NO. COA18-714 **TWENTY-SECOND B DISTRICT**

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Davidson**
	)	
MOLLY MARTENS CORBETT and THOMAS MICHAEL MARTENS	**)**	

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BRIEF FOR THE STATE
(Defendant Thomas Michael Martens)

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ISSUES PRESENTED

I. WHETHER THE SUPERIOR COURT PROPERLY DENIED DEFENDANT'S MOTION FOR APPROPRIATE RELIEF WITHOUT A HEARING.

II. WHETHER THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S ATTEMPTS TO INTRODUCE TWO OUT OF COURT STATEMENTS INTO EVIDENCE.

III. WHETHER THE TRIAL COURT CORRECTLY EXCLUDED DEFENDANT MARTENS' TESTIMONY REGARDING AN ALLEGED STATEMENT BY MICHAEL FITZPATRICK PURSUANT TO RULE 403.

IV. WHETHER THE TRIAL COURT PROPERLY ALLOWED EXPERT TESTIMONY UNDER RULE OF EVIDENCE 702 REGARDING THE BLOODSTAINS ON DEFENDANT'S CLOTHING.

V. WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON SELF-DEFENSE, INCLUDING THE AGGRESSOR DOCTRINE.

VI. WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT MARTENS' MOTION TO DISMISS.

VII. WHETHER THE TRIAL COURT PROPERLY EXCLUDED THE STATEMENTS OF JASON'S CHILDREN, JACK AND SARAH, AS THE STATEMENTS WERE INADMISSIBLE HEARSAY.

VIII. WHETHER DEFENDANT'S CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT.

STATEMENT OF THE CASE

On 18 December 2015, the Davidson County Grand Jury indicted Defendants Thomas Michael Martens ("Defendant" or "Martens") and his daughter, Molly Martens Corbett ("Defendant Corbett" or "Corbett"), for murder and voluntary manslaughter. (R pp. 2-5)[1] Defendants were tried

[1] References to trial transcript are abbreviated as "T p. ___" and the Record on Appeal as "R p.___."

jointly at the 17 July 2017 Criminal Session of the Davidson County Criminal Superior Court, the Honorable W. David Lee, Judge presiding. (T p. 1)

On 9 August 2017, the jury found both Defendants guilty of second-degree murder. (R pp. 531-32) The trial court sentenced each Defendant to a term of 240 to 300 months imprisonment. (R pp. 533-36) Defendants gave notice of appeal in court. (T p. 3148, R p. 537)

Defendants filed a Motion for Appropriate Relief ("MAR") on 16 August 2017 and a supplemental MAR on 25 August 2017, in Davidson County Superior Court. (R p. 542) In an order filed 4 December 2017, the superior court denied the Defendants' MAR. (R p. 647) Defendants gave notice of appeal relating to the MAR order on 6 December 2017. (R p. 649)

STATEMENT OF THE FACTS

Shortly after 3:00 a.m. on 2 August 2015, Emergency Medical Services ("EMS") personnel responded to 160 Panther Creek Court in Davidson County. There, they found the naked body of the victim, Jason Paul Corbett ("Jason"), lying on the floor in the first-floor master bedroom. Leaning against a dresser was a small, "28 inch, 17 ounce Louisville Slugger" baseball bat. There was also a brick or cement paver stone on the floor near a lamp, which had been knocked over. There was "blood all over the floor and the walls." (T pp. 1879-80, 1914-19, 1954-62, 2012, 2065-66, 2097-99, 2148-52)

Sergeant Barry Alphin of Davidson County EMS testified that when attempting to intubate the victim, all his fingers on his left hand "went inside [the victim's] skull," and his right hand was "just mushy." He then realized that "there was severe heavy trauma to the back of the head." (T p. 1927) Sgt. Alphin testified that in the victim's eye socket there was gelled blood and that some of the blood on the victim had dried. (T p. 1929) Responding paramedic David Bent likewise testified that Jason had "dry blood on him." (T pp. 1954-55)

Also, Mr. Bent saw Defendant Corbett "doing an attempt to perform chest compressions" and that the compressions "were not effective." (T p. 1958) When asked if he observed any injury to Defendant Corbett at the scene, Mr. Bent testified that she had a "light redness" on the left side of her neck. (T p. 1968) There we no other injuries to Defendant Corbett, and she signed a refusal form to indicate she did not want to go to the hospital for treatment. (T p. 1990)

Paramedic Amanda Hackwork testified that when she touched Jason's body, "his torso felt cool." (T pp. 2001-02) Ms. Hackworth then turned to Sgt. Alphin and asked, "How long did you say they waited before they called 911[?]" Sgt. Alphin replied that "[t]hey said they called as soon as he went down." (T p. 2010) Ms. Hackwork also observed dried blood on Jason's body. (T p. 2012)

There was a pool of blood around the victim's left eye socket, blood on the victim's chest area, puddles of blood on the floor that were already congealing and an area of blood on the wall. After the victim was removed from the room, Davidson County Sheriff's Office Corporal Clayton Stewart Daggenhart observed blood that appeared to be dried or drying on the wall. There was more blood that was going into the master bathroom. (T pp. 1877-80)

Corporal Daggenhart testified that he was able to observe Defendants after he finished assessing the master bedroom. They were still standing "right outside" the bedroom door. According to Corporal Daggenhart, there was "[n]othing remarkable" about Defendant Corbett, "other than she had blood on the top of her head." When asked what he saw regarding Defendant Martens, he answered, "Nothing really as well." (T pp. 1882-83) Law enforcement located the victim's two young children, Sarah and Jack, asleep, undisturbed, and unaffected, in bedrooms upstairs. (T pp. 1884-87)

Davidson County Sheriff's Deputy David Dillard testified that he escorted Defendant Corbett from the front steps of the residence to his patrol car. (T p. 2025) Deputy Dillard did not observe any injury on Defendant Corbett, although he did see some dried blood on her forehead and face. (T p. 2026) Dillard stayed with Corbett for over an hour and described Defendant's behavior during this time:

> She was making crying noises but I didn't see any visible tears. She was also rubbing her neck (demonstrating). I would say in a scrubbing motion-type thing. It wasn't a constant. She would do it and stop and do it and then stop while continuing to make the crying noises. That was about everything she had done.

(T p. 2027)

Associate Chief Medical Examiner Craig Nelson, M.D., performed the autopsy on Jason's body. (T p. 1784) Dr. Nelson testified that the cause of Jason's death was blunt force head trauma and the manner of his death was homicide. Summarizing his external examination of Jason's body, Dr. Nelson testified,

> The autopsy documented multiple blunt force injuries. These included ten different areas of impact on the head, at least two of which had features suggesting repeated blows indicating a minimum of 12 different blows to the head.

(T p. 1784) According to Dr. Nelson, the "degree of skull fractures in this case are the types of injuries that we may see in falls from great heights or in car crashes under other circumstances." (T p. 1810)

There were two large complex lacerations on the back of Jason's head, with each showing evidence of repeated blows. In describing those two impact sites to the jury, Dr. Nelson testified that while there was more than one impact to each, he could not say "exactly how many impacts there were because

with repeated blows there may be additional injury or further crushing of already injured tissue." (T pp. 1794, 1796)

There was an "almost triangular area" where a portion of Jason's skull was missing. (T p. 1800) Of the ten different impact event sites on Jason's head, Dr. Nelson opined he would expect a "loss of consciousness based on the underlying skull fractures" in the two complex areas. Regarding the eight other impact sites, Dr. Nelson testified that it was "possible" they could be consistent with loss of consciousness. (T pp. 1804-05) Dr. Nelson determined that one of the blows to Jason's head occurred after he was dead. (T p. 1799)

The toxicology report showed an alcohol level of "point 02 percent," as well as the presence of the drug "trazodone." (T pp. 1808-09)

Expert pharmacologist Dr. Russell Patterson testified that trazodone is an anti-depressant; however, it is "not very successful in that realm." According to Dr. Patterson, because trazodone has "one significant side effect," which "is to induce sleep," physicians started using it "therapeutically" or "off label" for sleep. (T pp. 1854-55) In fact, Dr. Patterson testified, it is currently "extremely rare" for trazodone to be prescribed as an anti-depressant. (T pp. 1854-56)

Both Defendant Corbett and Jason were patients at Kernersville Primary Care ("KPC"). KPC nurse practitioner Katie Wingate testified that

Defendant Corbett requested a sleep aid and was prescribed trazodone on 30 July 2015. KPC records showed that Jason had never been prescribed anything for sleep and, more specifically, had not been prescribed trazodone. (T pp. 1709-24) Defendant Corbett filled her prescription for trazodone on the same day it was prescribed. (T p. 1739)

Jason was a native of the Republic of Ireland, where he originally lived there with his first wife, Margaret, and their two children, Jack and Sarah. Margaret died of an asthma attack in 2003. Jason employed Defendant Corbett while still in Ireland as an au pair after Margaret's death. After several weeks, Jason and Defendant Corbett established a romantic relationship. In 2011, Jason, Defendant Corbett, and Jason's two children moved to 160 Panther Creek Court because of Jason's work. Jason and Defendant Corbett got married that same year. (T pp. 2600-04)

Defendant Martens is Defendant Corbett's father. He was an attorney and a retired FBI Agent. He testified that he did not like Jason. (T pp. 2670-71, 2673, 2731)

David Fritzsche and his family lived next door to the Corbetts. Fritzsche testified that the two families socialized together during the afternoon of 1 August 2015, until Defendant Martens and his wife arrived around 8:30 p.m. to visit. According to Fritzsche, from 3:30 p.m. to 8:30 p.m., Jason's demeanor

was "typical" and "was very calm," and there was no change in Jason's demeanor after Defendant Martens and his wife arrived. In fact, Jason helped unload his in-law's car. (T pp. 2031-45)

The next morning at around 3:30 a.m., Fritzsche saw police and first-responders at Jason's house. At 5:30 a.m., Defendant Corbett came to Fritzsche's house to use the bathroom twice. Fritzsche testified that Defendant Corbett was upset, but had no visible injuries on her body, and no blood on her hands or face. (T pp. 2046-49)

Davidson County Sheriff's Office Lieutenant Frank A. Young took a photograph of Defendant Corbett at the scene to document "any possible injuries she had received." As Lt. Young was preparing to take Defendant Corbett's photograph, Defendant Corbett "continually tugged and pulled on her neck with her hand." After Lt. Young made several requests for her to stop, she complied. Lt. Young did not notice any injuries on Defendant Corbett. However, he did observe blood on her cheek, forehead, and hair. (T pp. 2065-66, 2097)

Lt. Young also took photographs of both Defendants at the Sheriff's Office. Lt. Young testified that the pictures of Defendant Corbett showed no visible injuries to her, on her neck or on either of her hands. (T pp. 2117-18) Lt. Young testified that the pictures of Defendant Martens showed suspected

blood on the front of his shirt, but there were no apparent injuries to Defendant Martens' face, hands, or the rest of his body. The photographs also revealed no damage to Defendant Martens' glasses or shirt. (T pp. 2120-23) The photographs did show suspected blood on the face of Defendant Martens' watch and also "red stain, red dots, stains around a couple of his fingernails." (T p. 2121)

Lt. Young videotaped and took photographs of the crime scene. Included in those photographs was one of the cement paver stone, which showed hair located on it "scattered throughout the black dark markings." (T p. 2098) In addition, Lt. Young took DNA swabs from each Defendant and swabbed the baseball bat for DNA. (T pp. 2149, 2168)

Forensic hair analysis revealed that the one of two fragments of the hair-like material removed from the baseball bat was microscopically consistent with the pulled hair from Jason's head. The other fragment had both some similarities and slight differences with Jason's hair, but was found to be microscopically different from the submitted head hair of Defendants. (T p. 2257) Examination of the cement paver revealed the presence of twenty-five hairs, twelve of which were found to be microscopically consistent with the hair from the victim. (T pp. 2258-60)

One of Jason's co-workers, Melony Crook, testified that on 4 August 2015 she was at work when she saw Defendant Corbett come to the facility to collect personal belongings from Jason's office. Ms. Crook could see Defendant Corbett's arms, legs, chest, and neck area, and she saw no injuries on Defendant; "[n]o scrapes or scratches or bruises or swelling or anything." (T p. 2628)

One of Defendant Martens' co-workers, Joann Lowry, testified that during a conversation with her in 2015, Martens said, referring to Jason, "that son-in-law, I hate him." (T pp. 2363-64)

Stuart H. James was offered and accepted by the court as an expert in the field of bloodstain pattern analysis. (T p. 2418) Mr. James testified that he prepared a written report on his findings and conclusions in this case. (T p. 2432) Mr. James reviewed the photographs and videos taken at the scene, as well as physical evidence collected by law enforcement. (T pp. 2433-36) Based upon his review of that evidence, Mr. James concluded the following:

> * The blood spatters on the boxer shorts Defendant Martens was wearing were "impact spatters." Those spatters were consistent with the wearer of the shorts being in proximity to the victim when blows were struck to his head. Jason's head was the source of the blood. (T pp. 2501-02)
>
> * The small blood spatters on the front underside of the left leg of the shorts were consistent with the wearer of the shorts being close to and above the source of the blood. The

source of the impact spatters was most likely Jason's head while it was close to the floor in the bedroom. (T p. 2502)

* The spatters on Defendant Martens' red polo shirt he was wearing were impact spatters. They were consistent with the wearer being in proximity to the victim when blows were struck to his head. Jason's head was the source of the blood. (T p. 2503)

* The pajama top worn by Defendant Corbett had impact spatters on it. This led to the conclusion that the wearer was in proximity to the victim when blows were struck to his head. (T pp. 2503-04)

* The impact spatters in the lower legs and cuff area of the pajama bottoms Defendant Corbett was wearing are consistent with her being in proximity to Jason when blows were struck to his head and when he was closer to the floor. (T p. 2504)

* The cement paver stone had transfer and spatter stains and hair fragments on it. The stone's condition was consistent with having caused more than one impact to Jason's head. (T p. 2505)

* There were transfer stains and hair fragments on the Louisville Slugger baseball bat. Those stains and fragments confirmed the conclusion that the bat's condition was consistent with having impacted Jason's head. (T p. 2506)

At their joint trial, Defendant Corbett did not testify or put on evidence. Defendant Martens testified and called one character witness.

Defendant Martens testified that on 1 August 2015, he and his wife visited Defendant Corbett, Jason, and Jason's children, Sarah and Jack. (T pp. 2675-76) Defendant Martens brought with him the baseball bat used to strike

Jason, and a tennis racket that was "suitable for a ten-year-old." He claimed the bat was for Jack, but he did not give it to him that evening. (T pp. 2677, 2680)

Defendant Martens testified that Jason was pleasant and social that evening. He and his wife went to bed in the guest bedroom downstairs in the basement, which was under the master bedroom's bathroom. (T p. 2681)

Defendant Martens testified he awakened from a sound sleep and heard thumping, "like loud foot falls on the floor" above him, a scream, and loud voices. Defendant Martens testified that he did not think to call 911. (T p. 2683)

According to Defendant Martens, he got out of bed, grabbed the baseball bat, and went upstairs to Jason and Defendant Corbett's bedroom. (T pp. 2682, 2684) He claimed he saw Jason with his hands around Defendant Corbett's neck. Defendant Martens testified that he closed the door. He then told Jason several times to "let her go," to which Jason responded each time by saying, "I'm going to kill her." (T p. 2684)

Defendant Martens testified that when he entered the room Jason had his hands around Defendant Corbett's neck, but after he entered, Jason "reversed himself so that he had her neck in the crook of his right arm [, and] she was in front of him between me and him." (T pp. 2684-85) Defendant

Martens said he took a step to his right and "hit [Jason] in the head." According to Defendant Martens, striking Jason in the head did not have any effect on Jason, except to "seemingly further enraged him." (T p. 2685)

Defendant Martens testified that in the hallway leading to the bathroom he struck Jason "as many times as [he] could to distract him." Defendant Martens claimed this was because Jason had Defendant Corbett in a "very tight chokehold" and she was "no longer wiggling." Defendant Martens testified that once they were in the bathroom, he "was able to get the little angle on him behind him," and that he hit him two times in the head. Martens again claimed this "didn't seem to have any effect." (T p. 2686)

Defendant Martens testified that Jason then began pushing into the hallway while holding Defendant Corbett in front of him. According to Defendant Martens, when they were back in the bedroom, he swung the bat again, but Jason caught the bat with his left hand and Defendant Corbett was able to go free. At this point, both Defendant Martens and Jason hold the bat, but Jason "cocks his hand," "punches out," and shoves Martens across the entire width of the bed. Defendant Martens testified that he ended up "on the floor with my back to him and face down on the carpet." (T p. 2687)

Defendant Martens testified that when he got up, he saw Jason with the bat and Defendant Corbett by the nightstand. (T p. 2688) Defendant Martens

testified that he decided to "rush" Jason and "try to get ahold of the bat." When he did so, both he and Jason ended up with both hands on the bat. (T p. 2689) Defendant Martens testified he tried to hit Jason with the end of the bat. In doing so, Jason "loses his grip," and Defendant Martens obtains control of the bat. Defendant Martens testified that he did not know how many times he hit Jason, but he kept hitting him "until he goes down." (T p. 2690)

On cross-examination, Defendant Martens admitted that prior to marrying Defendant Corbett, Jason had transferred money to America to purchase the Panther Creek residence, such that there was no mortgage on the property; that Jason likewise transferred money to furnish the residence; and that Jason had transferred to him, Defendant Martens, "$49,073.39 for the marriage" (T pp. 2725-26) While Defendant Martens denied specifically ever saying he hated Jason, he did admit that he had conversations which "were negative in tone or critical of Jason's behavior," and that he "just didn't like him." (T pp. 2728, 2731) Defendant Martens was aware that Jason had a life insurance policy and that his daughter, Defendant Corbett, was the beneficiary. (T p. 2749)

ARGUMENT

I. THE SUPERIOR COURT PROPERLY DENIED DEFENDANT'S MOTION FOR APPROPRIATE RELIEF WITHOUT A HEARING.

A. Standard of Review

Motions for Appropriate Relief are controlled by Article 89 of Chapter 15A of the North Carolina General Statutes. As the moving party, the defendant has the burden of proof; he must prove, by a preponderance of the evidence, every fact essential to support the motion. N.C. Gen. Stat. § 15A-1420(b)(5) (2017). When reviewing rulings on motions for appropriate relief, this Court must determine whether the findings of fact are supported by evidence, whether those findings support the conclusions of law, and whether the conclusions of law support the order entered by the trial court. State v. Frogge, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005).

If the superior court's findings of fact are supported by competent evidence, then those findings are binding on appeal and may be disturbed only upon a showing of manifest abuse of discretion. Conclusions of law are reviewed de novo. State v. Wilkerson, 232 N.C. App. 482, 489, 753 S.E.2d 829, 834 (2014).

B. Argument

Defendant argues that the trial court should have granted the joint MAR based upon claims of juror misconduct and violation of Defendant's confrontation clause rights. But because there was no competent evidence showing any prejudice to Defendants, or violation of the confrontation clause, Defendant's arguments are without merit.

The North Carolina Supreme Court has distinguished between "internal" and "external" influences on jury deliberations. See State v. Robinson, 336 N.C. 78, 124-25, 443 S.E.2d 306, 329-30 (1994) (juror affidavits submitted in support of MAR related "internal influences" and were properly dismissed by trial court); State v. Quesinberry, 325 N.C. 125, 381 S.E.2d 681, sentence vacated, 494 U.S. 1022, 108 L. Ed. 2d 603, on remand 328 N.C. 288, 401 S.E.2d 632 (1991). "Internal" influences relate to information coming from the jurors themselves-- "the effect of anything upon [a] juror's mind or emotions as influencing him" to agree or disagree to the verdict, "or concerning his mental processes in connection therewith." Id. at 134, 381 S.E.2d at 687 (quotation omitted). Testimony relating to internal influences is inadmissible. Id. "External" influences relate to information dealing with the defendant or the case that is being tried which reaches a juror without being introduced into evidence. Id. at 135, 381 S.E.2d at 688.

A juror may not testify as to (1) any matter or statement occurring during the course of the jury's deliberations, (2) the effect of anything upon that juror's mind or emotions as influencing the juror to agree or disagree with the verdict, or (3) matters concerning the mental processes in connection with the juror's reaching a verdict. N.C. Gen. Stat. § 8C-1, Rule 606(b), see also State v. Barnes, 345 N.C. 184, 226, 481 S.E.2d 44, 67 (1997) (juror may only testify as to matters occurring during deliberation with respect to the question "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror").

Juror affidavits are not admissible to impeach a verdict except as they pertain to extraneous influences that may have affected the jury's decision. State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994). This rule is "long-standing and well-settled." Cummings v. Ortega, 365 N.C. 262, 266, 716 S.E.2d 235, 238 (2011).

> [W]ithout this rule "motions for a new trial would frequently be made, based upon incautious remarks of jurors, or declarations by them procured to be made by the losing party, or some person in his interest, and thus the usefulness and integrity of trial by jury would be impaired."

Id. at 266, 716 S.E.2d at 238 (citations omitted).

1. The Trial Court Properly Denied Defendant's Motion for Appropriate Relief as There Was No Competent Evidence Showing Any Prejudice to Defendant.

Defendant argues that the trial court should have granted the joint MAR filed seven days after the verdict on 16 August 2017. (R p. 542) Defendant argues that the evidence shows that "jurors committed gross and pervasive misconduct." (Def.'s Br. p. 12) Defendant's argument is without merit, and the trial court properly denied the MAR. (R pp. 647-48)

In support of his argument, Defendant cites the North Carolina Supreme Court opinion in Cummings v. Ortega, 365 N.C. 262, 716 S.E.2d 235. However, a review of that opinion along with the other opinions of this Court and the North Carolina Supreme Court, and the application of those opinions to the facts of this case, demonstrate that the trial court properly denied Defendants' MAR.

In Cummings, the issue before the North Carolina Supreme Court was whether evidence contained in juror affidavits was admissible to support a motion for a new trial. The Supreme Court held that statements were inadmissible pursuant to Rule 606(b). Id. at 262, 716 S.E.2d at 236.

In Cummings,

> ..two days after the jury returned its verdict, Rachel Simmons, one of the jurors, contacted plaintiff's attorneys to

> report misconduct by a fellow juror, Charles Githens. According to Simmons, Githens made several statements about the case to the other jurors in the jury room before the case was submitted formally to the jury, notwithstanding repeated warnings from the trial court.

Id. at 263, 716 S.E.2d at 236.

The nature of the allegation in Cummings was much more severe than the allegations made in the present case. In Cummings, juror Simmons executed an affidavit claiming:

> …[Githens], while in the jury deliberation room, and in the presence of myself and the other jurors, made the statement to the effect that his mind was made up, that the other jurors could agree with him or they would sit there through the rest of the year. He subsequently stated that he wished the plaintiff, Ms. Cummings, would have died, and we wouldn't have to be sitting there at all. He also attempted to discuss the case prior to deliberations with several jurors present, at which point another juror reprimanded him.

Id.

Simmons went on to state in that affidavit that Githens' statements interfered with her "thought process about the evidence," that she believed it interfered with the other jurors, and that it was her opinion that "there was not a full and frank discussion of the evidence." Id. Plaintiff's attorneys subsequently submitted an affidavit from another juror. Id.

The North Carolina Supreme Court, holding the trial court erred by considering evidence of alleged juror misconduct contained in the affidavits,

reversed the trial court's order granting a new trial and reversed this Court's affirmance of the trial court order. Id. at 265, 716 S.E.2d at 238. The Supreme Court did so based on the long-held and well-established law that juror testimony may not impeach a verdict, except where it concerns an extraneous influence, as reflected in Rule 606(b). Id. at 266-67, 716 S.E.2d at 238-39 (citing State v. Robinson, 336 N.C. 78, 124, 443 S.E.2d 306, 329 (1994) and Tanner v. United States, 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1985)).

In Cummings, the Court was clear in the application of Rule 606(b), holding that

> …bars jurors from testifying during consideration of post-verdict motions seeking relief from an order or judgment about alleged predeliberation misconduct by their colleagues.

Id. at 270, 716 S.E.2d at 240-41.

The application of Cummings, and the above-cited cases from the North Carolina Supreme Court to the present case clearly shows the trial court correctly denied the post-verdict MAR and correctly held that the evidence Defendants cited in support of the MAR would not be admissible. (R p. 648)

None of the allegations in Defendants' MAR, including those in the supplemental MAR, show any extraneous influences that may have affected the jury's verdict. Also, while Defendant argues the evidence shows the jurors

committed "gross and pervasive misconduct," that allegation is simply not supported by the record.

Defendant points to affidavits submitted in support of his MAR that allege conversations between jurors after the trial had begun but before the verdict, as well as an allegation of two jurors sitting in a car for ten to fifteen minutes at the end of the day. Defendant also submitted reports from social media involving jurors that were posted after the trial was over as well as a transcript of a media interview with the jury foreperson. None of the items, however, involved or alleged **any** extraneous influence impacting the jury or its verdict.

While Defendant argues that the facts alleged in the present case are "far more egregious" than the facts alleged in Cummings, that too is unsupported by the record. The allegations here in the materials offered in support of the joint MAR, were in fact much less "egregious" than the facts alleged in Cummings. However, outside of determining whether the facts concern internal or external influences, the nature of the allegations are irrelevant in discerning whether Cummings applies.

Cummings undoubtedly applies in the present case. As in Cummings, there were allegations of statements/conversations about the case between jurors after trial began and before the case was submitted formally to the jury.

Id. at 263, 716 S.E.2d at 236. The Court was clear in its application of Rule 606(b):

> Although these affidavits contain troubling information, nevertheless they are inadmissible pursuant to Rule 606(b). As discussed above, we have interpreted Rule 606(b) to allow jurors to testify about external influences that affected their consideration of the case before them.

Id. at 271, 716 S.E.2d at 241.

An examination of what was said by the foreperson in the media interview and the social media posts attached to the MAR shows no juror misconduct that would justify overturning the jury's verdict.

Defendant cites to this Court's opinion in State v. Drake, 31 N.C. App. 187, 229 S.E.2d 51 (1976), in support of his argument that conversations between jurors prior to deliberations can support overturning a conviction. (Def.'s Br. p. 11) However, there are two problems with Defendant's reliance on Drake. First, to the extent Drake is inconsistent with Cummings and the long line of North Carolina Supreme Court cases on juror's impeachment of a verdict, Drake cannot control any issue in this case. **Second, Drake was decided prior to the 1983 enactment of Rule 606(b).** Cummings, 365 N.C. at 266, 716 S.E.2d at 238.

2. Defendant Was Tried By a Jury of Twelve Qualified Jurors

Defendant argues that his right to a jury of twelve persons was violated due to "some jurors" committing "serious misconduct." (Def.'s Br. p. 14) Because Defendant has shown no "serious misconduct" by jurors and he was tried and convicted by a jury of twelve persons, there was no error and Defendant's argument is without merit.

Defendant cites three cases from this Court and the North Carolina Supreme Court in support of his argument. None of these cases entitle Defendant to relief.

Defendant first cites State v. Elliott, 360 N.C. 400, 628 S.E.2d 735 (2006) for the proposition that the North Carolina Constitution guarantees a criminal defendant a trial by jury and that the jury must be composed of twelve persons. Id. at 417-18, 628 S.E.2d at 747. In Elliott, the defendant filed a MAR which "alleged that defendant's statutory and constitutional rights had been violated when two jurors met and prayed outside of the jury room during a recess from deliberations." Id. at 417, 628 S.E.2d at 747. The defendant argued that the meeting between the two jurors constituted deliberations outside the presence of the other jurors. The trial court denied the defendant's MAR and denied his request for an evidentiary hearing. The North Carolina Supreme Court upheld

those denials, holding that "nothing in defendant's motion for appropriate relief indicated that the jurors considered extraneous information." And that as a result, even if there had been an evidentiary hearing ordered by the trial court, "none of defendant's proposed juror witnesses would have been allowed to testify concerning the issues raised" in the MAR. Id. at 420, 628 S.E.2d at 748-49.

Defendant next cites State v. Poindexter, 353 N.C. 440, 545 S.E.2d 414 (2001), in which the North Carolina Supreme Court did grant a new trial, holding that the post-verdict removal of a juror for misconduct committed during the guilt-innocence phase deliberations violated the defendant's right under the North Carolina Constitution to trial by a jury composed of twelve qualified jurors. Id. at 443, 545 S.E.2d at 416. However, in Poindexter, unlike the present case, there was extraneous influence in the form of a phone call to a juror, that the juror shared with other jurors, where the phone call conveyed a suggestion that they be aware or careful on account of defendant's family. Id. at 442, 545 S.E.2d at 415. Poindexter is inapplicable to the present case.

The last case cited by Defendant in support of this argument is this Court's opinion in State v. Hester, 216 N.C. App. 286, 715 S.E.2d 905 (2011). Like Poindexter, Hester is inapplicable because it concerned allegations of extraneous influences, specifically juror interactions/observations with

defendant's brother and also juror talking with a spectator of the trial. Id. at 287, 715 S.E.2d at 906.

3. Defendant Corbett's Mental Health Was Not an Issue before the Jury and There Was No Violation of Defendants' Confrontation Rights.

Defendant Martens argues that the documents attached to the joint MAR shows that Defendant Corbett's mental health came to the attention of jurors in a way that violated both Defendants' confrontation rights. Because the record does not support Defendant's argument, the trial court neither abused its discretion nor committed error in denying the MAR. Additionally, the evidence complained of related to Defendant Corbett, not Defendant Martens.

This Court has held that "[t]he determination of the existence and effect of jury misconduct is primarily for the trial court, whose decision will be given great weight on appeal." State v. Moye, 12 N.C. App. 178, 191, 182 S.E.2d 814, 822 (1971) See also State v. Gardner, 322 N.C. 591, 593, 369 S.E.2d 593, 595 (1988). Crucially, Defendant's evidence of "misconduct" consists of post-verdict interviews or social media statements where it appears jurors gave their opinions and impressions of Defendant Corbett - whom they observed and heard evidence about her conduct during the trial. Even if the jurors' comments after the trial were improper, which the State is not conceding, any misconduct

would have occurred after the issuance of the guilty verdict, meaning that twelve qualified jurors reached a verdict before any misconduct occurred. See Gardner, 322 N.C. at 594, 369 S.E.2d at 595-96.

Defendants presented no support for any misconduct occurring during the trial or deliberations regarding jurors' opinions of Defendant Corbett. The trial court therefore correctly denied the joint MAR.

II. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S ATTEMPTS TO INTRODUCE TWO OUT OF COURT STATEMENTS INTO EVIDENCE AND EVEN IF THE TRIAL COURT ERRED IN DENYING ADMISSION, ANY ERROR WAS HARMLESS.

A. Standard of Review

Under Rule 403, even relevant evidence may be excluded where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C. Gen. Stat. § 8C-1, Rule 403. A trial court's ruling concerning whether to exclude relevant but prejudicial evidence under Rule 403 is reviewed for an abuse of discretion, and should not be overturned on appeal unless the ruling was "manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." State v. Hyde, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000); State v. Handy, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992).

This Court has held that the admissibility of alleged hearsay evidence is a question of law and is reviewed de novo. State v. McLean, 205 N.C. App. 247, 249, 695 S.E.2d 813, 815 (2010). Under a de novo standard of review, this Court "considers the matter anew and freely substitutes its own judgment" for that of the trial court. State v. Williams, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

B. Argument

1. The Trial Court Correctly Excluded Defendant Martens' Testimony Regarding an Alleged Statement by Margaret Corbett's Deceased Father.

At trial, Defendants sought to introduce an alleged out-of-court statement by the late Michael Fitzpatrick, the father of Jason's first wife Margaret, through Defendant Martens' testimony, that Jason had caused the death of his first wife. Defendants argued that the alleged statement was relevant to Defendant Martens' state of mind at the time of the assault on Jason, and also argued that the Rule 804(b)(4) and (5) exceptions applied. (T p. 2657) The trial court did not allow Defendant Martens to testify to the alleged statement by Mr. Fitzpatrick, holding that pursuant to Rule 403, the unfair prejudicial effect "outweighed the probative value of that self-serving statement." (T p. 2665)

Even assuming that the alleged statement was ever said, which the record does not support, that the evidence was not hearsay, and that it was relevant, the trial court properly exercised its discretion in ruling the testimony of Defendant Martens inadmissible.

On appeal, Defendant fails to establish the trial court's ruling was not the result of a reasoned decision. As argued more fully in section III below, given the record and evidence before the trial court, there was no abuse of discretion. This argument is without merit.

2. The Trial Court Did Not Commit Reversible Error by Sustaining the State's Objection to Defendant Martens Testifying to an Alleged Statement by Defendant Corbett.

During his testimony, Defendant Martens testified that during the assault on Jason he heard his daughter scream "don't hurt my dad." The State objected and moved to strike. The trial court sustained the objection and instructed the jury not to consider that statement. (T pp. 2687-88) Defense counsel made no argument to the trial court as to why the out-of-court statement of Defendant Corbett should be admissible.

In support of his argument on appeal, that the alleged statement was admissible, Defendant cites this Court's opinion in State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703 (2006).

The alleged statement, while self-serving, was not relevant. Defendant Martens testified that he was in a struggle with Jason, and claimed he was in that struggle to protect his daughter. Immediately prior to his stricken testimony of what Defendant Corbett allegedly said, Defendant Martens testified that Jason had just shoved him across the bed. The alleged statement of Defendant Corbett added nothing to Defendant Marten's state of mind.

But even if the trial court erred by sustaining the State's objection, the Defendant is still not entitled to any relief. Under N.C. Gen. Stat. § 15A-1443(b), a defendant is prejudiced by non-constitutional errors when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial. It is defendant's burden to show prejudice exists.

There could be no prejudicial error resulting from the complained of evidence being denied admission at trial. The trial court properly sustained the State's objection to the evidence of Co-Defendant's alleged statement. However even if it was error to not admit this evidence, any error was harmless. N.C. Gen. Stat. § 15A-1443(b). The assignment of error is without merit.

III. THE TRIAL COURT CORRECTLY EXCLUDED DEFENDANT MARTENS' TESTIMONY REGARDING AN ALLEGED STATEMENT BY MICHAEL FITZPATRICK PURSUANT TO RULE 403.

A. Standard of Review

As noted supra, a trial court's Rule 403 rulings are reviewed under the abuse of discretion standard. Hyde, 352 N.C. at 55, 530 S.E.2d at 293.

B. Argument

As also noted supra, the trial court did not allow Defendant Martens to testify to the alleged statement by Mr. Fitzpatrick, holding that pursuant to Rule 403, the unfair prejudicial effect "outweighed the probative value of that self-serving statement." (T p. 2665) The trial court was correct.

During the argument on the admissibility of Defendant Martens' testimony, the Assistant District Attorney pointed out that in his first interview with law enforcement on 2 August 2015, Defendant Martens was aware that Jason's first wife died from an asthma attack.[2] (T pp. 2658-59; R p. 439) Mr. Fitzpatrick was dead by the time of trial, but in support of the State's argument, the Assistant District Attorney submitted a statement signed by

[2] There was also testimony at trial from Jason's sister, Tracey Lynch, that Margaret "died of an asthma attack." (T pp. 2601-02)

Mr. Fitzpatrick clearly denying the self-serving claims of Defendant Martens. (T p. 2661; R p. 433) Specifically, Mr. Fitzpatrick stated the following:

> 8. I wish to state in no uncertain terms that the relationship between Jason Corbett and Margaret Corbett and the relationship between Jason Corbett and Molly Martens was never discussed in any manner whatsoever. I can also state categorically that we never discussed my daughter Margaret or the circumstances of her death nor did I inform Thomas Martens that Jason had killed my daughter Margaret. **Such statements by Thomas Martens are totally and utterly untrue and mischievous.**

(R p. 435) (emphasis added)

While Defendant argues in his brief that the jury should have been able to evaluate the "Fitzpatrick Statement", it is important to acknowledge the only true "Fitzpatrick Statement" was the one signed by Mr. Fitzpatrick completely denying ever saying what Defendant Martens wanted to testify to, and calls Defendant Martens' statements "are totally and utterly untrue and mischievous." (R p. 435) What Defendant wanted to have admitted was Defendant's self-serving testimony of an alleged statement, from a dead man, in which he claims that Mr. Fitzpatrick told him that Jason killed his daughter. **A daughter who, as Defendant Martens knows, died of asthma.**

Even assuming that the alleged statement was ever said, which is an assumption the record does not support, and that the evidence was relevant,

the trial court did not abuse its discretion and correctly ruled the testimony of Defendant Martens inadmissible. The trial court ruled as follows:

> THE COURT: All right. I have carefully considered the alleged statement of Mr. Fitzpatrick with respect to the cause of Margaret Corbett's death. I have considered the totality of the circumstances relating to this hearsay statement. The self-serving nature of it, and in my discretion I have determined under Rule 403 that the probative value of this evidence substantially is outweighed by the danger of unfair prejudice, confusion of the issues and misleading to the jury, so I will not permit the statement of Mr. Fitzpatrick through the Defendant Martens.

(T p. 2664)

Given that Margaret died of asthma, that the record supports the conclusion that Mr. Fitzpatrick never made the statement Defendant Martens claimed, and that Mr. Fitzpatrick was dead and could not testify, it is clear that the trial court did not abuse its discretion in not allowing this testimony into evidence.

IV. THE TRIAL COURT PROPERLY ALLOWED EXPERT TESTIMONY UNDER RULE OF EVIDENCE 702 REGARDING THE BLOODSTAINS ON DEFENDANT'S CLOTHING.

A. Standard of Review

Rule of Evidence 702(a) governs the admission of expert witness testimony. N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017). This Court reviews a

trial court's decision per Rule 702(a) for an abuse of discretion. State v. McGrady, 368 N.C. 880, 884, 893, 787 S.E.2d 1, 5, 11 (2016).

Rule 702(a) provides, in pertinent part,

> [i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017).

Rule 702(a) dictates that expert testimony must (1) be relevant, meaning it must concern "scientific, technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue"; (2) be from a witness "qualified as an expert by knowledge, skill, experience, training, or education"; and (3) be reliable, as judged by the rule's three-prong reliability test. McGrady, 368 N.C. at 897, 787 S.E.2d at 7; accord N.C. Gen. Stat. § 8C-1, Rule 702(a).

1. Relevance

Expert testimony "must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience" and "do more than invite the jury to 'substitut[e] [the expert's] judgment of the meaning of the facts of the case' for its own." McGrady, 368 N.C. at 889, 787 S.E.2d at 8. (alteration in original) (citation omitted). Speculation and conjecture, even by experts, is inadmissible because it does not assist the jury in understanding evidence and determining the facts in issue. See State v. Clark, 324 N.C. 146, 160, 377 S.E.2d 54, 62-63 (1989); State v. Brunson, 204 N.C. App. 357, 359-60, 693 S.E.2d 390, 392 (2010).

2. Qualified Expert

"It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession." State v. Morgan, 359 N.C. 131, 160, 604 S.E.2d 886, 904 (2004). Rather, "it is enough that the expert witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." Id. (citation and internal quotation marks omitted); accord McGrady, 368 N.C. at 889, 787 S.E.2d at 9.

3. Reliability

To be deemed reliable, expert opinion testimony must be "based upon sufficient facts or data"; "the product of reliable principles and methods"; and given by an expert who "applied the principles and methods reliably to the facts of the case." N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)-(3); accord McGrady, 368 N.C. at 890, 787 S.E.2d at 9.

B. Argument

Defendant Martens argues that the trial court abused its discretion by allowing Mr. James to testify about stains and spatter on the "underside of the hem" of the boxer shorts he was wearing when he assaulted Jason. Defendant Martens argues that those stains were not tested and conclusively shown to be blood and that Mr. James' testimony was not the product of reliable principles and methods. Defendant's argument is without merit. Mr. James' testimony, as found by the trial court, met all three prongs of Rule 702(a).

Clearly, the blood stains and spatter on Defendant Martens' boxer shorts were relevant. Equally clear is the fact that Mr. James' expertise rendered him in a better position to have an opinion on the blood stains and spatter than the jury.

Defendant argues that the State did not show the reliability prong. However, the testimony at trial demonstrated the necessary reliability to meet

the third prong. Mr. James testified on voir dire that the stains on the outside of the boxer shorts were tested for blood, but the stains on the underside of the shorts were not tested for blood. Mr. James also testified he did not review a photo of Defendant wearing the exact boxer shorts, explaining his understanding that Defendant Martens had changed his shorts after the assault. (T p. 2380) When discussing the testing of the stains on the boxer shorts, Mr. James said:

> A. Apparently they weren't. However, looking at the overall patterns of the ten spatters on this particular item, they all have the same physical characteristics, okay? You know, based on physical characteristics of what blood looks like, in small spatters I would consider it in the same company as the other types of spatters, if you see what I'm saying? Another reason -- well, sometimes they will save areas to be tested by the defense, so not always all samples are tested anyway.
>
> Q. But none of the ones underneath the hem were tested?
>
> A. Yeah, apparently not. Yeah, but I'm still considering this basically as one pattern.

(T pp. 2384-85)

Mr. James went on to testify:

> A. Well, it was based upon my association of those spatters with the rest of the spatters on the shorts, but I understand the issue that they weren't tested. But they have the physical characteristics of blood. And if you would take those away, it really doesn't change much of my opinion. It is still

impact spatter with the wearer of the shorts in proximity with the source of the blood.

Q. So you can give your opinion fully and completely without any reference at all?

A. If need be.

Q. Under the shorts?

A. Either with or without.

(T pp. 2386-87)

The Court then questioned Mr. James on this point:

THE COURT: Let me ask a couple questions, if I may? I want to make sure I'm clear. Obviously the rub here has to do with the previous expert not having tested or confirmed in any way that the spatter on the underside of the hem is in fact blood. So my question to you, have you had that circumstance arise in any prior occasions that you have had to examine materials or clothing for blood, that is, that not all of the spatter or areas identified in your report were confirmed to be blood?

THE WITNESS: Yes, sir. That happens on a fairly frequent basis. One reason for that, not that it applies in this case, is that the DNA laboratories often allow, only allow maybe five or six samples to be submitted because of their overload. That's an unfortunate situation. So the people who are submitting samples have to be very judicious in what stains they are choosing, so they don't overflow the laboratory with excess work, which is unfortunate.

.....

THE COURT: All right. Taking into account those limitations, do you consider the opinions that you've offered

> and as outlined in both of these reports to be the product of reliable principles and methods in bloodstain pattern analysis?
>
> THE WITNESS: Yes, I do.

(T pp. 2389-90)

After allowing extensive voir dire and questioning the witness himself, the trial court found that the admission of Mr. James' opinion testimony was based on sufficient facts and data. The trial court also found that Mr. James' testimony was

> the product of reliable principles and methods which he is familiar and which others in his field are familiar and he has applied those principles and that leads reliably to the facts, including what he has referred to as the physical characteristics of the stains on the underside of the hem as to their size, shape, and distribution, and his opinion based in part on it being likely created during this event, stains created likely during the same event.

(T p. 2401)

When testifying to the jury as to his conclusions as to the stains on the front of the boxer shorts, Mr. James testified that

> these impact spatters are consistent with the wearer of these boxer shorts in proximity to the victim Jason Corbett when blows were struck to his head. The head being the source of the blood in this particular case.

(T p. 2502)

Mr. James' testimony on the stains on the underside of the boxer shorts was consistent with his testimony on the front stains: "My conclusion there was the source of the impact spatters is most likely the head of Jason Corbett while it was close to the floor in the bedroom." (T p. 2502) And Mr. James' test on Defendant's shirt was also consistent with his testimony on the boxer shorts: "[M]y conclusion, these are consistent with the wearer being in proximity to Jason Corbett when blows were struck to his head." (T p. 2503)

Defendant does not argue error on appeal as to the admission of Mr. James' testimony on the front stains on the boxer shorts, or as to the admission of the testing as to the stains on the shirt Defendant wore during the attack on Jason. Only on the testimony regarding the stains "underneath" the hem of the boxer shorts does Defendant claim error. But Mr. James testified that he could fully give his conclusions with or without reference to the stains "underneath." (T pp. 2386-87)

The physical evidence showed there was blood on the walls and floor in the master bedroom where Jason's body was found. Mr. James' testimony regarding the bloodstains on the outside of the shorts (the admission of which Defendant does not challenge on appeal) indicate the boxer shorts were in close proximity to Jason's head (as the source of the blood). Thus, even if it was abuse of discretion to allow testimony on the stains on the underside of the boxer

shorts, that error is harmless because Defendant cannot show "absent the error a different result would have been reached at trial." State v. Ferguson, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001), see also N.C. Gen. Stat. § 15A-1443.

In sum, the trial court properly overruled Defendant's objection to the evidence and allowed the testimony under Rule 702. However, even if it was an abuse of discretion to admit this evidence, any error was harmless. Defendant's argument to the contrary is without merit.

V. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON SELF-DEFENSE, INCLUDING THE AGGRESSOR DOCTRINE, GIVEN THAT DEFENDANT ARMED HIMSELF WITH A METAL BAT BEFORE ENGAGING THE VICTIM.

A. Standard of Review

This Court has held that the question of whether the evidence is sufficient to warrant an instruction on self-defense is a question of law that is subject to de novo review. State v. Mills, __ N.C. App. __, __. 788 S.E.2d 640, 642 (2016).

B. Argument

Defendant argues that the trial court erred by giving the aggressor instruction as part of the self-defense instruction to the jury. Defendant contends that arming himself before attacking Jason does not support giving

the aggressor instruction. In support, he cites three opinions of this Court and an opinion from the North Carolina Supreme Court. A review of the cited opinions show Defendant's argument is without merit as the cases he cites are distinguishable from the present case.

In State v. Vaughn, 227 N.C. App. 198, 742 S.E.2d 276 (2016), the defendant was attacked and injured by an assailant prior to her arming herself. Id. at 199, 742 S.E.2d at 277. In State v. Tann, 57 N.C. App. 527, 291 S.E.2d 824 (1982), the defendant was approached and assaulted by an assailant prior to taking any action. Id. at 530, 291 S.E.2d at 827. ("[T]he testimony of both victim and defendant point to [the victim] as the initial assailant.") And in State v. Ward, 26 N.C. App. 159, 215 S.E.2d 394 (1975), this Court held it was error to include the aggressor instruction, as the evidence "tends to show that the deceased was the aggressor up to the instant the defendant fired the fatal shot." Id. at 163, 215 S.E.2d at 396-97.

The North Carolina Supreme Court's opinion in State v. Washington, 234 N.C. 531, 67 S.E.2d 498 (1951) is extremely far removed from the facts of the present case. In Washington, all the evidence showed the victim, not the defendant, was the aggressor.

> The defendant's evidence indicates that she was entirely free from fault and never fought willingly and unlawfully. Her evidence further shows that the deceased made a violent

> attack upon her. First he assaulted her with his fists, knocking her down an embankment; and then struck her several blows with a large stick. Following this, while attempting to drag her away from the people who were standing by, he declared it was his purpose to take her out of sight and kill her. She begged the deceased to stop beating her, and it was only after he announced his intention to take her elsewhere and kill her that she stabbed him in a vital spot.

Id. at 534, 67 S.E.2d at 500.

Contrast Washington with the present case. There were no actual injuries to either Defendant as opposed to the victim, two different sections of whose skull had "fallen away" as a result of repeated blows to the head with a metal bat. (T p. 1801)

In fact, the lack of any injuries to Defendant Martens, compared with the devastating injuries to Jason, is sufficient evidence to support the aggressor instruction. This Court held exactly that, in a case involving this same issue on very similar facts.

> Further, the lack of injuries to defendant, compared to the nature and severity of the wounds on [the victim] at his death, is sufficient evidence from which a jury could find that defendant was the aggressor or that defendant used excessive force.

State v. Presson, 229 N.C. App. 325, 330, 747 S.E.2d 651, 656, cert. denied, 367 N.C. 274, 752 S.E.2d 150 (2013).

Defendant Martens points to his and Defendant Corbett's statements of what happened in the incident and argues that "[n]o contradictory evidence was introduced by the State." (Def.'s Br. p. 34) Defendant is incorrect. The State presented evidence on the comparison on the injuries to Jason (extreme) and the injuries to the two Defendants (none apparent or shown). As this Court held in Presson, that "is sufficient evidence from which a jury could find that defendant was the aggressor or that defendant used excessive force." Id.; see also State v. Mumma, __ N.C. App. __, __, 811 S.E.2d 215, 219-220, cert. granted, __ N.C. __, 813 S.E.2d 850 (2018).

The trial court properly instructed the jury on self-defense, including the aggressor instruction language, and this is argument is without merit.

VI. THE TRIAL COURT PROPERLY DENIED DEFENDANT MARTENS' MOTION TO DISMISS AS THERE WAS SUBSTANTIAL EVIDENCE OF EACH ESSENTIAL ELEMENT OF THE OFFENSE.

A. Standard of Review

The North Carolina Supreme Court has held the following:

> On a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it. If there is substantial evidence -- whether direct, circumstantial, or both -- to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Locklear, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988) (citations omitted).

The North Carolina Supreme Court has emphasized that "in passing on a motion for nonsuit, evidence favorable to the State is to be considered as a whole in order to determine its sufficiency." State v. Thomas, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978); see also State v. Cutler, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967) (stating that application of the sufficiency test "must be made to the evidence introduced in each case, **as a whole**, and adjudications in prior cases are rarely controlling as the evidence differs from case to case.") (emphasis added). "This is especially necessary in a case, such as ours, when the proof offered is circumstantial, for rarely will one bit of such evidence be sufficient, in itself, to point to a defendant's guilt." Thomas, 296 N.C. at 245, 250 S.E.2d at 209. "If a reasonable inference of defendant's guilt can be drawn from a combination of the circumstances, defendant's motion is properly denied." Id.

B. Argument

In the present case the State presented evidence showing that: (1) the victim suffered extreme injuries from at least twelve blows to the head, with two of the impact points so severe that the back of his skull had "fallen away";

(2) Defendant Martens had no visible injuries; (3) the toxicology report from Jason's body showed the presence of the drug trazodone, which is a drug he did not have a prescription for, which induces sleep; (4) that Defendant Corbett did have a prescription for trazodone and filled that prescription on 30 July 2015; (5) that EMS and law enforcement responders noticed that some of the blood on Jason's body had dried; (6) more than one paramedic testified that Jason's body felt cool, one such paramedic asking another, "How long did you say they waited before they called 911"; (7) Defendant Martens told a co-worker he hated Jason; (8) prior to the marriage, Jason had transferred money to purchase the house on Panther Creek such that there was no mortgage; and (9) Jason had a life insurance policy, for which Defendant Corbett was the named beneficiary.

Based on the above facts and the other evidence presented at trial, it is clear that the evidence presented by the State permitted "reasonable inference that the Defendant is guilty of the crimes charged." State v. Vause, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991).

Defendant cites the North Carolina Supreme Court opinions in State v. Carter, 254 N.C. 475, 119 S.E.2d 461 (1961) and State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972), for the proposition that "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted

or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." Bolin, 281 N.C. at 424, 189 S.E.2d at 241; Carter, 254 N.C. at 479, 119 S.E.2d at 464. But as shown by the evidence listed above, and the other evidence presented at trial, the defendants' self-serving statements, as in Bolin, were "contradicted in material respects." Bolin, 281 N.C. at 429, 189 S.E.2d at 244.

The trial court need only satisfy itself that evidence is sufficient to take the case to the jury; it need not be concerned with the weight of the evidence. State v. Lucas, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982). In the present case, there is clearly more than "a reasonable inference of defendant's guilt." Defendant Martens' argument is without merit.

VII. THE TRIAL COURT PROPERLY EXCLUDED THE STATEMENTS OF JASON'S CHILDREN, JACK AND SARAH, AS THE STATEMENTS WERE INADMISSIBLE HEARSAY.

Defendant Martens states in his brief that he incorporates the arguments of Defendant Corbett regarding the exclusion of the statements of Jason's children, Jack and Sarah, by the trial court. In addition to the response below, the State incorporates the arguments in the State's brief filed in response to Defendant Corbett's brief.

A. Standard of Review

This Court has held that it reviews evidentiary rulings for an abuse of discretion. State v. Gettys, 243 N.C. App. 590, 594, 777 S.E.2d 351, 355 (2015). And the "trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." State v. Wilson, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

B. Argument

In her brief, Defendant Corbett argues that the children's statements should have come into evidence under Rule of Evidence 803(4) and (24).

1. Rule 803(4)

Admission of evidence under Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment. State v. Hinnant, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000).

The trial court correctly held that "[n]one of the proffered statements of Jack Corbett and Sarah Corbett satisfy the first prong of Hinnant analysis as they were not intended to obtain a medical diagnosis or treatment." The trial

court also held the statements failed the second prong of Hinnant as "they were not pertinent to any diagnosis or treatment." (R p. 636)

These conclusions were based on the children's testimony that they were at the Dragonfly Child Advocacy Center because their dad died. Any allegations by the children of prior arguments or claims of violence between their dad and stepmom would not be related to their medical treatment. There was no evidence that either child possessed any motivation to speak related to medical diagnosis or treatment. Hinnant, 351 N.C. at 287, 523 S.E.2d at 669. The trial court properly held the children's statements inadmissible under the hearsay exception in Rule 803(4), and that ruling was not an abuse of discretion.

2. Rule 803(24)

Admission of evidence under Rule 803(24) is determined by the trial court applying the six-part inquiry contained in the rule. See State v. Smith, 315 N.C. 76, 92, 337 S.E.2d 833, 844 (1985). The trial court followed and applied this six-part test and noted that the statements were "specifically recanted and disavowed." (R p. 637) The trial court properly held the children's statements inadmissible under the hearsay exception in Rule 803(24), and that ruling was not an abuse of discretion.

It is clear the trial court rulings on admission of this evidence under Rule 803(4) and (24) were correct and could not be an abuse of discretion. Defendant Martens' argument is without merit.

VIII. AS DEFENDANT'S CLAIMS OF ERROR WERE WITHOUT MERIT INDIVIDUALLY, THERE IS NO CUMULATIVE ERROR.

In the very case, Defendant cites in support of his cumulative error argument, the North Carolina Supreme Court held that even if some errors occur, that may not result in cumulative error entitling a defendant to relief. State v. Wilkerson, 363 N.C. 382, 426, 683 S.E.2d 174, 201 (2009) ("However, these errors, individually or collectively, do not fatally undermine the State's case."). Moreover, in the present case, none of the error claimed by Defendant Martens possess merit, therefore there was no cumulative error. See State v. Thompson, 359 N.C. 77, 106, 604 S.E.2d 850, 871 (2004) (explaining that because no error occurred at all, "there is no need to consider defendant's cumulative error argument").

CONCLUSION

Defendant Martens received a fair trial. Defendant's assignments of error are without merit and the Court should uphold the jury's verdict and trial court's rulings.

Electronically submitted this the 15th day of November, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 28 (j)(2)

Undersigned counsel certifies that the State's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure and this Court's 10 October 2018 Order allowing the State to file a brief not exceeding 11,000 words (proportional type) in length in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 11,000 words as indicated by Word, the program used to prepare the brief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR THE STATE upon the DEFENDANT by electronically mailing the same in PDF format to his COUNSEL OF RECORD, using the following electronic addresses:

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