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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1277

Filed: 15 May 2018

Cabarrus County, Nos. 15 CRS 1126, 51906

STATE OF NORTH CAROLINA

v.

DAMIEN MACKINS

Appeal by defendant from judgment entered 25 April 2017 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 7 May 2018.

Attorney General Joshua H. Stein, by Associate Attorney General Cara Byrne, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.

TYSON, Judge.

Damien Mackins ("Defendant") appeals from a judgment entered upon his convictions for larceny from a merchant, resisting a public officer, and having attained habitual felon status. We find no error.

I. Factual Background

On 17 April 2015, Defendant entered a department store located in Charlotte, North Carolina. A loss prevention officer observed Defendant on surveillance cameras as he pulled a tool out of his pocket, removed security sensors off of two pairs of sunglasses, and discarded the sensors. The officer further observed Defendant conceal a pair of shoes inside a plastic bag he had carried into the store. Defendant then exited the store without paying for any items. The loss prevention officer contacted the Concord Police Department, as he followed Defendant out of the store. Defendant jogged to his car, got in, and drove away.

A Concord Police Department officer received a call regarding the theft, as well as a description of Defendant's vehicle. A short time later, the officer spotted Defendant's vehicle and initiated a traffic stop. Defendant was alone in the vehicle. Inside of the vehicle, on the passenger-side floor board, the officer saw the shoes that had been stolen from the department store. The officer asked Defendant to step out of the vehicle and immediately saw a pair of sunglasses in the driver-side door pocket, with a white barcode still attached. In sum, the officer found two pairs of sunglasses inside Defendant's vehicle with the tags still attached, but no security sensors. The officer then searched Defendant's person and found a pair of wire cutters in Defendant's right front pocket.

After finding the wire cutters, the officer put them on top of the car and pulled out a pair of handcuffs. As he attempted to place Defendant in handcuffs, Defendant

pushed the officer and ran away. Defendant ran approximately 300 yards into an open field before he gave up and laid down upon the ground.

On 4 May 2015, Defendant was indicted for larceny from a merchant, misdemeanor larceny, and resisting a public officer. During opening arguments at trial, the prosecutor made the following statement:

> The officer's going to tell you that when he got up to the car, this defendant was the driver, and there was no one else in the car. Pay close attention when he tells you that he found the shoes and the sunglasses in the car. I also want you to pay close attention when he tells you that when he searched the defendant, he found those wire cutters right in his front right pocket.
>
> And you're also going to hear that when [the officer] went to detain him to place him under arrest or detain him for the investigation of the larceny, the defendant, again, ran. He ran all the way across the guardrail from Burton Smith Blvd., all the way over to a vacant lot between Carrabba's and another business. You'll get to see how far he ran. And even then, when [the officer] caught up with him, he didn't stop. He refused to put his hands behind his back.
>
> Now, finally, [the officer] was able to arrest him. They returned the shoes and the sunglasses back to [the department store], and they collected the wire cutters, and the cut sensors, where did they find them? You're going to hear they found those sensors right in the men's shoes department; right where the defendant left them.
>
> *Ladies and gentlemen, this defendant is still running. He won't stop running. But at the end of this case, I'm going to stand before you again, and I'm going to ask you not to let him run anymore. I'm going to ask you to find him guilty.* (Emphasis supplied).

Immediately after the prosecutor completed her opening statement, the trial judge sent the jury to the jury room and expressed his concern to the parties that the prosecutor's argument constituted a "reference to the defendant's failure to plead guilty in violation of his constitutional rights for a jury trial." The prosecutor denied such intent. Defendant moved for a mistrial. After a brief recess, the trial court denied the motion.

Defendant's counsel asked for a curative instruction, in which the prosecutor's statement was specifically referenced, but the trial court denied the request. The trial court repeated the instructions to the jury that Defendant had a right to a trial by jury, there was no burden on Defendant, and the fact he was charged with a crime was not evidence of guilt.

The jury convicted Defendant of larceny from a merchant, resisting a public officer, and attaining habitual felon status. The trial court consolidated the convictions for judgment and sentenced Defendant to an active term of 95 to 126 months of imprisonment. Defendant gave notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court on appeal from a final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017) and N.C. Gen. Stat. § 15A-1444(a) (2017).

III. Issue

Defendant's sole argument on appeal asserts the prosecutor's statement constituted an improper reference to his decision to plead not guilty, and the trial court erred by failing to give a curative instruction. Defendant argues the trial court's failure to remedy the prosecutor's statement was not harmless error.

IV. Standard of Review

Defendant's counsel did not object upon hearing the prosecutor's opening statement. "[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Fletcher*, 348 N.C. 292, 322, 500 S.E.2d 668, 685 (1998) (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996)), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999). "To make this showing, defendant must demonstrate that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Campbell*, 359 N.C. 644, 676, 617 S.E.2d 1, 21 (2005) (citation and internal quotation marks omitted).

V. Analysis

"It is well established that a defendant has the right to a trial by an impartial jury and a verdict based only on the evidence developed at trial." *State v. Barnes*, 345 N.C. 184, 226, 481 S.E.2d 44, 67 (1997) (citing *Turner v. Louisiana*, 379 U.S. 466, 471-

72, 13 L. Ed. 2d 424, 428-29 (1965)). "Further, a criminal defendant possesses an absolute constitutional right to plead not guilty and be tried before a jury, and 'should not and [cannot] be punished for exercising that right.'" *State v. Thompson*, 118 N.C. App. 33, 41, 454 S.E.2d 271, 276 (1995) (quoting *State v. Langford*, 319 N.C. 340, 345, 354 S.E.2d 523, 526 (1987)). Consequently, a prosecutor's arguments that a criminal defendant has failed to plead guilty and thereby put the State to its burden of proof is impermissible and violates his Sixth Amendment right to a jury trial. *Id.*

We must first determine whether the prosecutor's comments were, in actuality, an improper comment upon Defendant's exercise of a constitutional right. *Id.* at 42, 454 S.E.2d at 276. Where such error occurs, it "is not cured by later instruction in the court's jury charge[.]" *Id.* (citation omitted). It may be cured, however, "by withdrawal of the remark or by an immediate statement from the court that it was improper, followed by an instruction to the jury not to consider [it] . . . ." *State v. Reid*, 334 N.C. 551, 556, 434 S.E.2d 193, 197 (1993) (citation omitted). "[A trial] court's failure to give a curative instruction after such a reference does not warrant a reversal, however, if the State shows that the error was harmless beyond a reasonable doubt." *State v. Larry*, 345 N.C. 497, 524, 481 S.E.2d 907, 923 (citations omitted), *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997).

Here, the prosecutor's argument that Defendant was "still running," where the evidence showed his flight, was ambiguous. The prosecutor claimed that, to the

extent that her argument could be construed as a reference to Defendant exercising his right to a jury trial, it was unintentional. The prosecutor stated she was instead remarking upon Defendant's flight from arrest, and that her primary purpose in making the argument was to demonstrate Defendant's "consciousness of guilt."

We conclude, at worst, the prosecutor's argument was an indirect reference to Defendant's failure to plead guilty. *Cf. State v. McCall*, 286 N.C. 472, 486, 212 S.E.2d 132, 140-41 (1975) (awarding defendant a new trial after the prosecutor "commented directly and clearly. . . [and] called attention to defendant's failure to testify in his own behalf at the trial."). Here, the trial court declined Defendant's request for a curative instruction specifically referencing the prosecutor's statement for fear of calling greater attention to the statement. Under these circumstances, we do not find the prosecutor's comments constitute an extreme impropriety. We conclude the trial court did not abuse its discretion by refusing to give a more specific curative instruction.

Presuming, *arguendo,* the trial court's failure to give an immediate, more specific curative instruction was an abuse of discretion, we conclude that this failure would be harmless error in light of the overwhelming evidence presented of Defendant's guilt. The loss prevention officer testified he had personally observed Defendant remove the security sensors from sunglasses and conceal the sunglasses and a pair of shoes. Defendant exited the store without paying for the merchandise.

The officer identified Defendant at trial. The State also presented video footage of the theft.

When Defendant was stopped by police, the merchandise stolen from the department store was found inside his car, and wire cutters, apparently the ones used to remove the security sensors, were found upon his person. Finally, Defendant took flight as the officer attempted to arrest him for the theft of the merchandise. *See State v. Rainey*, 198 N.C. App. 427, 439, 680 S.E.2d 760, 770 (2009) ("Evidence of flight does not create a presumption of guilt, but is to be considered with other factors in deciding whether the circumstances 'amount to an admission of guilt or reflect a consciousness of guilt.'") (citation omitted). Defendant's arguments are overruled.

VI. Conclusion

Defendant received a fair trial, free of prejudicial errors he preserved and argued. We find no error in the jury's convictions or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).