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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1001

Filed: 17 April 2018

Johnston County, No. 14 CRS 53524

STATE OF NORTH CAROLINA

v.

CHRISTINA ANNE CALABRESE

Appeal by defendant from judgment entered 27 January 2017 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 20 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew E. Buckner, for the State.

Narron, O'Hale and Whittington, P.A., by John P. O'Hale and Frank B. O'Hale, for defendant-appellant.

TYSON, Judge.

Christina Anne Calabrese ("Defendant") appeals from a jury's conviction of misdemeanor driving while impaired ("DWI"). We find no prejudicial error.

I. Background

On 5 July 2014, Defendant attended a cookout with two friends, K. Sorrell and K. Perry. The group arrived in Sorrell's car at approximately 5:00 p.m. and left the cookout around 10:00 or 10:30 p.m. During the course of the evening, Defendant snacked, ate half a hot dog, and drank two or three twelve ounce Bud Light beers. Defendant agreed to drive Sorrell's car home, as she did not believe she was too impaired to drive.

North Carolina Highway Patrol Trooper Williams was on duty on the evening of 5 July 2014. At approximately 11:00 p.m., Trooper Williams was parked on the shoulder of N.C. Highway 42 and running radar. He observed Sorrell's silver Hyundai approaching in his rearview mirror, and clocked the vehicle travelling 61 mph in a 45 mph zone. Trooper Williams began pursuit of the Hyundai and activated his vehicle's blue lights. Defendant immediately pulled off the highway into a Lowe's Food-anchored shopping center. Trooper Williams did not observe the Hyundai weaving within its lane or crossing any marked lines on the road.

Trooper Williams testified he smelled alcohol on Defendant's breath. Defendant initially denied she had been drinking. Defendant produced her license and registration without difficulty, exhibited no slurred speech, and exited the vehicle without issue. Trooper Williams asked Defendant to take an alco-sensor test. Defendant consented and both samples she provided indicated the presence of alcohol. Defendant then admitted to consuming one beer.

Trooper Williams had Defendant complete standardized field sobriety tests. Defendant indicated she would have difficulty standing and balancing on the line for the walk-and-turn test. Defendant declined to perform the one-leg stand due to medical problems with her knees. Trooper Wood formed an opinion that Defendant had consumed a sufficient amount of an impairing substance, which had appreciably impaired her mental and/or physical faculties, due to the smell of alcohol on Defendant's breath, the positive alco-sensor tests, Defendant's difficulty in performing the walk-and-turn test, and Defendant's red, glassy eyes. Defendant was placed under arrest for impaired driving.

After being transported to the Johnston County jail, Defendant requested a witness to observe the chemical testing of her breath. After waiving her *Miranda* rights, Defendant stated her sobriety was a four on a scale from zero to ten, with zero being completely sober. The resulting chemical testing indicated Defendant's alcohol concentration was 0.10.

At trial, Defendant testified that she had suffered from medical issues due to her weight, resulting in multiple knee surgeries as well as bariatric surgery. The bariatric surgery rerouted Defendant's intestine to bypass her stomach, which greatly reduced the quantity she could eat or drink, and changed the way her body absorbed food and liquid. Defendant did not believe her normal faculties were impaired, and stated she was "shocked" when she saw the results of the alcohol tests.

Defendant's companions also testified at trial. Sorrell did not want to drive her car home, because she was tired from a busy work week. She observed Defendant while both were at the cookout, and asserted Defendant walked fine, spoke fine, did not have red or glassy eyes, and appeared "completely normal." Perry testified that he saw Defendant drink a few beers, but agreed with Sorrell's assessment that Defendant was not impaired.

At trial, the closing arguments were not initially recorded. During the prosecutor's closing argument, defense counsel made several objections, many of which were overruled. Defense counsel also made a motion to record the prosecutor's argument, which appears to have been initially denied, but was granted before the end of the State's closing argument. The remainder of the State's closing argument was transcribed:

> God help the people of this state that have to drive on the roads with people that are impaired who think they are not. That's why this statute is here.
>
> It doesn't matter how she felt. It doesn't matter how her friends thought she felt or thought she acted. Because the fact is, is she didn't plan to be the driver that night. She drank too much for her. And after she was arrested, a relevant time after driving, she blew a pair of 10's.
>
> Let's call a spade a spade and a 10 a 10 and this defendant guilty. Thank you.

At the conclusion of the prosecutor's argument, defense counsel requested to be heard, and stated:

> I would like to reconstruct for the record what I recall the prosecutor saying or if you want to put it in the record. But he has made comments to the jury that is improper argument. It's reversible error. And at this time I'm moving the Court, based upon his conduct, to declare a mistrial.

The court declined to reconstruct the State's closing argument for the record and denied Defendant's motion for mistrial.

After charging the jury, both parties made statements for the record regarding the prosecutor's argument, with the prosecutor stating, "I believe that the statement that I made when we were not recording is substantially similar enough to the statement that I made after that you [sic] made the motion to record."

Defense counsel stated he would file an affidavit with the court with his recollections of the closing argument. The court told him he was "free to file with the court whatever [he] believe[d] [was] appropriate." In his affidavit, Defense counsel reconstructed the prosecutor's statements as follows:

> A. Thank God laws like this help stop the drunks like our defendant to stay off our roads.
>
> B. Thank God we have laws in place to help keep these kinds of people off the roads and to keep our families safe.
>
> C. God help those who drive on a highway after the defendant is out there after having something to drink. It is the jury's duty to find the defendant guilty to prevent such things from happening again.

Defendant gave oral notice of appeal. On 13 June 2017, Defendant filed the affidavit regarding the prosecutor's closing argument, served it on the State, and

included it in the proposed record on appeal. At the hearing to settle the record on appeal, the trial court held that because the affidavit was not filed during the trial or sentencing, Rule 11(c) precluded its inclusion in the record on appeal.

Defendant filed a motion to amend the record on appeal and a petition for writ of *certiorari* to include the defense counsel's affidavit into the record before us. On 20 October 2017, a panel of this Court allowed Defendant's motion to amend the record on appeal, and included the affidavit as an exhibit. On 10 November 2017, the State filed a motion to amend the record on appeal to include an affidavit of the prosecutor's recollections of his closing argument.

II. Jurisdiction

An appeal of right lies with this court from a final judgment of the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issues

Defendant argues four issues on appeal: (1) the prosecutor's closing argument was improper and constituted prejudicial and reversible error; (2) the trial court erred by failing to instruct the jury in accordance with Defendant's request for special instruction regarding the intoxilyzer test; (3) the trial court erred by denying Defendant's motion to reconstruct the record; and, (4) the trial court erred by denying Defendant meaningful appellate review. Defendant requests this Court to vacate the superior court's judgment and remand for a new trial.

IV. Analysis

A. Propriety of Closing Remarks

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted). Such a determination requires this Court to "determine if the ruling could not have been the result of a reasoned decision." *Id.* (citation and internal quotation marks omitted).

We first consider whether the State's closing remarks were improper. *Id.* A closing argument is improper if the attorney "become[s] abusive, inject[s] his personal experiences, express[es] his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make[s] arguments on the basis of matters outside the record[.]" N.C. Gen. Stat. § 15A-1230(a) (2017).

If the argument is improper, "we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106.

Defendant argues the State's closing argument was improper because it: (1) was explicitly religious in nature; (2) misstated the law and misapplied the facts; (3) referenced events outside the record; and, (4) was grossly inflammatory. We disagree

and conclude Defendant has failed to show the trial court abused its discretion in denying Defendant's objection to the closing argument and motion for mistrial.

1. "Religious Sentiment"

The Supreme Court of North Carolina has cautioned against the use of arguments based upon religion and has "in the past disapproved of prosecutorial arguments that made improper use of religious sentiment." *State v. Ingle*, 336 N.C. 617, 648, 445 S.E.2d 880, 896 (1994) (citations omitted). However, the Supreme Court concluded an argument, which does not "contain . . . extensive references to religion[,]" and is more appropriately characterized "as a request that the jury fulfill its duty to render a verdict in accordance with the dictates of justice and [is] not a direct appeal by the prosecutor to take religion into account[,]" is not improper. *Id.* at 648-49, 445 S.E.2d at 897.

In this case, the prosecutor's references to God included the phrases "Thank God" and "God help those . . . ." Such appeals are unlikely to "pose a danger of distracting the jury from its sole and exclusive duty of applying secular law." *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002) (citation omitted). As the State argues, such appeals and phrases are common idioms in standard usage. Moreover, four references to "God" do not rise to the level of "extensive references to religion." *See Ingle*, 336 N.C. at 648, 445 S.E.2d at 897. Defendant has not shown the

prosecutor's religious references in this matter were improper to warrant intervention by the trial court or to declare a mistrial. *See id.*

2. Statements of Law and Application of Fact

"Incorrect statements of law in closing arguments are improper." *State v. Ratliff*, 341 N.C. 610, 616, 461 S.E.2d 325, 328 (1995). However, attorneys have the latitude to "argue to the jury the law, the facts in evidence and all reasonable inferences drawn therefrom." *State v. Womble*, 343 N.C. 667, 692, 473 S.E.2d 291, 305 (1996) (citation omitted). The statement, "God help those who drive on a highway after the defendant is out there having something to drink," does not misstate the law, but was a reasonable inference based upon the facts of the case and the applicable law.

To prove an offense of impaired driving, the State must show the defendant's mental or physical faculties were appreciably impaired, or show an alcohol concentration of 0.08 or greater. *State v. McDonald*, 151 N.C. App. 236, 244, 565 S.E.2d 273, 277 (2002); *see also* N.C. Gen. Stat. § 20-138.1(a) (2017). The State presented evidence of Defendant speeding, the smell of alcohol on her breath, her alco-sensor results at the scene, her initial denial of and later admitted consumption of alcohol, her glassy eyes, her difficulty performing field sobriety tests, and her 0.10 alcohol concentration level. Taken together, it was a reasonable inference that Defendant was a danger to her passengers and other drivers because she had

consumed alcohol in excess of statutory allowances. These facts are supported by the evidence in the record, and not solely based upon her having admitted to consuming some alcohol.

Similarly, the prosecutor's statement, "It doesn't matter how she felt. It doesn't matter how her friends thought she felt or thought she acted," is a reasonable inference in this case. Defendant presented evidence to rebut the State's evidence, namely Defendant's knee problems, the observations and perceptions of her colleagues, her opinion of her faculties, and the possible effects of her bariatric surgery upon the results of the intoxilyzer test.

"The jury's role is to weigh evidence, assess witness credibility, assign probative value to the evidence and testimony, and determine what the evidence proves or fails to prove." *State v. Moore*, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012) (citations omitted). Further, a prosecutor "can argue to the jury that they should not believe a witness[.]" *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 345 (1967).

Defendant cites *Elonis v. United States*, __ U.S. __, 192 L. Ed. 2d 1 (2015), to support her assertion the prosecutor's use of the phrase "it doesn't matter" is significant. The defendant in *Elonis* was charged with interstate communication of threats, a violation of 18 U.S.C. § 875(c). *Id.* at __, 192 L. Ed. 2d at 6. In its closing argument, the Government stated it was irrelevant whether the defendant intended

his postings to be threats, stating, "it doesn't matter what he thinks." *Id.* at __, 192 L. Ed. 2d at 11.

The Supreme Court of the United States found that it did matter: "the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.* at __, 192 L. Ed. 2d at 17.

Unlike the U.S. Code provision in *Elonis*, there is no specific intent requirement for a conviction under N.C. Gen. Stat. § 20-138.1(a):

> A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
> (1) While under the influence of an impairing substance; or
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration[.]

Defendant's opinion, and the opinion of her colleagues, was evidence offered to rebut the State's evidence that Defendant was, in fact, impaired. Viewing the prosecutor's argument in context, it is reasonable to conclude the challenged statement is a proper inference based upon the facts before the jury and law in this case. *See Womble*, 343 N.C. at 692, 473 S.E.2d at 305.

3. Events Outside the Record

Defendant argues the prosecutor's statement, "Thank God laws like this help stop the drunks like our defendant stay off our roads," invokes other impaired driving cases outside the record. Defendant cites *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985), to support this assertion.

In *Scott*, the prosecutor stated,

> Now, we often hear, we often read in the paper or hear on television or anything else, something that happens, there's a lot of public sentiment at this point against driving and drinking, causing accidents on the highway. And, you know, you read these things and you hear these things and you think to yourself, "My God, they ought to do something about that." . . .
>
> . . . .
>
> Well, ladies and gentlemen, the buck stops here. You twelve judges in Cumberland County have become the "they".

Id. at 311, 333 S.E.2d at 297.

The statements "the buck stops here" and referring to the jury as "[y]ou twelve judges" and "the 'they'" were not improper, as "[t]hese statements correctly informed the jury that for purposes of the defendant's trial, the jury had become the representatives of the community." *Id.* However, the statements were improper when they referenced the public sentiment concerning other instances of drinking and driving which were causing accidents. *Id.* at 312, 333 S.E.2d at 298. This statement went outside of the record and "appealed to the jury to convict the defendant because impaired drivers had caused other accidents." *Id.*

Unlike in *Scott*, the statements in this case do not reference public sentiment or other accidents that may have occurred outside the record. The clear reference is to Defendant and her intoxicated driving, which led to the charge. Further, the prosecutor's argument asserting, "It is the jury's duty to find the defendant guilty to prevent such things from happening again," "correctly informed the jury that for purposes of the defendant's trial, the jury had become the representatives of the community." *Id.* at 311, 333 S.E.2d at 297.

Further, the statement "drunks like our defendant" was not grossly inflammatory, but was a characterization based upon the evidence presented at trial. *See State v. Rouse*, 339 N.C. 59, 92, 451 S.E.2d 543, 562 (1994) (prosecutor's labeling of defendant as a "maniac", a "mean, cold-blood killer" and a "violent murderer" was not improper where supported by the evidence), *overruled on other grounds by State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309 (2006).

Because Defendant has failed to show the prosecutor's closing statements were improper, we need not proceed through the second step of analysis to determine if the statements may have prejudiced Defendant. *See Jones*, 355 N.C. at 131, 558 S.E.2d at 106.

B. Denial of Special Instruction

Defendant acknowledges the Supreme Court of North Carolina's decision of *State v. Godwin*, 369 N.C. 604, 800 S.E.2d 47 (2017), but argues that precedent does

not control the outcome here, as the prosecutor in this case made improper remarks. As we have found the remarks of the prosecutor were not improper, the outcome of *Godwin* is applicable in this case.

Godwin recognized that "[w]hen a defendant requests a special jury instruction that is correct in law and supported by the evidence, the court must give the instruction *in substance*." *Id.* at 613, 800 S.E.2d at 53 (emphasis supplied) (citing *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976)). If that substance is embodied in the pattern or standard jury instructions given by the trial court, "no further instructions [are] necessary." *Godwin*, 369 N.C. at 613, 800 S.E.2d at 53 (quoting *State v. Green*, 305 N.C. 463, 477, 290 S.E.2d 625, 633 (1982)).

The defendant in *Godwin* had requested special jury instructions indicating the jury "was not compelled to find defendant's alcohol concentration to be 0.08 or more based on the result of the chemical analysis." *Id.* at 614, 800 S.E.2d at 53. The trial court denied the defendant's request, and instead followed the pattern jury instructions on impaired driving. *Id.*

These instructions included that the State could prove impairment by an alcohol concentration of 0.08 or more, and that chemical analysis was "deemed sufficient evidence to prove a person's alcohol concentration." *Id.*; *see* N.C. Gen. Stat. § 20-138.1(a) ("The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration"). The jury was further instructed on their

role as the "sole judges of the credibility of each witness and the weight to be given to the testimony of each witness." *Godwin*, 369 N.C. at 614, 800 S.E.2d at 53.

Our Supreme Court concluded:

> These statements signaled to the jury that it was free to analyze and weigh the effect of the breathalyzer evidence along with all the evidence presented during the trial. Therefore, we hold that the standard jury instruction on credibility was sufficient in this case and that the trial court adequately conveyed the substance of defendant's requested instructions to the jury.

Id. at 614-15, 800 S.E.2d at 54.

Similarly, Defendant requested a special instruction concerning the weight to be given to alcohol levels ascertained through chemical analysis. Like the trial court in *Godwin*, the trial court in this case followed the pattern jury instructions and properly charged the jury with their role as fact-finders and evaluators of the evidence and presented testimony. As in *Godwin*, the substance of Defendant's special instruction was presented to the jury. Defendant's arguments are overruled. *See id.*

C. Denial of Defendant's Motion to Reconstruct the Record and Denial of Meaningful Appellate Review

Section 15A-1241 of the North Carolina General Statutes does not require closing arguments to be recorded, but "[w]hen a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the

matter to which objection was made." N.C. Gen. Stat. § 15A-1241(a), (c) (2017). Defendant's counsel requested the trial judge to reconstruct the prosecutor's closing argument a number of times, which the trial judge refused to do.

Presuming the trial court erred in denying Defendant's motion to reconstruct the closing arguments under N.C. Gen. Stat. § 15A-1241(c), Defendant cannot show prejudice to warrant a new trial, as she has been provided with meaningful and thorough appellate review of the issues she asserts. "The unavailability of a verbatim transcript does not automatically constitute error." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006) (citation omitted). Defendant must show how the alleged deficiency in the record prejudiced her. *Id.*

"General allegations of prejudice are insufficient to show reversible error." *Id.* "[T]he absence of a complete transcript does not prejudice the defendant where alternatives are available that would fulfill the same functions as a transcript and provide the defendant with a meaningful appeal." *State v. Lawrence*, 352 N.C. 1, 16, 530 S.E.2d 807, 817 (2000) (citations omitted).

While the *verbatim* of the prosecutor's entire closing argument was not recorded or reconstructed by the trial court, we can adequately review Defendant's asserted errors on appeal. The transcript contains both the end of the prosecutor's argument, as well as the discussion among the trial judge, the prosecutor, and defense counsel regarding Defendant's objections to the closing argument and defense

counsel's reconstruction of the prosecutor's closing argument. Both defense counsel and the prosecutor submitted sworn affidavits describing the closing argument. Both affidavits were allowed into the record, in addition to the transcript.

Even without a complete *verbatim* transcript or reconstruction by the trial court, the partial transcript and both parties' affidavits of the content of the closing argument provide this Court with the tools and materials needed to conduct a meaningful appellate review to overcome Defendant's claim of prejudice. *See Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616 (1998) ("Defendant cannot, however, show prejudice in the instant case as the record includes both parties' versions of the . . . proceedings."). Defendant's claim of prejudice is overruled. *See id.*

V. Conclusion

The prosecutor's closing argument, adequately reproduced and reported through the partial transcript and both counsels' affidavits, does not contain improper statements to award a mistrial. Defendant erroneously argues the State must prove the trial court's alleged statutory error in refusing to reconstruct the arguments was "harmless beyond a reasonable doubt," the incorrect standard for this alleged statutory error. The absence of improper closing argument compels us to follow *Godwin*. 369 N.C. at 614-15, 800 S.E.2d at 54.

Defendant's counsel and the prosecutor submitted affidavits, along with the partial transcript from trial, to permit an adequate appellate review of her objections

to the closing argument. Defendant has failed to show prejudicial errors in the trial court overruling defense counsel's objections to the prosecutor's closing argument or in initially failing to record or reconstruct the prosecutor's closing argument. We find no prejudicial errors in the jury's conviction or in the judgment entered thereon. *It is so ordered.*

NO PREJUDICIAL ERROR.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).