No. COA99-981 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA)
)
)
VS.) From Guilford County
)
)
RONNIE LEE KIMBLE,)
Defendant-Appellant)

****

DEFENDANT-APPELLANT'S BRIEF

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QUESTIONS PRESENTED

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III. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S RIGHT TO FULL AND EFFECTIVE CROSS EXAMINATION AND CONFRONTATION UNDER THE STATE AND FEDERAL CONSTITUTIONS AND THE RULES OF EVIDENCE BY NOT ALLOWING THE DEFENDANT TO POSE A SERIES OF QUESTIONS ON CROSS EXAMINATION TO THE PROSECUTION'S LEAD DETECTIVE?

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STATEMENT OF THE CASE

This case came on for trial during the August 3, 1998 session of Guilford County Criminal Superior Court before the Honorable C. Preston Cornelius, Judge Presiding. The defendant was tried capitally before a jury and found guilty of first degree murder in 97CRS-39580; conspiracy to commit murder in 97CRS-23654 and first degree arson in 98CRS-23485. At the sentencing proceeding the jury recommended life imprisonment without parole and the Court imposed that sentence. (R p 54). In addition the court sentenced the defendant to 55 to 75 months on the arson charge to run at the expiration of the life sentence and 135 to 171 months on the conspiracy charge to run at the expiration of the arson sentence. The defendant filed notice of appeal. (R p 60).

STATEMENT OF FACTS

The charred body of Patricia Kimble was found in a burned through area of the front hall of her house on October 9, 1995. (T p 272). Arson was the obvious cause of the fire; investigators found a partially full gas can still in the kitchen. (T p 294). Investigators theorized the fire had initially burned with great intensity until it consumed all the oxygen in the house and then smoldered for some length of time until the fire created a hole in the flooring and let in oxygen from the crawl space. (T pp 295-96). Opinion testimony was given that the fire could have been burning as long as two to three hours until it was discovered by the victim's brother and his wife at 8:30 p.m. (T pp 76-77; 309). The apparent murder

weapon was found in the master bedroom which, along with a back study, had been ransacked. Suspicion immediately focused on Ted Kimble, the defendant's brother and husband of the deceased, and detectives concluded that the ransacked portions had been staged to make it appear that she had surprised a burglar. It was undisputed that the house had been broken into several time before(T p 309). An autopsy revealed that she had been shot once in the side of the head, but the time of death could not be determined, although a co-worker testified Patricia left work at about 3:25 and an acquaintance said he saw her between 3:30 and 4:45 heading back in towards town. (T pp 147; 165).

The state espoused a theory that Ted Kimble became dissatisfied with his marriage and decided to kill his wife and collect on life insurance which he planned to have taken out on her. Although the state was never able to show any direct evidence of a conspiracy between Ted and Ronnie Kimble, its theory was that Ted recruited Ronnie as his "trigger man" and got a second job so that he would have an alibi by being at work. Most of the entire first week of the state's evidence was devoted to showing Ted's purported motive for getting rid of his wife and his attempts to defraud the insurance company. The state presented evidence that Ted had attempted to take out a substantial policy on his wife shortly before her death by, among other things, forging her name on the application. Ultimately, however, the policy was never issued because his wife had not gotten the required physical.

To establish the defendant's involvement, the state's cornerstone was the testimony of Mitch Whidden, a marine corps acquaintance of the defendant's, who testified that Ronnie had confessed his involvement in his sister-in-law's murder one night when Ronnie and his wife had come to visit the Whiddens while visiting Liberty Bible College in Lynchburg, Virginia.

The defendant presented evidence from his wife Kimberly that on October 9, 1995, the day Patricia Kimble was murdered, Ronnie had gotten up early to install underpinning at their mobile home. (T p 1696). He had driven to his brother Ted's and borrowed his box truck to haul the underpinning which he picked up at Atlantic Mobile Home Supply in Greensboro. (T p 1697). She testified that she talked to him around 12:30 about the possibility of having lunch together, but when she learned that he had not yet installed the underpinning, she told him to go ahead and work on the project. She talked to him again around 3:00 p.m. and he told her that he had to go to his brother Ted's building supply store (Lyle's) and pick up a saw blade so he could cut the underpinning. (T p 1698). She did not see him until she got home from work at 5:40 p.m. at which time he was still working on the underpinning. She testified that Ronnie told her her father had just left after helping him briefly with the underpinning. She testified she noticed nothing unusual about his demeanor when she came home and saw him about 5:40 p.m. (T p 1715). After Ronnie showered, they decided to go out and get something at the grocery store for dinner which would require minimal preparation. (T p 1700). Kimberly Kimble testified they stopped by her

parents' house and did not leave there until sometime after 7 p.m. after which they went directly to the grocery store and purchased stuffed flounder and tater tots. The defendant introduced a grocery receipt from the grocery store indicating they paid for their purchases at 7:36 p.m. (T pp 1703-07). Mrs. Kimble told the jury that they went home and ate and were in bed by 9 p.m. A short time later they got phone calls informing them that there was a fire at Ted and Patricia's house, at which point they went to the house where they found firemen already on the scene. (T pp 1707-12). After learning of Patricia's death they went to a church gathering for Ted and Patricia's family.

Kim Kimble then related to the jury the circumstances surrounding their visit to the Whiddens in Lynchburg. She explained that Ronnie had a sleep disorder diagnosed while in the Marine Corps and had been sent to the Norfolk naval base for further diagnosis. (T p 1716). In conjunction with that trip, she and Ronnie decided to go to Liberty University to see the campus because Ronnie was thinking of following in his father's footsteps and becoming a Baptist pastor. (T p 1721). Kim told the jury that although she had misgivings about staying with the Whiddens because she had never met them, they called the Whiddens and arrived at their apartment in Lynchburg about 10 p.m. that night. They didn't do much more than introduce themselves before they went to bed that night. (T pp 1722-23). She told the jury how she and Ronnie toured the campus and met Dr. Jerry Falwell the next day and contemplated going back home because of icy weather conditions but decided to stay. They decided to go out

to eat with the Whiddens that evening and Kim called her mother, Judy Stump, only to find out that the lead detective on Patricia's case, Jim Church, had called Mrs. Stump. This set off a brief discussion about the investigation of Patricia's murder, after which they all went out to eat. (T pp 1720-29). Kim told the jury that they went to a buffet style restaurant and then shopping for a short period of time where both bought office chairs from a going-out-of-business sale and then went back to the apartment. She contradicted the testimony of Mitch Whidden that Ronnie had never said he needed to talk to Mitch alone without either of their wives being present and told the jury she would have remembered that because she would have wanted to know what Ronnie had to tell him that he couldn't tell her. (T pp 1730-33). She did say that Ronnie and Mitch went upstairs to do bible study and prayer together and probably stayed upstairs for about 15 minutes. As they were coming back downstairs, Debra Whidden, who was pregnant, experienced an episode of low blood sugar and began to pass out. After she revived Ronnie and Mitch carried her upstairs to her bed. (T pp 1734-37). Kim told the jury that they left early the next morning primarily because they had to drive back to Greensboro and then Ronnie had to drive the rest of the way back to Camp Lejeune.

Judy Stump, the defendant's mother-in-law corroborated what her daughter Kim had said, that she and Ronnie had come over to their house on October 9, 1999 and had left shortly after 7 p.m. (T p 1809). James Stump, the defendant's father-in-law testified that he had stopped by Ronnie and Kim's mobile home at 4:50 p.m.

after work and found Ronnie there working on the installation of the underpinning. (T pp 1826-29). Further, he told the jury he noticed nothing unusual about his demeanor nor could he smell anything like gasoline on him. (T pp 1824-34). Additionally he corroborated what Kim had testified to about she and Ronnie coming over to their house and leaving sometime shortly after 7 p.m. (T pp 1837-38).

Ronnie Kimble testified in his own defense. He told the jury that he and his brother were never close, that they saw each other as brothers who live in same area do, but they did not associate out of friendship. (T p 1989). His testimony paralleled that of his wife's and in addition he detailed his whereabouts on the day of Patricia's death to the jury. After picking up the box truck from his brother's house he went to his brother's building supply store and waited on customers. (T pp 2074-76). Then he went and picked up the underpinning (T p 2075) and drove back to his trailer, stopping by the building supply store on the way home to ask Ted if he could fill up the truck on the business account. (T p 2081). When he got back to his trailer, he unloaded the underpinning and took the box truck back to his brother's house around 1:15 p.m. (T pp 2083-87). Back at his trailer, he set up his work and then realized that he needed a fine-tooth saw blade to cut the underpinning, so he stopped for lunch before going back to Lyles to get the saw blade. (T pp 2088-92). There he waited on customers for a while and then left to go home around 4:15 p.m. and started working on the underpinning again until James Stump stopped by. (T p 2095).

The defendant testified about going to Norfolk for his sleep disorder and then going to see Mitch Whidden and his family in Lynchburg. (T pp 2107-13). The defendant's account of what happened during their stay paralleled what his wife had testified to. (T pp 2113-37). Ronnie Kimble told the jury that he and Mitch went upstairs and prayed together and then Mitch asked him about the case. Ronnie told him about a dream he had had where he was in a house with Patricia and saw the person who killed her but could not recall his face, then heard a loud noise and woke up. (T p 2139). He discussed the fact that there was reward money of $20,000 being offered on the case, and recalled that Mitch asked him if it was blood money to which he replied that he didn't know. (T p 2139). Ronnie told the jury that at this point Mitch told him about a dream he had had where he dreamed that a man was abusing a child and when he woke up the next morning he prayed that the Lord would kill this man. The next day he read in the paper that a man had died and attributed this to his prayer. (T p 2139). He testified that he and Kim left the Whiddens that Saturday morning because he had to get back because he had duty on Sunday morning. (T pp 2147-48). Within a week or two Ronnie got a call from Mitch while he was at work at Camp Lejeune asking him to lunch. His wife Debra got on the phone and expressed regrets for not being able to see them off when they left Lynchburg. (T p 2149). When Ronnie got in his truck to go to lunch with him he asked Ronnie if he was sure that this was a dream. When the defendant answered that he was sure, Mitch began to ask him questions about details, like where was

the gun. Ronnie asked why would he know that. At some point Mitch asked him to ask his brother about the reward money and Ronnie told him his brother would think he was "nuts." (T p 2152). Mitch then cancelled lunch saying that he had to meet some friends. (T p 2152).

The defendant put on evidence establishing that Ted Kimble employed a man by the name of Rodney Woodberry at Lyle's Building Supply until July or August before Patricia's death. (T pp 2401-03). Mr. Woodberry admitted not being truthful with detectives concerning Ted activities. (T p 2407). Although Mr. Woodberry denied it, the defendant presented evidence through Woodberry's former girlfriend, Laura Shepard, that she had been awakened early one morning by the sound of Rodney Woodberry's crying. When she asked him what was wrong, Mr. Woodberry told her that he had done something he might get the death penalty or go to jail for and asked if she would come to see him while he was in jail. (T pp 2477-78). When she told him she would not come to see him, he said that he might be coming into some money, implying that he would help her out if she would agree to come to see him while he was in jail. (T p 2478).

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING INTO EVIDENCE HEARSAY STATEMENTS OF CODEFENDANT TED KIMBLE IN VIOLATION OF THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONT AND CROSS EXAMINE THE WITNESSES AGAINST HIM AS WELL AS IN VIOLATION OF NORTH CAROLINA LAW.

Assignment of error number 2. Record p 83.

In order for hearsay statements of a codefendant to be admissible against a defendant at trial they must qualify under

some firmly rooted exception of the hearsay rule. *Ohio v. Roberts,* 448 U.S. 56 (1980). This is true even if, in a joint trial, the court instructs the jury the hearsay statements are not to be considered against the non-declarant defendant. *Bruton v. U.S.,* 391 U.S. 123 (1968). Even though in the case *sub judice* codefendant Ted Kimble was not on trial with the defendant, the confrontation issues are just limiting on the state because Ted Kimble would not testify, *i.e.,* he was called in voir dire before the court and invoked his Fifth Amendment Privilege not to testify. (T p 851). However, after hearing the defendant's motion in limine regarding hearsay statements made by Ted Kimble and repeated objections to specific testimony, the trial court ruled Ted Kimble's statements admissible on the grounds they qualified under the coconspirator exception of Rule 801(d)(E). Case law interpreting the rule is well settled: in order to be admissible the statements must be made "during the course and in furtherance of the conspiracy," that is "'made by a party to it [the conspiracy] and **in pursuance of its objectives.**'" Rule 801(d)(E); *State v. Marlow,* 334 N.C. 273, 282 (1993), quoting *State v. Mahaley,* 332 N.C. 583, 593-94 (1992).

Although undersigned counsel raised some 19 assignments of error (basically all hearsay statements attributed to Ted Kimble), for purposes of this issue counsel would focus on the most damaging statements. Representative of these incriminating statements offered by the prosecution through Nicholes and Pardee was the testimony of Pardee. Pardee testified that he had been involved with Ted Kimble and Robert Nicholes in a theft ring that

had stolen building supplies from houses under construction and on two occasions items from retail stores, Home Depot and Northern Hydraulics. (T pp 1109-20). After telling the jury he was testifying pursuant to a deal with the prosecution for leniency on his felony charges from the theft ring, he testified that in late January of 1997 he was working for Ted Kimble at his building supply store and asked him if something was bothering him. (T p 1121). It is critical to note that this conversation took place more than two years after the murder of Patricia Kimble. According to Pardee, Ted Kimble then proceeded to indicate what was 'bothering him.' In answer to Pardee's request to be more explicit about what he meant, Pardee testified this exchange took place: "I asked him if he had any -- if he did it [the murder of his wife]. He said no, his brother Ronnie did it." (T p 1121). Pardee told the jury that Ted then told him on the night his wife was murdered he closed up Lyles Building Materials about 5:30 and then drove to his part-time job. (T pp 1121-22). Pardee testified that Ted Kimble told him the murder was committed for the insurance money, but admitted essentially that he realized that he wasn't going to be able to collect since the policy wasn't in effect because his wife had not taken a physical. (T p 1122).

The prosecution also offered a double hearsay statement purportedly from Ted Kimble to Pardee that Pardee never testified to. This was brought in through Ann Mauney, an insurance investigator who testified Pardee told her: "Ted said his brother, Ronnie, had taken care of the murder, because he, Ted,

didn't want to be married anymore." (T p 2659). In addition, the prosecution offered the testimony of Robert Nicholes who told the jury that after he had become close to Ted in the theft ring, Ted, while not admitting that he had killed his wife, did admit that he was involved: "And I flat out asked him 'Did you have anything to do with -- or did you kill Patricia, or kill your wife?' And he said no. And then I asked if he had anything to do with it, and he said yes, he did." (T p 1032). When coupled with Pardee's statement, this was the equivalent of naming the defendant as the 'trigger man.'

In order for these statements to be admissible, this Court must be convinced that first, the statements were made during the course of this conspiracy and second that they were made in furtherance of the conspiracy.1 Rule 801(d)(E); *State v. Marlow,* 334 N.C. 273, 282 (1993); *State v. Mahaley,* 332 N.C. 583, 593-94 (1992). Pardee puts the time of his statement at the end of January 1997 and Nicholes's statement has to have been around the same time because his explanation is that Ted confided in him only when they became active in the theft ring together and that ran from approximately January 1997 until the end of March of that year. Patricia Kimble was killed October 9, 1995, well over two years before, and any conspiracy had long since ended.

The conspiracy alleged by the prosecution is set out in the indictment:

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1. Counsel will concede that the state made a *prima facie* showing of a conspiracy based the circumstantial evidence presented.

> ... on or about October 9, 1995, the Defendant, Ronnie Lee Kimble did unlawfully, willfully and feloniously that [sic] conspire, combine, confederate and agree with Theodore Mead Kimble to commit the felony of murder in the first degree, in that Ronnie Lee Kimble did agree with Theodore Mead Kimble to murder, kill and slay Patricia Kimble in violation on N.C. Gen. Stat. 14-17, and the common law of the State of North Carolina.

The prosecution's own indictment establishes that the goal of the conspiracy, namely the murder of Patricia Kimble, had been completed more than two years before Ted Kimble had made the hearsay statements. Significantly, the indictment says nothing about an agreement, implicit or explicit, to conceal the stated object: the murder Patricia Kimble. More importantly, the conspiracy indictment says nothing about insurance fraud as a goal of the conspiracy. The state will doubtless raise two arguments in an attempt to rebut the clear language of the indictment: first, that the conspiracy was not limited to the simple act of murdering Patricia Kimble, but embraced other objectives, primarily Ted Kimble's receipt of insurance money upon her death and secondly, that the conspiracy implicitly embraced an objective of concealment which served to perpetuate the conspiracy. Both of those issues are controlled by decisions of the United States Supreme Court. In *Krulewitch v. United States,* 336 U.S. 440 (1949) the government attempted to persuade the nation's highest Court on the identical issue that the hearsay was admissible on the grounds that it was in furtherance of the continuing implied agreement to conceal the conspiracy after its primary objective had been completed. The Supreme Court flatly rejected this argument, holding that the hearsay

statements must be made in furtherance of conspiracy charged, reversing the defendant's conviction on that ground. *Id.* at 442-43. North Carolina has adopted the position of *Krulewitch* in *State v. Tilley,* 292 N.C. 132, 141 (1977) holding that admission of statements by coconspirators made two weeks after the murder was error. However, North Carolina law was well settled on this issue long before the U.S. Supreme Court decided *Krulewitch.* As far back as *State v. Dean,* 35 N.C. 63, and *State v. Ritter,* 197 N.C. 113, 116, 147 S.E. 733, 734 (1929) this state had followed the position set out in *Ritter:* "[D]eclarations of one of the conspirators, made after the offense has been committed and in the absence of the others, are not competent against the others, because not uttered in furtherance of the common design" quoted with approval in *State v. Branch,* 288 N.C. 514, 531 (1975). Thus, the basic law of North Carolina has been and continues to be that statements not made in furtherance of the conspiracy were not admissible even before the Supreme Court decided *Krulewitch.*

Even if the state were to argue (ignoring *Krulewitch*, the indictment and North Carolina caselaw) an unstated objective of the conspiracy was the insurance money, the evidence is clear that by this time, over two years after Patricia Kimble's death, the conspiracy is dead. The state's own hearsay statements from Ted Kimble demonstrates this. Ted admits to Pardee that "he wished that the policy would have been in effect," (T p 1122) showing clearly that he knows that there is no chance of collecting on the insurance policy.

Nor can it be argued that even if the trial court admitted the hearsay statements of Ted Kimble wrongly under the coconspirator exception, they are admissible as statements against penal interest. Just this past term, the U.S. Supreme Court has foreclosed the argument that an accomplice's statement inculpating another falls within a firmly rooted hearsay exception when that exception is a statement against penal interest. *Lilly v. Virginia,* 65 Crim. Law Rptr. 327 (Decided 6-10-99). Writing for a plurality Justice Stevens noted:

> The decisive fact which we make explicit today, is that accomplices's confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence.

Lilly at 65 Crim. Law Rptr. 332. It matters not that the state can produce independently corroborating evidence:

> "We have squarely rejected the notion that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears "particularized guarantees of trustworthiness,'"

Id. at 333 quoting *Idaho v. Wright,* 497 U.S. 805, 822 (1990). Just as in the case before this Court, the codefendant brother was called to testify at his brother's trial and invoked his Fifth Amendment privilege. The state introduced his statement to police under the hearsay exception for statement against penal interest. The U.S. Supreme Court concluded that although the non-testifying brother's statement was against his penal interest, it was insufficient to overcome Confrontation Clause mandates because of the inherent unreliability of accomplice confessions which implicate codefendants, notwithstanding their

self incriminating nature. We have an almost identical situation in the defendant's case down to the fact that it pits brother against brother.

Finally, admitting the statements of Pardee and Nicholes was not harmless error. The state's case against Ronnie Kimble, with the exception of the hearsay statements of Pardee, Nicholes and Mitch Whidden, consisted almost entirely of building a circumstantial case against Ted Kimble for the murder of his wife for insurance money and freedom from marriage and then arguing that he must have recruited his brother as his "trigger man" because they were so close. The evidence portion of the trial began at approximately 9:30 a.m. on Monday August 14, 1998 and it was not until after four full days of testimony that Ronnie Kimble's name was even mentioned by a substantive witness, and that only to say that he and Ted had an animated conversation, the substance of which was not even heard by the witness, more than a month after Patricia's death. (T pp 815-16).

To be sure the linchpin of the state's case was the testimony of Mitch Whidden. However, just as surely, there were a number of internal inconsistencies in his story which were readily apparent to the jury. First, there was the problem of why the defendant would "confess" to Whidden in the first place. By his own admission Whidden and the defendant were at best buddies who saw each other about once a week in the course of their jobs with the chaplain's office at Camp Lejeune over the course of several months. Neither had met the other's wife nor had they been to each other's home. Whidden testified that

Ronnie Kimble and his wife had stayed with him and his family when Ronnie had visited Liberty Bible College while contemplating enrolling after his tour of duty was up with the Marine Corps. Whidden told the jury that the defendant had toured the campus and the two families had gone out to eat and shop. When they came back that evening Kimble had confessed to Whidden while they were upstairs and their wives downstairs with the Whidden children. (T. pp 1418-21). Whidden told the jury that the defendant had indicated to him that he killed his sister-in-law out of greed but that now he didn't want the money and wanted to know if Whidden would take it and use it for "God's work." (T p 1420). Whidden advised that he couldn't take the money, that it was "blood money." (T p 1420). The jury was well aware of the fact that no insurance money for Patricia Kimble's death was ever received by Ted Kimble or Ronnie Kimble. Whidden further related that although he was very frightened the defendant might harm him or his family--to the point that he and his family checked into a motel--he went down a few days later to Camp Lejeune to meet and talk with Ronnie Kimble again. He told the jury that he was not able to talk Ronnie into turning himself in, and when he confronted him with his 'confession', Whidden testified that Ronnie claimed that it had only been a dream and not something he had actually done. Whidden said he told Ronnie that he could ask his brother for the money and if he gave it to him he would know it was not a dream. (T p 1427). The jury had to reconcile Whiddens inexplicable failure to confront Ronnie Kimble with what he had testified was the truth: that Ronnie had explicitly told

him he had killed his sister in law and there had been no mention of any dream. In addition, in the eyes of the jury, this approval by Whidden of his explanation at Camp Lejeune that he had just related a dream to Whidden squared with the defendant's testimony to the jury, that he did indeed talk to Whidden about Patricia Kimble's death, but what he talked about was a dream which Whidden had obviously misinterpreted as a factual recounting. The jury was also faced with the difficult task of reconciling Whiddens professed fear of Ronnie as a just-confessed murderer and his ultimate decision to let Ronnie spend the night at his home with his pregnant wife and child just in the next room. The jury ultimately found Ronnie Kimble guilty, and that decision was based at least in part on the testimony of Mitch Whidden, but had the jury not had the benefit of the improperly admitted hearsay accusations of his brother, they would not have been able to conclude beyond a reasonable doubt that the purported confession happened just as Mitch Whidden said it did.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING INTO EVIDENCE HEARSAY STATEMENTS OF THE DECEASED VICTIM IN VIOLATION OF THE DEFENDANT'S RIGHT TO CONFRONT AND CROSS EXAMINE WITNESSES AGAINST HIM GUARANTEED UNDER THE STATE AND FEDERAL CONSTITUTIONS AS WELL AS IN VIOLATION OF NORTH CAROLINA LAW.

Assignment of error number 1. Record p 83.

The defendant filed a motion in limine to block the admissibility of the statements of Patricia Kimble. (R pp 25-27). After hearing arguments on the motion, the trial court deferred ruling on the issue until such time as the evidence was

presented in court. (Mot. T pp 60; 63-64). The state put up the insurance agent who had talked to Ted Kimble about the possibility of taking out life insurance on his wife Patricia. When he attempted to testify concerning what Patricia Kimble had said to him regarding the policy, the defendant objected and was overruled. (T pp 47-48). The agent then testified that Patricia had asked him about why he needed the information he requested for a cancer policy. (T p 48).

Following objection by the defendant and a voir dire the trial court allowed the state to present evidence through Linda Cherry, a close friend of Patricia Kimble's, of what Patricia had told her in a phone conversation about two or three weeks prior to her death. Ms. Cherry testified that Patricia had told her that Ted did not want to spend time with her, that she had seen a "change in him, attitude change, temperament change, being very agitated and very easily testy ... his language started changing, started using words such as profanity ... he was not what he used to be." (T p 676). She testified that Patricia told her that they were fine financially, that they didn't need the money Ted would make from the second job he took. (T p 677). Next the prosecution elicited evidence from another friend of Patricia Kimble's, Cara Dudley, following objection and voir dire by the defendant. (T pp 679-84). She told the jury of another phone conversation about two weeks prior to Patricia's death in which she told her that in case "anything strange ever happened to her" that Ted had taken out a large insurance policy on her. (T p 685). In addition, she said that Patricia had said that they

didn't need any more insurance, that Ted had forged her name, that she had never signed anything, that he must have paid cash for the policy and that Ted had gotten a second job to buy a motorcycle to go cruising on High Point Road--that married men didn't do that sort of thing. (T pp 685-86). To be sure, the prosecutor in both instances did a superb job of tying these factual statements into the emotional state of Patricia Kimble--that she was either concerned or upset while she was talking. However, as the discussion below makes clear, the rule and caselaw require that the hearsay statements themselves describe some existing mental or emotional condition.

Next, following the same sequence of objection and voir dire, the prosecution was allowed to present the testimony of Rose Lyles who told the jury that Patricia had called her upset and crying and said that "'Ted is not the man I married;'" that '"[a]ll he care[d] about was money;'" and that he had bought a car they didn't need with $5,000 worth of extras on it. (T p 172). She further stated that Patricia had "'found a life insurance policy'" which Ted had forged her name to it; that Ted slept with a gun under his pillow and said "she didn't know ... if she would wake up in the morning or not when she went to bed at night." (T p 712). Gary Lyles testified over objection following his wife that at the end of the phone conversation Patricia had had with his wife she told him many of the same things: that he had taken out the insurance policy without discussing it with her, that he wanted to buy a motorcycle and cruise High Point Road like he was single; that he put $5,000

worth of extras on their new car they didn't need and that he slept with a gun under the bed. (T pp 716-18). Once again the witness testified that Patricia Kimble was upset when he talked to her.

All of these hearsay statements were admitted by the trial court under N.C. Rule of Evid. 803(3), Then Existing Mental, Emotional or Physical Condition. While the rule itself is not a model of clarity--"... but not including a statement of memory or belief to prove the fact remembered or believed," (N.C. Rule of Evid. 803(3)) the Supreme Court has defined the rule simply and cogently in *State v. Hardy,* 339 N.C. 207, 451 S.E.2d 600 (1994). Statement's of the declarant's state of mind are admissible, *e.g.* "I'm frightened," or "I am angry." Statements of fact, even those which might explain why the declarant was frightened or angry are not admissible. *Id.* at 339 N.C. 229. *Hardy* is directly on point with our case: there the state sought to introduce portions of the victim's diary which the state argued showed she was frightened of the defendant. The diary entries described two prior attacks on the victim as well as threats against her by the defendant. *Id.* In ruling that the trial court had erred in admitting the diary, the supreme court focused on the fact that although the diary contained many statements describing events and factual occurrences, "Karen's diary, however, contains no statements like these ['I'm frightened' or 'I'm angry' or 'scared'] which assert her state of mind." *Id.* In our case the trial court seems to have confused the factual issues testified as explanations for why Patricia Kimble was

"concerned" or "upset." Clearly under the rule, Patricia's statement that she was upset or even concerned is admissible. Just as clearly her recitation of factual events or circumstances is not admissible. Such statements that Ted wanted to buy a motorcycle to cruise up and down High Point Road like a single man, that they were in excellent financial shape and he didn't need to take on a second job, that he slept with a gun under his pillow, that he was not the man she married, that his whole temperament had changed including using foul language, and that he was irritable and subject radical mood changes are simply not statements of Patricia's state of mind. They are for the most part factual conclusions on her part and are exactly what the rule was designed to bar.

Nor is the admissibility of such statements harmless error. First, it should be noted that the trial court was made well aware of the danger of such statements even before trial by virtue of the defendant's motion in limine. Secondly, for almost all the witnesses, a voir dire was held and argument and caselaw presented by the defendant to bar the admissibility of these non-state of mind statements. It is not as if the trial judge, in the hurly-burly of trial, was suddenly presented with a difficult hearsay problem and required to rule on it in 30 seconds with the jury still in the courtroom. Here, the issue was presented and briefed as well as could be anticipated prior to trial. The defendant further requested a voir dire hearing during trial so there would be no question as to the disputed testimony. These are very damaging statements and all the more damaging to Ronnie

Kimble because he has no way to rebut them. Ted Kimble was called to the stand outside the presence of the jury and asserted his Fifth Amendment right not testify. (T pp 851-53). The traditional underpinning of the inadmissibility of hearsay statements is, of course, the lack of an opportunity to cross examine the declarant. In this situation not only can Ronnie Kimble not cross examine Patricia Kimble, he is unable to rebut the statements because they concern Ted Kimble who invoked his right not testify. Nor are the statements less damaging to Ronnie Kimble because they involve only his brother and not him. Under the particular facts of this case, the prosecution's theory of the case readily conceded that Ronnie Kimble had no direct motive to murder Patricia Kimble and that was why it spent almost a full week of testimony establishing Ted Kimble's motive. Without that presentation of Ted Kimble's actions and motives, the prosecution had no provable case against Ronnie Kimble. Yet Ronnie Kimble was hamstrung in not being able to rebut in any way, through cross-examination of Patricia or presentation of direct evidence from his brother, this cornerstone of the state's case. These hearsay conclusions from the victim regarding her husband's action served proved the first half of the simple conviction equation: motive plus opportunity equals guilt. Due to the court's erroneous ruling, the defendant's guilt was sealed on at least the first half of the equation without his being able to contest it in any way. Such error can never be harmless.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S RIGHT TO FULL AND EFFECTIVE CROSS EXAMINATION AND CONFRONTATION UNDER THE STATE AND FEDERAL CONSTITUTIONS AND THE

RULES OF EVIDENCE BY NOT ALLOWING THE DEFENDANT TO POSE A SERIES OF QUESTIONS ON CROSS EXAMINATION TO THE PROSECUTION'S LEAD DETECTIVE.

Assignment of error number 8. Record p 84.

The defendant attempted to dispel some damaging assertions presented by the state during the course of the trial by trying to pin down the state's lead detective, Jim Church, with pointed questions during cross examination. First counsel established that Detective Church was thoroughly familiar with a statement the defendant had given to Agent Gregory Munroe on October 30, 1995. This was important because Detective Church had used that earlier statement as a basis to question Ronnie Kimble again on July 26, 1996. (T pp 1317-22). Counsel asked Detective Church: "There was nothing misleading whatsoever about what Ronnie Kimble told Agent Munroe, was there?" (T p 1326). Although Rule 611 is not mandatory regarding leading questions: "Ordinarily leading questions should be permitted on cross-examination," it is inconceivable for a court to deny a defendant that right in a capital murder trial. Next counsel attempted to ask the same detective a series of related questions which brought objections that were sustained: "So you knew, when you said to Ted Kimble that 'at this point in the investigation, Ronnie was the last known person at his and his wife's residence before she was murdered,' you knew that had nothing to do with her death, didn't you?" (T p 1334) and "And you knew that Ronnie Kimble had been present atLyles during the time that Patricia was still alive in her office with Nancy Young, didn't you?" (T p 1335) and this final series:

Q But you knew that she had been alive after he left?

MR. PANOSH: Object.

THE COURT: Sustained.

Q You don't contend even now in this trial that when he returned that box truck to her residence, that he killed her, do you?

MR. PANOSH: Object.

THE COURT: Sustained.

Q You don't contend that, do you, sir?

MR. PANOSH: Object.

THE COURT: Sustained.

(T p 1336).

In North Carolina it is assumed that the cross-examining party has the right to ask leading questions absent some showing of friendliness on the part of the witness towards that party. *State v. Mitchell,* 317 N.C. 661 (1986); *State v Hosey,* 318 N.C. 330 (1986); N.C. Rule of Evidence 611. Our courts and the federal courts have interpreted this to confer a right to a criminal defendant. *Id.*; Brandis, Brandis and Broun on North Carolina Evidence, 4th Ed. Section 169. These questions were critical to Ronnie Kimble's defense because his principle defense was that of simple denial and alibi. What better way to establish that defense than out of the mouths of those who sought to convict the defendant. What the defendant was not allowed to establish through the chief investigator for the state was that at a time when he could show an irrefutable alibi the victim was

still alive. Had the defendant been allowed to establish through the testimony of Detective Church that Patricia Kimble was still alive when he brought the box truck back and even after that time when he was conclusively at Lyles, he would not have had to counter vague suspicions on the part of the jury that he may have killed her at a much earlier time. While it is true the answers Detective Church would have given had the questions been allowed are not before this court, we would ask this court to assume since the prosecutor objected that Detective Church would have answered as the questions led. That is obviously why he objected.

These errors were not harmless--certainly not when coupled with other errors of the trial court--or even on their own. Alibi was the defendant's only defense and he was effectively barred from presenting a major portion of that to go with his own testimony: namely, that he had given no misleading evidence to police the first time he was interviewed and that even the police were not implying that he killed the victim earlier in the day--either when he took the box truck back or after that time when he was at Lyles.

IV. THE TRIAL COURT ERRED IN SUSTAINING PROSECUTION OBJECTIONS TO LEADING QUESTIONS OF THE DEFENDANT CONCERNING WHETHER HE AND HIS CODEFENDANT BROTHER DID VARIOUS CONSPIRATORIAL ACTS TOGETHER IN VIOLATION OF THE DEFENDANT'S RIGHT TO PRESENT A FULL AND EFFECTIVE DENIAL OF THE CHARGES AGAINST HIM.

Assignment of error number 11. Record p 85.

Compounding the error in allowing the factual hearsay testimony of Patricia Kimble, the defendant was further stymied in his attempt to rebut such allegations because the trial court

sustained the prosecutor's objections to his own denial of his brother's actions. On direct examination of the defendant, counsel attempted to ask him if Ted told him his marriage was too confining and that he wanted to get a motorcycle and cruise High Point Road (T p 2053); if he ever mentioned an interest in plastique or explosives; (T p 2054); if he ever mentioned how to rig an explosive in a traffic pylon (T p 2055); and "Did your brother, Ted, ever tell you that he would pay you money if you would assist him in eliminating her?" (T p 2056). All of the objections were sustained on the basis of improper leading of the witness. It is important to note that all of these questions were based directly on evidence presented by the prosecution earlier in the trial. First, the questions are not leading. They are specific because they have to be in order to rebut the specific earlier charge brought out by the prosecution. The questions themselves do not suggest an answer beyond the specificity or the fact that they are meant to be answered 'yes' or 'no.' *State v. Kim,* 318 N.C. 614, 617-618, 350 S.E.2d 347 (1986) (specific question of 'did he get his penis inside you?' not leading when put to prosecutrix in rape case because of context). Here since the prosecution had already been allowed to get into evidence the hearsay statements of Patricia regarding Ted Kimble wanting to get a motorcycle and out of his marriage so he could cruise High Point Road, there is no other way to ask the question. The defendant could not put Ted Kimble on the stand because he had asserted his right not to testify and he certainly could not cross-examine Patricia. It would be the height of

hypocrisy to interpret our system of justice to foreclose the defendant the right through manipulation of the rules of evidence the right to deny that his brother had done or discussed these matters with him.

This was nothing more than calculated gamesmanship on the part of the prosecutor to discredit the defendant and his counsel in the eyes of the jury through hypertechnical manipulation of the Rules of Evidence. Particularly vexing, is that despite the testimony of Pardee and Nicholes that Ted had shown a keen interest in plastique and other explosives including how to rig an explosive in a traffic cone, the defendant was not even allowed to tell the jury that Ted, whom he was alleged to have conspired with, had never mentioned that sort of thing to him.2 Before this court concludes this to be harmless error, it should consider two points. First, this is compound error with respect to the question about the cruising High Point Road on a motorcycle--the defendant had already objected to this evidence. Secondly, if the court allows this on whatever theory, the defendant will not have been able deny to the jury the fundamental charge against him--that his brother offered him money to kill his wife. That is error and was not harmless.

V. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO QUESTION THE DEFENDANT ON CIRCUMSTANCES WHICH WERE BOTH IRRELEVANT AND COLLATERAL, INCLUDING PICTURES OF A FEMALE JAILOR THE DEFENDANT WAS ALLEGED TO HAVE HAD AN AFFAIR WITH AND

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2. The defendant concedes that he answered all of these questions before the objections were sustained, but under the law it is presumed that the jury followed the judge's admoninition and disregarded the question and answer once sustained.

QUESTIONING HIM ABOUT POSSIBLE INSURANCE FRAUD INVOLVING BOTH HIS BROTHER AND PARENTS.

Assignments of error numbers 12 and 13. Record p 85.

During cross-examination of the defendant the trial court allowed the prosecutor to question the defendant concerning several pictures of a female jailor found in his cell which the defendant was alleged to have had an affair with. (T p 2236). The defendant's wife had previously testified that she had filed for divorce. (T p 1740). In answer to the prosecutor's questions, the defendant told the jury he had a loving relationship with his wife and did not hide anything from her. (T p 2224). But that response has to be consider in the context of the earlier testimony from the defendant's wife that she had filed for divorce. Following a voir dire outside the presence of the jury, the trial court ruled the prosecutor could show the three pictures of Janet Smith and force him to identify them. The jury was brought back in and the defendant was asked again if he had a loving relationship with his wife and kept no sectrets from her. (T p 2237). He was then shown the pictures of Janet Smith, asked to identify them as to who they were and that they were in his possession while in jail. (T p 2238). Extending this line of questioning on issues which simply cast aspersions on the defendant's character and family, the prosecutor asked him if his parents had told him they were claiming to live in his and his wife's trailer as part of some insurance scam involving them and his brother Ted. Despite objection, the defendant was forced to answer that his parents had not told him. (T pp 2267-68).

The questions at the core are nothing short of inadmissible character impeachment not allowed under Rule 404(a) and not fitting the exceptions under Rule 404(b). The intent of the prosecution is clear: to impugn the character of the defendant in the eyes of the jury in two ways regarding the pictures: by showing that he lied to the jury in telling them he had a loving relationship with his wife and that he kept no secrets from her and secondly, by showing that he was a cad and bounder, a man of such low degree that he would keep pictures of another woman in his jail cell while his wife waited faithfully for him. The import is clear, it need never be spoken to the jury: such a man is far more likely to agree to kill his sister-in-law for insurance money than an upright man. The second line of questions involving the alleged insurance fraud with his brother and parents, while arguably less inflammatory is the same type of character assignation. The identification of the pictures and the questions about his parents staying in his trailer are presented for the sole reason of maligning the defendant's character. The cases are legion expressing the concept that Rule 404(b) is a rule of inclusion, but here there is no legitimate rationale for the production of the pictures. Their sole purpose is clear and unfortunately, very effective in the eyes of the jury: character assination of him by maligning his family. These issues are not relevant and certainly fail Rule 403's balancing test.

The pictures and the identification also violate the rule against extrinsic evidence to prove a collateral matter. The

Rule in North Carolina has long been and continues to be in virtually every jurisdiction in the Anglo-American judiciary, that on collateral matters the questioner is bound by the witness's answer. *See e.g.* McCormick, Third Ed. Section 47; *State v. Green,* 296 N.C. 183, 250 S.E.2d 197 (1978); *State v. Long,* 280 N.C. 633, 187 S.E.2d 47 (1972). The test is simply to determine whether the "contradiction" evidence would be admissible for some other purpose independent of the contradiction. The answer flows back to the discussion above, and it is clear that these pictures would not be admissible. In simplest terms: would the prosecution have been allowed, independent of everything else, to present that the defendant was an unfaithful husband. The answer is clearly no.

The only real issue is: were these errors harmless. This case rested on the credibility of the defendant. Anything that diminished that credibility was devastating to his case. The prosecutor was intent on showing up the defendant any way he could. First he implies the defendant is an unfaithful cad and then he makes sure the jury knows that this bad character is consistent with the defendant's heritage: his parents and brother are all involved in a fraudulent scheme to get money from the insurance company. To declare such a dual pronged character attack harmless, is to revert to trial by ordeal.

CONCLUSION

For the reasons stated above the defendant would ask this Court to grant him a new trial or such relief as this Court deems just and proper.

This the 26 day of October, 1997.

RESPECTFULLY SUBMITTED,

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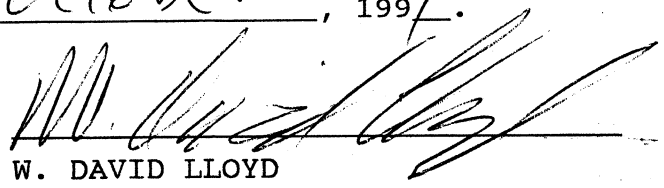
CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that the original of the above and foregoing Defendant-Appellant's Brief has been duly filed by placing the same in an envelope addressed to John H. Connell, Clerk of the Court of Appeals, P.O. Box 2779, Raleigh, North Carolina, 27602-2779, first-class postage prepaid, and depositing the same in an official depository under the exclusive care and custody of the United States Postal Service, in accordance with Rule 26(a) of the North Carolina Rules of Appellate Procedure.

FURTHER I HEREBY CERTIFY that a copy of the above and foregoing Defendant-Appellant's Brief and appeal information statement have been duly served on the following persons by United States Mail, first-class postage prepaid:

ATTORNEY GENERAL MIKE EASLEY
N.C. DEPARTMENT OF JUSTICE
POST OFFICE BOX 629
RALEIGH, NORTH CAROLINA 27602

THIS the 26 day of October, 1997.



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