

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-519

Filed: 7 January 2020

Forsyth County, Nos. 16 CRS 60970, 60434

STATE OF NORTH CAROLINA

v.

BILLY JACKSON SIMMONS, III, Defendant.

Appeal by defendant from judgments entered 21 September 2018 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 5 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Daniel T. Wilkes, for the State.

Marilyn G. Ozer for defendant-appellant.

YOUNG, Judge.

Where there was overwhelming evidence of defendant's guilt, he cannot show that he was prejudiced by the introduction of jailhouse phone calls. Likewise, defendant cannot show that he was prejudiced by the State's reliance on those phone calls to impeach his credibility, or by his counsel's failure to object to the admission of those phone calls into evidence. Where the evidence tended to show that defendant

continued the conflict after the victim attempted to flee, the trial court did not err in instructing the jury on the aggressor doctrine of self-defense. We find no error.

I. Factual and Procedural Background

On 10 November 2016, Billy Jackson Simmons, III (defendant) went to visit the home of Jeanette Johnson (Johnson), his cousin. As he left the house to purchase cigarettes, he saw a green cab, and its driver, Acara Goldsmith (Goldsmith). On his return to the house, he saw Goldsmith's cab even closer to Johnson's house. Defendant went to the house, gave Johnson the cigarettes, and went out to the street to confront Goldsmith. Johnson called to defendant from the house, and when he turned back to Goldsmith, he saw Goldsmith reaching into his pocket. Defendant raised his hands and backed away to go into the house. Goldsmith then threatened him, and defendant responded by drawing his own weapon and shooting Goldsmith. Defendant did not, however, see a gun in Goldsmith's hand. Goldsmith ultimately died from his injuries.

Virginia Caldwell Hairston (Hairston) witnessed the shooting. While watching the five o'clock news, she heard what sounded like a firecracker going off. When she heard a second noise, she went outside of her home. There, she saw defendant shoot Goldsmith. She watched as Goldsmith rose from the ground and began to flee, and defendant shot him in the back. As she watched, another bystander asked defendant why he did it, and defendant responded, "I'll shoot you too."

On 25 September 2017, defendant was indicted for the second-degree murder of Goldsmith, and for possession of a firearm by a felon. On 21 May 2018, the Grand Jury entered a superseding indictment, replacing the charge of second-degree murder with one of first-degree murder.

At trial, the State sought to present, among other evidence, recordings of phone calls made by defendant from prison. Defendant objected to the introduction of these calls generally, arguing that they were not properly authenticated; the court overruled this objection. One such call was played for the court, and defendant objected to its introduction, on the basis of relevance. The court sustained the objection and excluded the call on a preliminary basis. Subsequently, after defendant presented his evidence, the State requested that the court reconsider the exclusion of the call, for the purpose of rebuttal. Defendant renewed his objection on the grounds of relevance. The trial court overruled the objection and allowed the call to be played for rebuttal.

In advance of trial, defendant provided notice of intent to offer the defense of self-defense. At the jury charge conference, the trial court stated its intent to instruct on the aggressor doctrine of self-defense, over defendant's objection.

The jury returned verdicts finding defendant guilty of second-degree murder and possession of a firearm by a felon. The trial court sentenced defendant to a minimum of 360 and a maximum of 444 months for second-degree murder, and a

minimum of 19 and a maximum of 32 months for possession of a firearm by a felon, to be served consecutively in the North Carolina Department of Adult Correction.

Defendant appeals.

II. Jailhouse Call

In his first argument, defendant contends that the trial court erred in permitting the State to play a recording of a jailhouse phone call for the jury, in permitting the State to use that phone call to impeach his credibility, and in denying his subsequent motion for mistrial based upon defense counsel's failure to object to the admission of the phone call. We disagree.

A. Admission of Evidence

Defendant contends that the State's introduction of the jailhouse phone call was improper and unduly prejudicial, and that the trial court erred in allowing it. Defendant objected to the call on the basis of relevance, and it is on that basis that we review whether the admission of this evidence constituted error.

The phone call at issue consists of a conversation between defendant and his grandmother regarding defendant's choices as to how to mount his defense. In it, defendant observed that his lawyer wanted him to testify, but that he had nothing to say; he made reference to what defense counsel wanted him to say, and how he did not feel comfortable saying it; and he complained that he asked counsel to have the

victim's clothing tested for gunpowder residue because "he probably shot at me," but that counsel didn't want to do so.

"Evidentiary errors are harmless unless a defendant proves that 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, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

Defendant contends that this call was not relevant. Even assuming *arguendo* that this is true, defendant still bears the burden of showing that the admission of this evidence was prejudicial. Notwithstanding defendant's arguments to that effect, we hold that it was not. The evidence at trial included the testimony of an eyewitness who saw defendant shoot the victim, as well as defendant's own testimony that he voluntarily approached the victim, that he fired multiple times at the victim, and that he knew the victim might die from the shooting.

In light of this overwhelming evidence that defendant knowingly and willfully shot the victim, we hold that defendant has not shown that, had this evidence been excluded, "a different result would have been reached at trial." We hold that he has failed to show prejudice, and therefore failed to demonstrate that the trial court erred.

B. New Trial

Additionally, defendant notes that, during its closing, the State referred to how defendant “came up with [his] story.” On appeal, defendant argues that the State’s closing was grossly improper and required a new trial.

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*. In other words, the reviewing court 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.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

Defendant cites our Supreme Court’s decision in *State v. Hembree*, 368 N.C. 2, 770 S.E.2d 77 (2015), for the principle that the insinuation that a defendant not only perjured himself, but colluded with his attorney to concoct a false story, is grossly improper. However, *Hembree* is not entirely applicable to this case.

In *Hembree*, the State suggested that the defendant had manipulated his attorneys and, with their help, crafted a false narrative by which to deceive the jury and the trial court. The State specifically described it as an “elaborate tale” and “smoke screens, . . . to try to confuse you.” *Id.* at 19, 770 S.E.2d at 89. On appeal, our Supreme Court noted that our courts typically find closing arguments grossly

improper where they call a witness or opposing counsel a liar “when there has been no evidence to support the allegation.” *Id.* (quoting *State v. Rogers*, 355 N.C. 420, 462, 562 S.E.2d 859, 885 (2002)). The Court went on to hold that “[w]hether or not defendant committed perjury, there was no evidence showing that he had done so at the behest of his attorneys.” *Id.* at 20, 770 S.E.2d at 89. Accordingly, the Supreme Court held that the comments were grossly improper, and the trial court erred in failing to intervene *ex mero motu*.

The instant case is distinguishable from *Hembree*. While it is true that the State referred to defendant’s narrative as “fictions” and “stories,” it did not suggest that defendant conspired with counsel. Rather, the State observed that defendant came up with his story through his “phone calls to family.” It was in conversations with family, not with counsel, that defendant assembled his narrative.

Moreover, in *Hembree*, the Court specifically noted that there was no evidence showing that defendant had created a false narrative at the behest of counsel. In the instant case, however, the State presented the recording of the phone call as evidence that defendant was discussing his narrative strategy with family. Our Supreme Court has held that, where there “was evidence from which the prosecutor could argue defendant had not told the truth on several occasions, from which, the jury could find that defendant had not told the truth at his trial[,]” and overwhelming evidence to support the defendant’s conviction on the merits, the State’s insinuations

that the defendant is a liar, while improper, are not so grossly improper as to amount to prejudice. *State v. Huey*, 370 N.C. 174, 183, 804 S.E.2d 464, 471 (2017). In the instant case, the phone calls did constitute evidence based upon which a jury could have found defendant's testimony incredible, and as we held above, there was other overwhelming evidence of defendant's guilt, including an eyewitness' and defendant's own testimony.

We recognize that the State's comments were improper. It remains disturbing to this Court the willingness of prosecutors to argue, or even to suggest, that a witness or defendant is lying, as opposed to merely challenging their credibility. However, since defendant did not timely object to these comments at trial, our standard of review in the instant case is not whether the statements were improper, but whether they were "so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." Given that the State in fact presented evidence which could permit the jury to find defendant's testimony incredible, and given the overwhelming evidence against defendant, we hold – as our Supreme Court did in *Huey* – that defendant has not shown that the State's comments were so grossly improper as to amount to prejudice. Accordingly, we hold that the trial court did not err in failing to intervene *ex mero motu*.

C. Mistrial

After the State’s closing argument, defendant moved for a mistrial on the basis of ineffective assistance of counsel, arguing that the phone call created an implication that counsel colluded with defendant “to fabricate a defense[;]” that the attorney failed to put on a surrebuttal to address the call; and that the attorney “compounded that error” in failing to address the call in closing. Notably, after the trial court denied this motion as premature, defendant did not renew it, nor did defendant file a post-conviction motion for appropriate relief.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

Once again, we hold – as we have now held twice – that given the other overwhelming evidence against defendant, he has failed to show prejudice. Even assuming *arguendo* that counsel’s performance “fell below an objective standard of reasonableness” – a fact of which this Court remains unpersuaded – defendant cannot show that, had counsel done more to oppose the introduction of or commentary upon

the phone call, “the result of the proceeding would have been different.” Accordingly, we hold that defendant cannot show prejudice, and has therefore failed to show that the trial court erred in denying his motion for mistrial based upon ineffective assistance of counsel.

III. Jury Instruction

In his second argument, defendant contends that the trial court erred in instructing the jury on the aggressor doctrine of self-defense. We disagree.

A. Standard of Review

“[Arguments] challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

When reviewing a trial court’s denial of a defendant’s request for a self-defense instruction, the appellate court must consider the evidence in the light most favorable to the defendant. *See State v. Webster*, 324 N.C. 385, 391, 378 S.E.2d 748, 752 (1989) (“In determining whether there was any evidence of self-defense presented, the evidence must be interpreted in the light most favorable to defendant.” (citation omitted)). By contrast, when reviewing a trial court’s denial of a defendant’s request to exclude the aggressor instruction from the jury instruction on self-defense, the appellate court does not consider the evidence in a light favorable to the defendant, as it is the province of the jury to resolve any conflict in the evidence in that regard.

State v. Lee, ___ N.C. App. ___, ___, 811 S.E.2d 233, 237 (2018).

B. Analysis

STATE V. SIMMONS

Opinion of the Court

As per defendant's request and the evidence presented, the trial court instructed the jury on the defense of self-defense. However, the trial court, over defendant's objection, also instructed the jury on the aggressor doctrine of self-defense. On appeal, defendant contends that this was error.

The aggressor doctrine provides that a defendant may not receive the benefit of self-defense if he was the aggressor. *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016). An individual is the aggressor if he or she " 'aggressively and willingly enters into a fight without legal excuse or provocation.' " *State v. Potter*, 295 N.C. 126, 144, 244 S.E.2d 397, 409 (1978) (quoting *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971)). Further, " '[a] person is entitled under the law of self-defense to harm another only if he is without fault in provoking, engaging in, or continuing a difficulty with another.' " *State v. Effler*, 207 N.C. App. 91, 98, 698 S.E.2d 547, 552 (2010) (internal quotation marks and citations omitted). "[W]here the evidence does not indicate that the defendant was the aggressor, the trial court should not instruct on that element of self-defense." *State v. Jenkins*, 202 N.C. App. 291, 297, 688 S.E.2d 101, 105 (2010).

Lee, ___ N.C. App. at ___, 811 S.E.2d at 236-37.

In the instant case, defendant's own testimony revealed that it was he who approached the victim. And while it is true that defendant testified as to his belief that the victim was armed, he also testified that he did not see a gun. Perhaps more importantly, the testimony of the eyewitness and medical examiner revealed that defendant shot the victim from behind, after the victim had fallen and was attempting to flee. A defendant who "continues an argument which leads to serious injury or

STATE V. SIMMONS

Opinion of the Court

death may be found to be the aggressor.” *Lee* at ___, 811 S.E.2d at 237. And where the evidence “reflects that the victim was shot from the side and from behind,” this may further support the inference “that defendant shot at the victim only after the victim had quit the argument and was trying to leave.” *State v. Cannon*, 341 N.C. 79, 83, 459 S.E.2d 238, 241 (1995). Accordingly, this evidence supports a determination that, regardless of who instigated hostilities, defendant continued them by shooting the victim while the latter was attempting to flee. This in turn supports an instruction permitting the jury to find that defendant may have been the aggressor, and would therefore not have been entitled to claim self-defense. That is indeed what happened in this case, and we hold that the trial court did not err in giving the instruction, supported as it was by the evidence.

NO ERROR.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).