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We have had many occasions in recent times to consider whether a victim's out-of-court statements are admissible to show the victim's state of mind, and we are once again faced with this issue. We now
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recede from some prior holdings and take this opportunity to clarify this area of law.

The State argues the diary entry was admissible since "defendant's violent conduct and threat toward his wife as shown by the exhibit were directly relevant to premeditation and deliberation and intent . . ." and since "the State may introduce evidence of violent conduct and threats by a husband against his wife in a trial of him for murdering her." The State also argues that the diary entry was admissible to show inferentially Karen's state of mind and her relationship with defendant. We deal with these arguments in turn.

In response to the State's argument that the diary entry is admissible to show defendant's violent conduct and his threat toward Karen, defendant argues that the State is attempting to prove the "truth of the matter asserted" in the diary entry and thus the diary entry is being used for a hearsay purpose.[fn4] See N.C. R. Evid. 801. Thus, the diary entry is inadmissible unless it is subject to a hearsay exception. N.C. R. Evid. 802.

The State in response refers to N.C. R. Evid. 803(3), which excepts from the hearsay rule:

> A statement of the declarant's then existing state of mind, 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 unless it relates to the execution, revocation, identification, or terms of declarant's will.

The State argues that the statements in the diary are "statement[s] of [Karen's] then existing state of mind" and that they are therefore not excluded by the hearsay rule. We cannot agree.

The statements in the diary are not statements of Karen's state of mind but are merely a recitation of facts which describe various events. This Court faced a similar issue in State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), judgment vacated, 494 U.S. 1023, 108 L.Ed.2d 604 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 108
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L.Ed.2d 369 (1990). In Artis the trial court prevented defendant from introducing evidence showing the victim said she was going to be killed

if "the people" ever caught up with her. Id. at 303, 384 S.E.2d at 484. Defendant argued on appeal that this hearsay evidence was admissible as a statement of the victim's state of mind. We disagreed, however, finding the statements to be merely a "'statement of . . . belief to prove the fact . . . believed.'" Id. at 304, 384 S.E.2d at 484 (quoting Rule 803(3)). Statements of a declarant's state of mind, are, for example, "I'm frightened," or, "I'm angry." See State v. Locklear, 320 N.C. 754, 759-60, 360 S.E.2d 682, 685 (1987) (rape victim's statement that she was "scared" of defendant is statement of state of mind and thus excepted from hearsay rule). Karen's diary, however, contains no statements like these which assert her state of mind.

Our conclusion is bolstered by the policy behind the state-of-mind hearsay exception, which is that "there is a fair necessity, for lack of other better evidence, for resorting to a person's own contemporary statements of his mental or physical condition" and that such statements are more trustworthy than the declarant's in-court testimony. 6 John H. Wigmore, Evidence § 1714 (James H. Chadbourn rev. 1976). Mere statements of fact, however, are provable by other means and they are not inherently trustworthy. The case before us makes this point quite clearly. The facts in Karen's diary, which portray attacks upon her and a threat against her, were admissible through the testimony of other persons who witnessed these events. Also, the facts lack the trustworthiness of statements such as "I'm frightened" and amount to precisely the type of evidence the hearsay rule is designed to exclude.

We are further persuaded that these statements are not admissible under the state-of-mind hearsay exception on the ground the diary entry is at best speculative as to Karen's state of mind. The State seems to assert that the diary shows that Karen feared defendant, but the diary entry is conflicting on that point. While the diary entry describes two attacks by defendant upon Karen, and we could infer generally that one who is attacked will fear her attacker, there are also indications in the diary entry that Karen was not intimidated by defendant. The diary states that Karen asked defendant to wash the dishes at which time he became "mad." Karen then said to defendant, "Act immature, why don't you? Why don't you try acting like an adult male." These are not words we would ascribe to a woman fearful of a physical attack by her husband.

The entire entry in fact expresses no emotion and seems to have been written in a calm and detached manner. This further tends to

refute any inference that Karen's state of mind was one of fear. In a footnote the State says, "Her [Karen's] initiation of some legal proceeding helps reveal her mental condition and helps illuminate her relationship with defendant." The State fails, however, to clarify what that mental condition was or the nature of the relationship. To the extent the State is arguing

hat filing a "harassment charge" is an indication of fear, we ust recognize that most battered wives do not report acts of iolence out of fear of retaliation.[fn5] That Karen filed a arassment charge, therefore, may be some indication that Karen id not fear defendant. Thus, it is not at all clear what state f mind is supposedly demonstrated by the diary entry. See State . Walker, 332 N.C. 520, 542, 422 S.E.2d 716, 729 (1992), cert. enied, ___ U.S. ___, 124 L.Ed.2d 271 (1993) (Webb, J., issenting, joined by Exum, C.J., and Frye, J.) (victim's tatements that defendant attacked her were inconclusive as to ictim's state of mind).

Thus, we conclude the diary entry was not admissible nder the state-of-mind hearsay exception.

5] As stated earlier, the State also argues that the statements in the diary are admissible as tending to show a bad relationship between Karen and defendant. The State's argument seems to be that the diary entries were not offered to prove the truth of the statements themselves; rather they were offered to show merely that the victim made them. Simply by showing that the victim made such statements, the State argues, is indicative of a bad relationship between her and defendant. Under this argument the diary entry is not offered to "prove the truth of the matter asserted" and thus we are not presented with a hearsay problem. See N.C. R. Evid. 801(c); see also State v. Holder, 331 N.C. 462, 484, 418 S.E.2d 197, 209 (1992) (victim's statements that defendant had a gun and that defendant threatened her not hearsay when used to show merely that statements were made and when statements were coupled with a statement that the victim was "scared").

Even if evidence that such statements were made by Karen is relevant on the issue of her relationship with defendant to show that this relationship was bad, its admissibility is still subject to Rule 403 which requires its exclusion if its probative value is substantially

outweighed by the danger of unfair prejudice. State v. Cummings, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990). We find in this case that the statements in the diary as they bear on Karen's relationship with defendant should have been excluded since any probative value they may have had was substantially outweighed by the danger of unfair prejudice.

To the extent that the diary statements are indicative of a bad relationship between the victim and the defendant, their probative value is substantially outweighed by the danger that the jury will make improper use of the statements. It would not be permissible for the jury to consider the statements as proof of the facts they declare; the jury would be restricted to considering simply the fact that the statements were made.

The evidence in this case showed that defendant assaulted his wife at the restaurant and caused her death.

Defendant returned to Martin Spencer's home on the morning of 4 March 1992 with blood on his pants, and he admitted to Spencer that he killed his wife at the restaurant by cutting her jugular vein with a knife. Police found bloody money bags in defendant's station wagon and defendant later made a full confession to police in which he detailed how he met his wife at the restaurant that morning and killed her with a knife. There was no evidence, nor any contention, that defendant killed his wife in self-defense or that his wife committed suicide. Based on this presentation of evidence, the only real issue for the jury was the degree of homicide of which defendant was guilty.

Thus, the central issue in the case was defendant's state of mind at the time of the murder. The issue before us is the extent to which Karen's relationship with defendant was relevant on any issue in the case. The State asserts, without further elaboration, that this relationship, to the extent that it was bad, was "helpful in proving issues like defendant's ill will." After examining the arguments of the parties and considering the other evidence in the case, we conclude Karen's relationship with defendant bears so tangentially on the issue of defendant's state of mind that it cannot justify admission of the diary entry.

First, the diary entry does not clearly reflect a certain type of relationship between Karen and defendant. To the extent the State relies upon the assaults and threat contained in the diary to establish the relationship between Karen and defendant, it is using the diary entry

for the truth of the matter asserted, which we have already found to be an impermissible hearsay use of the diary.

To whatever minimal extent Karen's relationship with defendant is probative of defendant's state of mind, it is substantially outweighed by the danger that the jury would misuse the diary entry, which sets forth two assaults by defendant upon Karen and a threat to take her life, as proof that defendant actually committed these acts. As stated by Justice Cardozo:

> It will not do to say that the jury might accept the [victim's] declarations for any light they cast upon [her state of mind], and reject them to the extent that they [incriminate the defendant with hearsay.] Discrimination so subtle is a feat beyond the compass of ordinary minds. . . . It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, and practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage,

the evidence goes out.

Shepard v. United States, 290 U.S. 96, 104, 78 L.Ed. 196, 201-02 (1933).

Having found that admission of the diary entry was error, we must next determine whether that error entitles defendant to a new trial. After reviewing the evidence against defendant, we find that there is no reasonable possibility that the admission of the diary entry affected the jury's verdict that defendant was guilty of first-degree murder. N.C.G.S. § 15A-1443(a) (1988).

The diary entry essentially described two assaults upon Karen Hardy and a threat to take her life. The latter of these assaults and the threat, however, were related to the jury through the testimony of John Davis who arrived at the restaurant on 27 February 1992 at 9:30 to 10:00 p.m., shortly before closing. Davis testified in detail about how he saw defendant "throwing things around such as ashtrays, paper pamphlets, newspaper, kitchen utensils"; he later explained that "[s]ometimes he was [throwing things] at Karen and then sometimes it was anger – you know, it was just slamming stuff." Davis then testified that defendant said, "Karen, I will kill you, bitch." He proceeded to explain that Karen went to her car but that it would not start. Davis then saw defendant banging on the car and attempting

unsuccessfully to enter the driver's side. Defendant then went to the back of the vehicle and managed to enter the vehicle. Davis testified that he "saw him beating on her" and that Karen tried to stop him by covering her head. Defendant then put his hands around Karen's neck, at which time Davis pulled defendant off Karen. Karen then drove off.

Thus, most of the diary entry was repetitive of Davis' testimony. In fact, Davis' testimony went far beyond the entry in the diary in terms of describing the assault upon Karen on the night of 27 February 1992 and the threat defendant made to Karen. The only harmful statement in the diary entry not contained in Davis' testimony was the statement that in the morning, "He hit me in the side of the head and slapped me across the face, then took off." It must also be noted, however, that Chad England testified to an attack upon Karen in January or February at the restaurant. In light of the more severe assault on the evening of 27 February 1992, which involved defendant throwing items at Karen, threatening to kill her, banging on her car in an attempt to enter it, beating her inside the car and eventually choking her, and in light of the weighty evidence against defendant, including his inculpatory statements to Martin Spencer and to the police, we find that there is no reasonable possibility that the admission of the diary entry affected the outcome of the trial. N.C.G.S. § 15A-1443(a); State v. Austin, 320 N.C. 276, 285, 357 S.E.2d 641, 646, cert. denied, 484 U.S. 916, 98 L.Ed.2d 224 (1987) (admission of victim's statements harmless).