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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-347

Filed: 21 February 2017

Guilford County, No. 14 CRS 082246

STATE OF NORTH CAROLINA

v.

ALMEDEO EUGENE STEWART, Defendant.

Appeal by defendant from judgment entered 13 August 2015 by Judge Lindsay R. Davis in Guilford County Superior Court. Heard in the Court of Appeals 2 November 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Francisco Benzoni, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.

ELMORE, Judge.

On 6 August 2015, Almedeo Eugene Stewart (defendant) was tried and found guilty of assault on a female. He contends on appeal that the State’s closing argument was grossly improper because the prosecutor emphasized the possibility of probation, advocated for a lower burden of proof, and impermissibly urged to the jury that “defendant was lying.” After review, we conclude that the prosecutor’s statements do

not rise to the level of gross impropriety so as to warrant *ex mero motu* intervention, and the trial court cured any impropriety with its instructions to the jury. No error.

I. Background

In 2014, Heather Hintergardt moved from California to Greensboro to accept a job promotion. She lived in an extended-stay hotel while she looked for an apartment in the area. Hintergardt had developed a relationship with defendant when she was in California. They met online and talked over the phone for six or seven months. After moving in Greensboro, Hintergardt invited defendant, who lived in Charlotte, to stay with her at the hotel.

The State's evidence tended to show that on the evening of 22 July 2014, approximately eight days after defendant arrived at the hotel, he and Hintergardt had a fight. Hintergardt testified that she was taking a bath when her "soon-to-be" ex-husband called to discuss some legal issues between them. Defendant became upset when he overheard the conversation and went into the bathroom. He pulled Hintergardt out of the bathtub, threw her on the bed, and got on top of her. As she tried to push defendant away, defendant bit her arm and the side of her face. At some point, Hintergardt was able to break free to call her mother. Defendant tried to take the phone from Hintergardt and slammed her head against a faucet.

Officers Mike Brazinski and Dustin Hansen of the Greensboro Police Department responded to Hintergardt's hotel room after receiving calls from her

mother and a neighboring hotel guest. Officer Brazinski testified that when he arrived at the scene, Hintergardt and defendant both appeared intoxicated. He observed bruising and bite wounds on Hintergardt's cheek and forearm, along with a fresh "goose egg" on her forehead which "continued to rise" as he took her statement. Hintergardt told Officer Brazinski that she was cooking meatballs in the kitchen when defendant became upset about a phone call she had received from her ex-husband. Defendant then grabbed her by the arms and hit her head against the wall. She informed Officer Brazinski that the bruising on her arms and face occurred the day prior, when defendant pulled her out of the bathtub and bit her.

Officer Brazinski also spoke with defendant, who denied causing any of Hintergardt's injuries and insisted that she had the injuries when she moved to Greensboro. Officer Brazinski testified that defendant said Hintergardt tried to "poke his eyes out" and cut him. Officer Brazinski observed what he believed were defensive wounds on defendant's body, including a superficial scratch on his neck and bloodshot eyes.

Defendant testified that "nothing happened" on 22 July 2014. He recalled that Hintergardt arrived at the hotel after work, visibly frustrated. She told defendant that she was stressed and wanted to "slow down" their relationship. Sensing her irritation, defendant left the hotel briefly to purchase alcohol and cigarettes. When he returned, Hintergardt was cooking meatballs in the kitchen. They started

drinking and, eventually, arguing. Hintergardt told defendant to leave and started throwing his bags outside just before the police arrived. He claimed that he never struck or bit Hintergardt and had only “grabbed her arms” during one prior altercation to avoid being hit. To explain Hintergardt’s injuries, defendant recalled a prior conversation when she told him, “I bruise easy.” Defendant also denied telling Officer Brazinski that Hintergardt tried to gouge his eyes out. He testified, curiously, that he pointed to his red eyes and the scratch on his neck to protest his arrest but did not want Officer Brazinski to believe that Hintergardt caused those injuries.

At trial, defense counsel attempted to impress upon the jury the inconsistencies in the testimony. She told the jury in her opening statement:

I’m sure we have all heard the phrase that “[there are] always two sides to a story, and the truth [is] usually somewhere there in the middle.”

In this case you’re going to hear two very, very different sides of what happened on July 22nd of last year. You’re going to hear from both sides that an argument occurred, but that’s pretty much the only place where these two stories converge.

She continued to emphasize her theme during closing arguments while reminding the jury of the State’s burden to prove defendant’s guilt beyond a reasonable doubt:

Now that’s a high burden. That’s the highest burden that we have in this court system. The reason it’s so high is because someone’s liberty is at stake. Someone’s life is at stake, at this point. And beyond reasonable doubt is fully satisfied and entirely convinced.

[The prosecutor] is probably going to tell you that, that doesn't mean beyond all doubt, and beyond a shadow of a doubt. And he's right. But it is a very high burden. It's not somewhere in the middle. It's an extremely high burden.

If you guys come back, you guys go back to that Jury Room and you start thinking about it, and you're like—"you know what"—you heard both side[s] of the story. "He Said She Said." The truth is split, probably, somewhere in the middle. Ladies and gentleman, that's a not guilty.

Defense counsel continued to argue in closing that defendant was honest in his testimony and "[t]he State has just not met its burden in this case."

In the State's closing argument, the prosecutor asked the jury to discredit defendant's testimony:

When we started, Defense Counsel got up and said that "Each side has a story, and the truth is somewhere in the middle." That's what she said. Now she goes, "The truth is you've had [sic] a story, but only one side is believable."

I submit to you, ladies and gentleman, the only way the Defendant is not guilty, is if you believe everything he said. That he didn't say to the officer—who has no interest, and didn't even stick around to find out what happened today—that he didn't say to that officer "She tried to gouge out my eye, and tried to cut [my] neck" and show him those injuries.

One of two things is true. Either the officer got up and lied. That's what the Defendant said. . . . Or, the Defendant is trying to craft the facts to fit his version of events. That he was just saying "Oh, I just wanted to show the officer that cut on my neck, just in case he didn't notice it."

What would be the point of that? . . .

....

So I submit to you that the Defendant has to have it his way. If you don't believe the Defendant, entirely, none of his story makes sense.

Why would you tell an officer "She attempted to gouge out my eye" if, as he said it, nobody laid hands on one another?

....

I submit to you, the Defendant is lying.

Addressing defense counsel's comment about defendant's "liberty," the prosecutor continued:

[Defendant] is the one who needs you to believe that [Hintergardt] is untrustworthy—that she is lying—because his liberty is at stake.

This is a Class A-1 Misdemeanor, which is punishable by up to 150 days in jail. It is also punishable by unsupervised probation, or supervised probation. So when [defendant] says his liberty is at stake, this does not mean if you find the defendant guilty he will go to prison. Okay, merely, that sanctions will be in place, amongst a spectrum of 1 to 150 days, either of probation, or supervised probation—something that can enable him to get anger management—things like that are the options.

So it's not a guarantee that his liberty will be taken away from him, and he'll be locked up and led off for 150 days, if you find him guilty. That's not the way it works in this state.

In conclusion, the prosecutor told the jury that "if the truth is anywhere in the middle, I submit to you, the defendant is guilty. If you find that any of those bruises came

from the defendant pushing, or biting her, then he is guilty of assault.” Defense counsel raised no objection during the State’s closing argument.

At the close of evidence, the trial court admonished the jury that it was to follow the instructions given by the court and not those suggested by the attorneys. The court later instructed the jurors that they were “the sole judges of the credibility of each witness” and “of the weight to be given any evidence.” It also explained the State’s burden of proof, including a definition of “reasonable doubt.”

After less than twenty minutes of deliberation, the jury found defendant guilty of assault on a female. The court entered a judgment suspending sentence of seventy-five days of imprisonment and placed defendant on supervised probation for eighteen months. Defendant was also ordered to complete a domestic violence intervention program. Defendant appeals.

II. Discussion

Defendant argues on appeal that he is entitled to a new trial because the State’s closing argument was grossly improper and the trial court failed to intervene *ex mero motu*.

“The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.” *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002)

(citing *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835 (1999)). In our review, we

must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Id. To meet this burden on appeal, the “defendant must show the prosecutor’s comments so infected the trial with unfairness that it rendered the conviction fundamentally unfair.” *State v. Robinson*, 346 N.C. 586, 607, 488 S.E.2d 174, 187 (1997) (citing *State v. Rose*, 339 N.C. 172, 202, 451 S.E.2d 211, 229 (1994)). Counsel are allowed wide latitude in closing arguments, and “whether an advocate has abused this privilege must be left largely to the sound discretion of the trial court.” *State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984) (citation omitted). In determining whether counsel’s argument was grossly improper, we consider “the context in which the remarks were made, as well as their brevity relative to the closing argument as a whole.” *State v. Taylor*, 362 N.C. 514, 536, 669 S.E.2d 239, 259 (2008) (citations and quotation marks omitted).

First, defendant argues that the State repeatedly encouraged the jury to consider the possibility that defendant would receive probation instead of jail time if he was found guilty, thereby encouraging a guilty verdict.

“In jury trials the whole case as well of law as of fact may be argued to the jury.” N.C. Gen. Stat. § 7A-97 (2015). Our Supreme Court has interpreted this statute to mean that “[c]ounsel may . . . in any case, read or state to the jury a statute or other rule of law relevant to such case, *including the statutory provision fixing the punishment for the offense charged.*” *State v. Lopez*, 363 N.C. 535, 539, 681 S.E.2d 271, 274 (2009) (quoting *State v. Britt*, 285 N.C. 256, 273, 204 S.E.2d 817, 829 (1974)). Counsel may not, however, comment on the statutory punishment in a way that encourages the jury “to consider the punishment as part of its substantive deliberations.” *State v. Wilson*, 293 N.C. 47, 57, 235 S.E.2d 219, 225 (1977).

In this case, the prosecutor’s statements regarding post-conviction punishment were within the boundaries afforded to counsel in closing arguments. Defense counsel had first told the jury that the State had the burden of proof beyond a reasonable doubt because “someone’s liberty is at stake. Someone’s life is at stake, at this point.” In response, the prosecutor agreed that “defendant’s liberty was at stake” but clarified how that expression should be interpreted. He explained the full range of punishment available for the offense—including the possibility of 150 days of imprisonment. There was never any intimation that a lesser sentence would be imposed if the jury found defendant guilty. We believe instead that the prosecutor sought to clarify defense counsel’s own words and did so within the province of N.C. Gen. Stat. § 7A-97.

Next, defendant contends that the prosecutor advocated for a lower burden of proof when he said in closing arguments that “if the truth is anywhere in the middle, I submit to you, the defendant is guilty.”

The prosecutor did not misstate the burden of proof because he was not referring to the burden of proof. He was instead drawing upon defense counsel’s theme from her opening statement that the truth was probably “somewhere in the middle.” The prosecutor followed his statement to the jury with an explanation that “[i]f you find that any of those bruises came from the defendant pushing, or biting her, then he is guilty of assault.” In other words, the prosecutor was arguing that even if the truth was “somewhere in the middle,” with defendant causing some, but not necessarily all, of Hintergardt’s injuries in a manner that met all the elements of assault on a female, then he would still be guilty of assault on a female. The context in which the statement was made does not indicate that the prosecutor advocated for a lower burden of proof. And because the court followed the closing arguments with a correct definition of “reasonable doubt” in its instructions, we conclude there was no error or prejudice resulting from the prosecutor’s statement. *See State v. Jones*, 336 N.C. 490, 496, 445 S.E.2d 23, 26 (1994) (holding that “the trial court did not err in failing to immediately correct the prosecutor’s erroneous definition [of ‘reasonable doubt’] where, as here, the trial court followed the complained-of argument of the prosecutor with proper instructions correctly defining the term “reasonable doubt”).

Finally, defendant contends that the prosecutor impermissibly argued to the jury that defendant was “lying.”

“While a prosecutor may argue to the jury that it should not believe a witness, it is improper for a lawyer to call a witness a liar.” *State v. Gell*, 351 N.C. 192, 211, 524 S.E.2d 332, 344–45 (2000) (citing *State v. Scott*, 343 N.C. 313, 344, 471 S.E.2d 605, 623 (1996); *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978); *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 345 (1967)). The impropriety of the statement, however, “must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.” *Id.* at 192, 211 S.E.2d at 345 (citing *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979); *State v. Barnard*, 346 N.C. 95, 106, 484 S.E.2d 382, 388 (1997)). It is not so grossly improper to state that the defendant is “lying” as to justify an *ex mero motu* intervention unless it unfairly prejudices the outcome of the trial and renders the conviction fundamentally unfair. *Id.*; see, e.g., *State v. Nance*, 157 N.C. App. 434, 442–43, 579 S.E.2d 456, 461–62 (2003).

Although it was perhaps improper for the prosecutor to argue that defendant was “lying,” it was not so grossly improper as to require *ex mero motu* intervention. The remark occurred as the prosecutor was highlighting how the testimony from Hintergardt and Officer Brazinski directly contradicted defendant’s assertion that

“nothing happened.” The prosecutor also harped on the inconsistencies in defendant’s own testimony, particularly when defendant denied telling Officer Brazinski that Hintergardt tried to “poke his eyes out” but admitted calling the officer’s attention to his bloodshot eyes and the scratch on his neck. The jury, to believe the testimony of one witness, had to discredit the other. And because the trial court also instructed the jurors that they were “the sole judges of the credibility of each witness,” we are not convinced that the prosecutor’s statement was so grossly improper that it unfairly prejudiced the outcome of the trial.

III. Conclusion

The trial court did not err in failing to intervene *ex mero motu* during the State’s closing argument.

NO ERROR.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).