n. 5 (1999), the

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[2] Here, Ted Kimble was clearly unavailable as he had refused to testify on account of Fifth Amendment privilege. (Vol. V,T.pp. 851-53.) Rule 804(a)(1) provides that "[u]navailability as a witness" includes situations in which the declarant "[i]s exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement . . . ."

Supreme Court confirmed that "a confession by an accomplice which incriminates a criminal defendant . . . does not come within a firmly rooted hearsay exception" for Confrontation Clause purposes. (Internal quotations and citations omitted.) However, the Court went on,

> This . . . does not mean . . . that the Confrontation Clause imposes a "blanket ban on the government's use of [nontestifying] accomplice statements that incriminate a defendant." Rather, it simply means that the Government must satisfy the second prong of the *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 100 S. Ct. 2531(1980), test in order to introduce such statements.

Id. Once again, the second prong of that test is that the hearsay statement must contain "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability.[3]

In *Lilly*, the Court found those guarantees wanting:

> It is abundantly clear that neither the words that Mark [the *Lilly* declarant] spoke nor the setting in which he was questioned provides any basis for concluding that his comments regarding petitioner's guilt were so reliable that there was no need to subject them to adversarial testing in a trial setting. Mark was in custody for his involvement in, and knowledge of, serious crimes and made his statements under the supervision of

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[3] This second prong of *Ohio v. Roberts*, the State believes, has been codified in the final sentence of Rule 804(b)(3): "A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement." N.C.R. EVID. 804(b)(3)(1999).

> governmental authorities. He was primarily responding to the officers' leading questions, which were asked without any contemporaneous cross-examination by adverse parties. Thus, Mark had a natural motive to attempt to exculpate himself as much as possible. . . . Mark also was obviously still under the influence of alcohol. Each of these factors militates against finding that his statements were so inherently reliable that cross-examination would have been superfluous.

527 U.S. at ____, 119 S. Ct. at 1901, 144 L. Ed. 2d at 136 (citations omitted).

In the case at hand, the factual setting is entirely different. Ted's statements were made, not to the police or other investigators, but to persons, subordinate to himself, with whom he was engaging in another criminal conspiracy. Clearly, Ted expected that Pardee and Nicholes, his co-conspirators in a theft ring, would not talk to the police. No doubt it was unwise for him to say anything of his involvement in the crime to anyone. However, there is nothing in these circumstances that tends to suggest why Ted would falsely implicate himself or his brother to Pardee or Nicholes. Ted did not identify the defendant as being involved to Nicholes at all. He did identify defendant's involvement to Pardee, but Pardee knew defendant already and the relationship of Pardee and Ted was closer and of longer duration than was Ted's relationship with Nicholes. In any case, the circumstances do not show that he expected either of them to be punished, or that he

cared what moral view Pardee or Nicholes might have of his and defendant's relative involvement. The circumstances surrounding the making of the statements here corroborate their trustworthiness.

In short, this case is distinguishable from *Lilly* because the circumstances surrounding the hearsay statements here contain "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability.

Harmless Error

Should this Court determine that Pardee's and Nicholes' testimony was inadmissable, it should find, nonetheless, that their admission was harmless beyond reasonable doubt. *Lilly*, 527 U.S. at ___, 119 S. Ct. at 1901, 144 L. Ed. 2d at 136 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L. Ed. 2d 705, 710-11(1967))[4]; *compare State v. Marlow*, 334 N.C. 273, 432 S.E.2d 275(1993)(error found harmless); see also N.C.G.S. § 15A-1443(a)(1999). This is so because the jury had before it not only voluminous circumstantial and other evidence implicating Ted

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[4] The Supreme Court remanded to the Virginia Supreme Court to make this determination. The Virginia Supreme Court, 1999 Va. LEXIS 138 (1999), found the error was not harmless beyond a reasonable doubt as to whether the defendant was the "triggerman" subject to the death penalty and that his own statement did not amount to a "confession" that he was the triggerman.

in the murder, but a confession from defendant given to his friend, the ministerial student Mitch Whidden. Defendant strains to find weaknesses in Whidden's testimony. However, these blemishes are, at most, pale. Whidden's testimony about the confession was confirmed by Jerry Falwell to whom Whidden reported it before the police had ever heard Pardee's and Nicholes' statements.[5] There is no reason whatsoever to believe that the jury, with Whidden's testimony before it, but without Pardee's and Nicholes', would have reached a different verdict.

Whidden's Testimony

Mitch Whidden was ordained as a Baptist minister on May 17, 1998. (Vol. VIII, T.p. 1408.) Prior to being ordained he was in ministry school in Lynchburg, Virginia. Prior to that he was in the United States Marine Corps, which he entered in 1994. Toward the end of his 4-year commitment to the Marine Corps he transferred to the chaplain's corps. (Vol. VIII, T.p. 1409.) He met defendant, who was also in the Marine Corps, shortly after he was "detached out" to the chaplain corps. They became friends during that time, though they did not associate except at work. (Vol. VIII, T.pp. 1410-11.)

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[5] Whidden was first interviewed by the police on February 3, 1997. (Vol. VIII, T.p. 1428.)

During this period defendant told Whidden some things about his sister-in-law's murder. (Vol. VIII, T.p. 1411.)

In August, 1996, Whidden left the Marine Corps to attend Liberty University to seek a pastoral degree. Some time later defendant called Whidden and said he would like to come visit the school, saying that he was interested in pursuing work in the ministry and was interested in attending the same school that his father, as well as Whidden, had attended.(Vol. VIII, T.p. 1413.) Whidden invited defendant to come to visit for a few days and this visit eventually transpired some time after January 24, 1997. (Vol. VIII, T.pp. 1414-15.) Defendant arrived sometime after dark with his wife and they talked awhile and went to bed. (Vol. VIII, T.p. 1415.) Defendant and his wife slept in the children's room while the children slept in Whidden's and his wife's bedroom. (Vol. VIII, T.p. 1416.)

Defendant and his wife attended class with Whidden the next day. In the evening before going out to eat, defendants' wife, Kim, called her mother and during that call told Kim that an investigator was calling. Defendant became very upset and then mad. During dinner they discussed the ministry but defendant also told Whidden that "his past was haunting him" and that this might prevent him going into the ministry. (Vol. VIII, T.pp. 1418-19.)

After getting home, defendant told Whidden he would like to talk to him alone. They went to Whidden's bedroom. Defendant told Whidden he had things he wanted to tell him but that he was afraid to as they might come back to haunt Whidden. They prayed together and then defendant told Whidden that he had killed his sister-in-law.(Vol. VIII, T.p. 1419.) He said he did it out of greed and that his brother would pay him to do it. (Vol. VIII, T.p. 1420.) Defendant asked Whidden if he could put that money to use at God's work. Whidden said no, that it was blood money.

Defendant asked if it would send him to hell if he killed himself. Whidden replied no and told defendant he should not do that, but, rather, should turn himself in. Defendant said he would die first. Defendant asked if he should leave and Whidden said that would be best, but they agreed, so as not to alarm everyone, that defendant and his wife would leave the next morning. (Vol. VIII, T.pp. 1420-21.) Whidden told defendant, that to be right with God, defendant would have to turn himself in and confess. Defendant said he had asked God for forgiveness and that "it would be okay, because it was her time to go anyway." (Vol. VIII, T.p. 1421.) Defendant said that "when your number's up, your number's up and that's it." (Vol. VIII, T.p. 1422.)

Whidden testified he would have asked defendant to leave that night but he was concerned about making him angry. The next day defendant and his wife left. Whidden felt sick over what he had been told and after talking to his wife, Whidden asked his sister to arrange a meeting for him with Jerry Falwell, the head of Liberty University. Whidden met with Falwell at a basketball game, told him about the meeting with defendant and asked for his advice. Falwell said he needed legal advice about his legal obligations and arranged for Whidden to meet with Falwell's son, who was a lawyer, as well as another lawyer.

Shortly afterward, Whidden and his wife drove down to Camp Lejeune, where they stayed with friends while Whidden met with defendant to try to persuade him to turn himself in. Defendant now told Whidden that maybe it was just a bad dream that never happened. (Vol. VIII, T.p. 1427.) Unable to persuade defendant to turn himself in, Whidden returned to Lynchburg where he met an attorney. The attorney arranged a meeting for Whidden with the Greensboro police and the State Bureau of Investigation to discuss what he had been told by defendant. (Vol. VIII, T.p. 1428.) Whidden then left school and moved out of state with his family for six months until he was certain defendant was in jail. (Vol. VIII, T.pp. 1429-30.)

Jerry Falwell testified and confirmed Whidden's testimony about the meeting he had with Whidden. He also testified that Whidden had appeared frightened. (Vol. VIII, T.p. 1478.)

Suffice it to say here, that there is ample evidence of defendant's involvement in the murder without Pardee's and Nicholes' testimony about Ted's statements. Defendant does not contest that Whidden's testimony was properly before the jury, and he concedes that the circumstantial evidence of conspiracy alone makes out a *prima facie* showing of conspiracy. (Def.'s Br. at 12, n. 1.) The State contends that it is beyond reasonable doubt that Pardee's and Nicholes' testimony about Ted's statements did not make any difference in the jury's decision to find defendant guilty.

II. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMITTING HEARSAY STATEMENTS OF THE VICTIM, PATRICIA KIMBLE.

ASSIGNMENT OF ERROR NO. 1

(R.p. 83)

The State was allowed to introduce a number of statements of the victim, Patricia Kimble, pursuant to N.C.G.S. § 8C-1, Rule 803(3) of the North Carolina Rules of Evidence. Defendant contends that the trial court committed prejudicial error in admitting these statements, arguing that they are simply statements of fact, which,

as they do not state her state of mind explicitly, are inadmissible under *State v. Hardy*, 339 N.C. 207, 451 S.E.2d 600(1994).

The State disagrees with this interpretation of *Hardy*. Rule 803(3) allows hearsay testimony into evidence if it tends to show the victim's then existing state of mind or "emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." N.C.R. EVID. 803(3)(1999). See, *State v. Wilds*, 515 S.E.2d 466, 474-75, 1999 N.C. App. LEXIS 403, *17 (N.C. Ct. App. 1999).

> "[E]vidence tending to show the state of mind of the victim is admissible as long as the declarant's state of mind is relevant to the case." *State v. Jones*, 337 N.C. 198, 209, 446 S.E.2d 32, 38 (1994). "It is well-established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant." *State v. Scott*, 343 N.C. 313, 335, 471 S.E.2d 605, 618 (1996); *see State v. Crawford*, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996) (conversations relating directly to victim's fear of defendant admissible under the state-of-mind exception to show the nature of victim's relationship with defendant and the impact of defendant's behavior on victim's state of mind prior to her murder); *State v. McHone*, 334 N.C. 627, 637, 435 S.E.2d 296, 301-02 (1993) (state of mind relevant to show a stormy relationship between victim and defendant prior to the murder), *cert. denied*, 511 U.S. 1046, 114 S.Ct. 1577, 128 L. Ed. 2d, 220 (1994); *State v. Lynch*, 327 N.C. 210, 222, 393 S.E.2d 811, 818-19 (1990) (defendant's threats to victim shortly before the murder admissible to show victim's then-existing state of mind).

State v. Macon, 346 N.C. 109, 116-17, 484 S.E.2d 538, 542 (1997). The State addresses in turn the statements which defendant identifies and argues in his brief. They are identified here by the name of the witness through whom they were introduced.

William Jarrell

William Jarrell was an insurance agent who had done business with both Patricia and her husband. He testified that Ted Kimble sought to take out a $200,000 life insurance policy on Patricia Kimble's life, for which a physical examination was required. This occurred shortly before her death. Defendant complains that Jarrell was permitted to testify that Patricia asked him why he needed the information regarding a cancer policy.

The first problem with defendant's argument regarding this "statement" of Patricia's is that it was not offered to prove the truth of what it said. It was offered not to show that a physical was required for a cancer policy. Rather, it was offered to show that Patricia was unaware that Ted Kimble was seeking to take out a life insurance policy on her life, a fact about which other testimony proved her to be quite upset. Thus, this "statement" was not in fact hearsay. "'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.R. EVID.

801(c)(1999). In any case, Patricia's response to Jarrell's reply to her next question, "how much" life insurance, did itself reveal her emotional state. When Jarrell replied that it was $200,000, Patricia "slammed the phone down." (Vol. I, T.p. 48.) This was uncharacteristic of her and shocked Jarrell. (Vol. I, T.p. 50.)

Although statements that relate only factual events do not fall within the Rule 803(3) exception pursuant to *Hardy*, the fact that statements tending to show the victim's existing state of mind, emotion, sensation, physical condition or plans also relate facts, does not require exclusion if the facts related by the victim serve to demonstrate the basis for the victim's state of mind. *Wilds*, 515 S.E.2d at 474, 1999 N.C. App. LEXIS 403 at *17.

> In the first place, it is in the nature of things that statements shedding light on the speaker's state of mind usually allude to acts, events, or conditions in the world, in the sense of making some kind of direct or indirect claim about them. . . . In the second place, fact-laden statements are usually deliberate expressions of some state of mind. . . . [I]t does not take a rocket scientist . . . to understand that fact-laden statements are usually purposeful expressions of some state of mind, or to figure out that ordinary statements in ordinary settings usually carry ordinary meaning. In the end, most fact-laden statements intentionally convey something about state of mind, and if a statement conveys the mental state that the proponent seeks to prove, it fits the [federal rule 803(3)] exception.

Id. at 474-475, 1999 N.C. App. LEXIS 403 at *18(quoting 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *Federal Evidence* § 438, at 417-18 (2d ed. 1994)).

Linda Cherry

Linda Cherry was a close friend of Patricia Kimble who was permitted to testify about a conversation with Patricia two to three weeks before her death. Defendant complains that this included Patricia's statements a) that Ted did not want to spend time with her, and b) that she had seen changes in his behavior toward her. The State disagrees. In context, it is clear that Patricia was expressing her concerns to Linda about the state of her marriage and her relationship to Ted, who according to the State's evidence, was conspiring with defendant to kill her for the life insurance money. These statements are clearly admissible under *Wilds*.

Cara Dudley

Cara Dudley was another friend who testified that about two weeks before her death Patricia told her, in case "anything strange happened to her," that Ted had taken out a large insurance policy on her. She also testified that Patricia told her that she did not need more insurance; that Ted had forged her name; that she never signed anything (for the policy); and that Ted must have paid for

the policy with cash from the extra job which he had gotten to buy the motorcycle he wanted to cruise on High Point Road – an unfit activity for a married man. (Vol. IV, T.pp. 680-81.)

Defendant admits that the prosecutor did a "superb job" tying these factual statements to Patricia's emotional state. However, he argues they are inadmissable because Patricia did not *state expressly* what her emotional state was.

Patricia's fact-laden statements to her friend clearly conveyed her state of mind and feelings about her relationship with her husband, defendant's co-conspirator, even though they were not simple declarations of those feelings. "[I]t was not necessary for [the victim] to state explicitly to each witness that she was afraid, as long as the 'scope of the conversation . . . related directly to [her] existing state of mind and emotional condition.'" *Wilds*, 515 S.E.2d at 475, 1999 N.C. App. LEXIS 403 at *20.

Rose and Gary Lyles

Rose Lyles testified that Patricia called her, upset and crying, and said that Ted was not the man she married; that he had bought a car they did not need; that she had found a life insurance policy to which Ted had forged her name; that Ted slept with a gun under his pillow; and that when she went to bed she did not know if she would wake up the next morning. Rose's husband Gary testified

to much the same statements by Patricia in his conversation with Patricia on the same occasion. Like Rose, he confirmed that Patricia was upset when she talked with him.

Once again, these statements clearly relate to and reveal Patricia's "then existing state of mind [and] emotion," specifically, fear. N.C.R. EVID. 803(3). They were properly admitted under the Rule.

The State contends that all of the challenged statements by the victim were admissible pursuant to Rule 803(3) to show her state of mind -- her fear, anger and concern about her husband's behavior. They were relevant to the question of the state of the relationship between the victim and the defendant's co-conspirator in the period leading up to her killing.

III. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN SUSTAINING THE STATE'S OBJECTION TO CERTAIN ARGUMENTATIVE, REPETITIVE AND SPECULATIVE QUESTIONS WHICH DEFENDANT PUT TO DETECTIVE JAMES CHURCH.

ASSIGNMENT OF ERROR NO. 8

(R.p. 84)

James Church was the lead detective assigned to investigate the murder of Patricia Kimble. The transcript contains 162 pages of cross-examination of this witness by defendant, not counting recross, following 66 pages of direct testimony. See, Vol. VII-VIII, T.pp. 1152-1393. Nonetheless, defendant complains that the Court

sustained objections to several of his questions to this witness. In his brief, defendant contends that he was entitled to ask leading questions of this witness.

These arguments are misplaced. In each case the State's objection was general. Therefore, the objections were properly sustained if the questions were objectionable on any basis. "'[W]here a general objection is sustained, it seems to be sufficient, if there is any purpose for which the evidence would be inadmissible.'" *Colonial Pipeline Co. v. Weaver*, 310 N.C.93, 100, 310 S.E.2d 338, 342 (1984)(quoting,1 BRANDIS, *Brandis on North Carolina Evidence* § 27 (1982)).

Here, the questions were objectionable not because they were leading, but because they were repetitive or argumentative, or because they called for speculation and conjecture from the witness. The trial judge has "broad discretion . . . to preclude repetitive and unduly harassing interrogation." *State v. McNeil*, 350 N.C. 657, 680, 518 S.E.2d 486, 500(1999); see also, *State v. Taylor*, 344 N.C. 31, 473 S.E.2d 596(1996); *State v. Bryant*, 337 N.C. 298, 312, 446 S.E.2d 71, 79(1994)("'trial courts may limit cross-examination to prohibit inquiry into . . . matters of only tenuous relevance, or to ban repetitious or argumentative questions. The legitimate bounds of cross-examination are largely

within the discretion of the trial judge'" (citations omitted)). See also, *State v. Wise*, 326 N.C. 421, 428-429, 390 S.E.2d 142,147, *cert. denied*, 498 U.S. 853, 111 S. Ct. 146, 112 L. Ed. 2d 113 (1990). Defendant has failed to show an abuse of discretion in the trial court's actions.

In any case, the defendant failed to preserve these issues for appellate review as the answers that would have been given were not preserved.

> In the case at bar, the record fails to demonstrate what the witness' answers would have been had they been permitted to respond to defendant's questions. "By failing to preserve evidence for review, defendant deprives the Court of the necessary record from which to ascertain if the alleged error is prejudicial." Thus, defendant cannot show that the trial court's ruling with respect to the exclusion of this testimony was prejudicial.

State v. Anderson, 350 N.C. 152, 176, 513 S.E.2d 296, 311, *cert. denied*, ___ U.S. ___, 120 S. Ct. 417, 145 L. Ed. 2d 326 (1999)(citations omitted). This assignment of error is without merit.

IV. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN SUSTAINING THE STATE'S OBJECTIONS TO CERTAIN LEADING QUESTIONS PUT TO DEFENDANT ON DIRECT EXAMINATION.

ASSIGNMENT OF ERROR NO. 11

(R.p. 85)

The defendant testified in his own behalf. During direct examination, defendant's counsel put a number of leading questions to him. Each of these questions is quoted in defendant's brief. The State objected to each question specifically on grounds of leading and the trial court sustained the objections on that ground. Rule 611(c) of the North Carolina Rules of Evidence provides generally that "[l]eading questions should not be used on the direct examination of a witness. . . ." N.C.R. EVID. 611(c)(1999). A trial court's rulings concerning the use of leading questions "may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59(1986). Defendant has utterly failed to show an abuse of discretion here.

Defendant's analogy of this case to *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986), is inapposite. In *Kim*, the question objected to was: "When you say he had sexual intercourse with you, did he get his penis inside you?" 318 N.C. at 617, 350 S.E.2d at 349. The victim witness in *Kim* was a ten year old girl, who was testifying about being raped. She had already testified that the defendant had sexual intercourse with her and had testified that at the time of the crime she did not know the "term sexual intercourse." In *Kim*, the question was clearly asked for

clarification, to make sure that the witness understood the critical meaning of the term she had used. Moreover, the Supreme Court has made clear that the rule against leading questions on direct is relaxed where understanding may be limited by age or where the inquiry is into a subject matter of delicate nature such as sexual matters. *State v. Greene*, 285 N.C. 482, 206 S.E.2d 229 (1974).

In contrast, in the case at bar, none of these special factors was present. Moreover, the Court's sustaining the objections did not prevent the defendant from testifying about the same matters. Indeed, for example, he did testify without objection that his brother never asked him to do anything like killing Patricia. (Vol. XI, T.p. 2051.)

V. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ALLOWING THE STATE TO QUESTION THE DEFENDANT AS TO PICTURES OF A FEMALE GUARD AND AS TO CERTAIN INSURANCE FRAUD.

ASSIGNMENTS OF ERROR NO. 12 AND 13

(R.p. 85)

During his direct examination, defendant testified that he had a loving relationship with his wife and that he kept no secrets from her. On cross-examination, he repeated this testimony and

brought it up to date to "today".[6] The court permitted the State to impeach this testimony by confronting defendant with three pictures of a woman named Janet Smith which were in his possession in his jail cell on November 19, 1997. (Vol. XI, T.p. 2238.) The Court did not permit the State to go into any further details concerning Janet Smith. Nor did the Court allow the State to ask whether defendant had told his wife about the pictures.

The State contends that defendant opened the door to impeachment on this collateral matter to this extent and in this manner by his testimony. In the court's discretion, specific instances of a witness' conduct, if probative of his truthfulness or untruthfulness, may be inquired into on cross examination, though they may not be proved by extrinsic evidence. N.C.R. EVID. 608(b)(1999). Even if it were improper impeachment, however, this questioning could not have been prejudicial. The jury had already heard from defendant's wife (one of defendant's witnesses) that she had filed for divorce from him. Moreover, the jury heard no testimony about Janet Cook beyond being identified as the person in the pictures. It strains credulity to believe that the jury could be swayed in their decision as to whether or not to convict the

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[6] "I don't know of anything that . . . my wife does not know today that I hold in secret from her in any way. I think she knows everything there is to know about me." (Vol. XI, T.p. 2224)

defendant of a heinous murder of his brother's wife, because he had in his possession, two years later, three pictures of a woman who was not his own wife. As defendant's counsel argued to the Court, the pictures did not show Janet Cook in the nude, nor could much inference be drawn from the fact that defendant had three pictures of a woman in his possession. (Vol. XI, T.pp. 2230, 2233.)

The State was also permitted to impeach defendant briefly as to whether he had told his wife that his parents had claimed to be living in a trailer where she had been living with another woman between November, 1995, and April, 1996. Apparently this was in connection with a false insurance claim defendant's parents had made. The defendant denied knowing about any such claim by his parents until reading discovery materials about it. (Vol. XII, T.p. 2268.) When the State sought to ask defendant whether his parents actually got money from this claim, the court sustained defendant's objection, and cut off further questioning about the matter. (Vol. XII, T.p. 2269.)

The State contends that the cross-examination was permissible to the extent the court allowed it. However, it also was not particularly damaging to defendant. Any error in permitting these particular questions was clearly unlikely to have any impact on the

jury's decision to convict defendant of murder and arson. In a word, if it was error, it was harmless.

CONCLUSION

Defendant received a fair trial, free of prejudicial error and there was ample evidence of his guilt of the crimes of which he was convicted. This Court should affirm the judgment of the trial court.

This the 11th day of January, 2000.

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