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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-82

Filed: 21 January 2020

Cleveland County, No. 15 CRS 55243, 2553

STATE OF NORTH CAROLINA

v.

QUAVIS JEROME CLYDE

Appeal by defendant from judgments entered 24 May 2018 by Judge J. Thomas Davis in Cleveland County Superior Court. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph E. Elder, for the State.

Joseph P. Lattimore for defendant-appellant.

TYSON, Judge.

Quavis Jerome Clyde (“Defendant”) appeals from judgments entered after a jury found him guilty of second-degree murder and possession of a firearm by a felon. We find no prejudicial error.

I. Background

Shawn Borders (“Mr. Borders”) rented a room in Brandon Jefferies’ home (“Jefferies”) at 1645 Friendship Road in Shelby. Defendant lived with his mother across the street from Jefferies’ home. Ms. Janaiya Miller (“Ms. Miller”) had been “seeing” Mr. Borders for eight months. Ms. Miller lived with her mother at their home in Kingstown. Ms. Miller went to visit Mr. Borders on 22 November 2015 at Jefferies’ house.

Around 9:00 p.m. on the evening of 24 November 2015, Ms. Miller decided to return home. Mr. Borders and Ms. Miller entered Mr. Borders’ car and he began to back the car down the driveway. Defendant approached the car on the driver’s side and asked for a ride to Shelby. Mr. Borders replied “No” to Defendant, because they were traveling to Ms. Miller’s home in Kingstown, the opposite direction from Shelby. Defendant then offered to pay Mr. Borders for a ride. Mr. Borders requested to see the money.

Defendant responded, “you’re a b...ch,” “you’re fake,” and “f...k you.” Ms. Miller testified she observed Defendant maneuvering his hands inside his pockets. Ms. Miller also testified Mr. Borders asked Defendant if he was going to shoot them.

Mr. Borders placed the car into park, removed his seat belt, and exited the car. A physical altercation between Defendant and Mr. Borders ensued. The men began “pushing each other back and forth” beside the car. Ms. Miller pleaded with the men to stop fighting, became scared, exited the car, and started walking towards Jefferies’

residence. Ms. Miller never saw a gun, but she observed two separate muzzle blasts and heard three shots. She then turned and ran away. Ms. Miller heard Defendant state Mr. Borders had “started it.”

Ms. Miller returned to the scene when ambulances arrived and observed Mr. Borders laying on the ground. At 9:16 p.m., Cleveland County Sheriff’s Deputy Steve Bonino (“Detective Bonino”) responded to the scene and observed Mr. Borders not breathing or blinking. Jefferies was rendering first aid to Mr. Borders. Emergency Medical Services personnel arrived on the scene and paramedics began efforts to resuscitate Mr. Borders. They were unable to revive him.

Cleveland County Sheriff’s Deputy Melanie Hicks (“Deputy Hicks”) arrived and observed Mr. Borders’ body located fifteen feet in front of his car. Deputy Hicks further observed the driver’s door of the car open and the lights inside the car illuminated. Deputy Hicks went to Defendant’s mother’s home to speak with Defendant but was unable to locate him. No weapon or shell casings were recovered at the scene.

A. 28 November 2015 Interview

Defendant surrendered to Cleveland County Sheriff’s Detective Christy Clark. (“Detective Clark”) on 28 November 2015. Defendant knowingly and voluntarily waived his *Miranda* rights after arrest and processing at the jail. He was interviewed

by and spoke with Detective Clark about the incident. Detective Clark recorded this conversation.

Defendant stated he approached the driver's side of Mr. Borders' car to request a ride. Mr. Borders declined, jumped out of his car, grabbed Defendant by the shirt, and put him up against the car. Defendant asserted he broke free, tried to go home, but Mr. Borders grabbed him by the hood of his jacket and again threw him against the car. Defendant ran from the scene and told his mother that something had gone off during the altercation.

B. Defendant's Trial

Defendant was indicted for first-degree murder and possession of a firearm by felon on 7 December 2015. Defendant's trial on the indicted charges began 21 May 2018.

1. *Testimony of Dr. Thomas Owens*

Mr. Borders' body was taken to the Mecklenburg County Medical Examiner for an autopsy on 25 November 2015. Chief Medical Examiner Thomas Owens, M.D. ("Dr. Owens") measured Mr. Borders at six feet, one inches tall and weighing 179 pounds. Dr. Owens observed two gunshot wounds to Mr. Borders' torso.

One wound was located at the "upper part of his left chest" and the other was observed on the rear of Mr. Borders' left shoulder. Dr. Owens testified the bullet in the front had entered the "chest above and past the nipple," traveled "through the left

lung,” and “grazed the heart” before it entered the spinal column and lodged in the spinal cord. The second bullet entered the back of Mr. Borders’ left shoulder and caused “a flesh wound” as it traveled and exited under his arm.

Dr. Owens also testified the bullet to the chest resulted in both a significant amount of blood loss and immediate paralysis in Mr. Borders’ legs. This upper wound caused roughly two liters of blood to settle into his chest cavity. Dr. Owens could not opine concerning of the position of Mr. Borders’ body at the time he was shot, nor determine the distance between the body and the gun at the time the gun was fired.

Dr. Owens opined the bullet path in Mr. Borders’ rear shoulder appeared to be “going down.” Dr. Owens did not locate any other wounds on Mr. Borders’ hands or arms.

2. Defendant’s Trial Testimony

Defendant testified at his trial. He stated he had known Mr. Borders all of his life. Defendant knew of Mr. Borders’ past violent acts, including his alleged past involvement in multiple shootings.

Defendant was at his mother’s house across the street from Jefferies’ home on the evening of 24 November 2015. Defendant admitted to consuming alcohol and smoking marijuana that day. A friend in Shelby called Defendant, looking to acquire marijuana. Defendant noticed Mr. Borders was inside his car about to leave. Defendant told his friend he would try to arrange a ride to Shelby with Mr. Borders.

Defendant further testified he approached Mr. Borders' vehicle in the driveway and asked him for a ride to Shelby. Mr. Borders declined. Defendant then offered to pay if Mr. Borders would drive him to Shelby. Defendant testified that Mr. Borders "got a smart mouth," and Defendant responded, "FU and the ride."

Defendant testified Mr. Borders put the car into park, exited the car, confronted Defendant, grabbed him, and threw him onto the windshield of the car. Mr. Borders allegedly began choking Defendant until he got loose from the hold. Defendant testified he placed Mr. Borders in a headlock "for a good minute" after he was free of the hold.

Defendant testified Mr. Borders introduced the gun into the altercation. As Defendant held Mr. Borders in this headlock, Mr. Borders allegedly reached into his pocket for a gun. Defendant knocked the gun out of Mr. Borders' pocket. As Mr. Borders lunged for the gun, Defendant pushed him away and grabbed the gun. Mr. Borders began to choke Defendant and tried take the gun away from Defendant. Defendant was able to get free of Mr. Borders' chokehold, turned, and fired the gun three times. Defendant testified he then dropped the gun and fled the scene.

At the close of the arguments, the trial judge instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter and possession of a firearm by a felon. The jury was not instructed on the "stand-your-ground" component of self-defense. The jury returned a verdict of guilty of second-degree murder and possession

of firearm by a felon. Defendant was sentenced to an active term of 300 to 372 months for the second-degree murder conviction and 19 to 35 months for the conviction of possession of a firearm by a felon. Defendant noticed appeal in open court.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Issues

Defendant argues: (1) the State's evidence was insufficient to submit or support a conviction for second-degree murder; (2) the trial court committed plain error by: (a) admitting inadmissible hearsay, (b) failing to redact the portion of the Defendant's recorded interview where police officers provided impermissible opinions, and (c) allowing the prosecutor to cross-examine Defendant about invoking his right to remain silent when posed with a question from police officers; and, (3) the trial court abused its discretion by not intervening *ex mero motu* in the absence of an objection, where the prosecutor allegedly speculated during closing argument.

IV. Defendant's Motion to Dismiss

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial

evidence (1) of each essential elements of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citations omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the benefit of every reasonable inference and resolving any contradiction in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Analysis

Defendant argues the trial court erred by denying his motion to dismiss. Second-degree murder occurs when a human life is taken with malice and without excuse. *See State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). An unlawful killing by a deadly weapon raises a presumption the act was intentional and done with malice. *State v. Knight*, 87 N.C. App. 125, 128-29, 360 S.E.2d 125, 128 (1987).

"Malice may be express or implied and it need not amount to hatred or ill will, but may be found if there is an intentional taking of the life of another without just cause, excuse or justification." *Robbins*, 309 N.C. at 775, 309 S.E.2d at 190 (citing *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 893 (1963)).

The State's evidence tended to show Defendant approached Mr. Borders and Ms. Miller, while both were seated inside the Mr. Border's vehicle, which was located in the driveway of Mr. Border's residence. Defendant admittedly cursed at Mr. Borders. An altercation between Defendant and Mr. Borders ensued. Ms. Miller testified she heard three shots and observed two muzzle blasts.

Testimony tended to show Defendant possessed a gun. Mr. Borders suffered two gunshot wounds, one being fatal. One of the gunshot wounds inflicted on Mr. Borders was consistent with a downward path of travel for the bullet. Defendant was a larger and younger man than Mr. Borders. Mr. Borders did not have any wounds to his hands or arms. No gun or shell casings were found at the scene. After the altercation, Defendant told his daughter, "I don't like nobody putting their hands on me" and then told his wife, "as soon as he let me loose, I shot him in the face two times."

This testimony along with Defendant's admitted use of a firearm constitutes substantial evidence to support the submission to and the jury's finding of malice necessary to convict Defendant of second-degree murder. *See Knight*, 87 N.C. App. at 128-29, 360 S.E.2d at 128 ("Where, however, there is evidence that the killing occurred in the heat of passion, or . . . there is some evidence of self-defense, the mandatory presumptions of unlawfulness and malice disappear . . . the jury is permitted, though not compelled, to infer malice and unlawfulness from the

intentional infliction of a wound with a deadly weapon proximately resulting in death.” (citations omitted)).

When viewed in the light most favorable to the State, the evidence is sufficient to deny Defendant’s motion to dismiss and to support a jury’s finding and verdict that Defendant intentionally assaulted and shot Mr. Borders with a deadly weapon that proximately caused his death. This argument is overruled.

V. Hearsay

A. Standard of Review

“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule of law without any such action never the less may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). The purported erroneous admission of evidence without objection or preservation is reviewed for plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

Plain error arises when the error is “so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations omitted). “Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the

jury probably would have reached a different result” to be awarded a new trial. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

Defendant argues Ms. Miller’s testimony that Defendant was known to carry a gun was inadmissible hearsay. Defendant failed to object and argues plain error.

“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801 (2019). Hearsay is inadmissible except as provided by the statutes or by the rules of evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2019).

Ms. Miller testified Mr. Borders had told her that Defendant had started carrying a gun in October 2015 and had threatened Mr. Borders with the gun. Defendant’s attorney failed to object to the witness’s testimony and introduction of this evidence.

A “prior consistent statement” is a hearsay statement consistent with a witness’s testimony given during the trial. *State v. Taylor*, 344 N.C. 31, 48, 473 S.E.2d 596, 606 (1996). A “[w]itness’ prior consistent statements may be admitted to corroborate the witness’ sworn trial testimony but prior statements admitted for corroborative purposes may not be used as substantive evidence.” *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 240 (2000).

In *State v. Ramey*, the Supreme Court of North Carolina addressed the admissibility of prior statements by a witness, testifying at trial, as corroborative evidence:

the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. Our prior statements are disapproved to the extent that they indicate that additional or "new" information, contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence. However, the witness's prior statements as to facts not referred to in his trial testimony and not tending to add weight or credibility to it are not admissible as corroborative evidence. Additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony.

State v. Ramey, 318 N.C. 457, 469, 349 S.E.2d 566, 573-74 (1986) (citations and emphasis omitted).

"However, while a witness may corroborate herself, she may not do so with the extra-judicial declarations of someone other than the witness purportedly being corroborated." *State v. Freeman*, 93 N.C. App. 380, 387-88, 378 S.E.2d 545, 550 (1989) (citation and internal quotation marks omitted).

Ms. Miller previously told officers she was scared when the altercation between Defendant and Mr. Borders began. Ms. Miller testified: "I was afraid that maybe he would start shooting at the car. I just was scared. That's all. I was afraid." The basis for her fear was prior knowledge that Defendant was known to carry a gun. Ms.

Miller's statement was recorded on the night of the incident, is consistent with her testimony at trial, and corroborates her testimony of fear. She believed Defendant carried a gun, observed Defendant's hands moving inside his pockets, and adduced he might shoot the occupants of the car. *Ramey*, 318 N.C. at 469, 349 S.E.2d at 574.

Presuming, without deciding, this admission was erroneous, Defendant failed to object to this testimony and does not carry his burden under plain error review to show this testimony was so prejudicial the jury would have reached a different outcome if excluded. *See Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. Defendant's argument to award a new trial for plain error is overruled.

VI. Failure to Redact Recorded Interview

Defendant argues the admission of his unredacted recorded interview with Detective Clark, who stated "I think you did have a gun," was prejudicial. Defendant failed to object and argues plain error requires a new trial.

Defendant surrendered to law enforcement officers, was arrested, waived his *Miranda* rights, and gave a voluntary and recorded statement to Detective Clark. Defendant's statement details what he asserted had occurred on the evening of 24 November 2015. Detective Clark asked follow-up questions and responded with her own theory of whether Defendant or Mr. Borders had introduced a gun into the fight.

Detective Clark responded to Defendant's assertions: "everything that you've told me matches up with everything that we've been told with the exception that you

had a gun.” Defendant denied he had brought the gun to the scene. Detective Clark responded to Defendant’s denial: “I’ve been doing this for quite some time, and I’m going to tell you what I think . . . I think that you did have a gun.”

Defendant argues the introduction of Detective Clark’s statement is not relevant under N.C. Gen. Stat. § 8C-1, Rule 401 (2019). Rule 401 provides: “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” *Id.*

The unobjected to evidence introduced at Defendant’s trial tended to show the following. Four days after Mr. Border’s death, Defendant maintained in his recorded interview that he did not know what had happened to Mr. Borders. Defendant did not assert Mr. Borders had possession of the gun or he had acted in self-defense during the interview with Detective Clark. No gun was found at the crime scene. For the first time at trial, Defendant testified Mr. Borders choked him and they struggled for control of the gun before Defendant shot and killed him.

Ms. Miller testified Defendant was moving his hands inside his pockets as he was asking for the ride to Shelby, and she was afraid he was armed. Mr. Borders asked Defendant about a gun and if Defendant was going to shoot them. Defendant told his wife he had shot Mr. Borders. All this properly admitted evidence

undermines any claim of prejudice due to the arguably irrelevant evidence under Rule 401 to set aside the jury's verdict.

Presuming, without deciding, the admission of Defendant's voluntary statements and responses during Detective Clark's recorded interview was error, Defendant failed to object when the evidence was admitted and has failed to demonstrate any prejudice under plain error review to warrant a new trial.

VII. State's Impeachment of Defendant's Inconsistent Statement

Defendant argues he suffered prejudicial error by the State impeaching him with a prior inconsistent statement made before he invoked his *Miranda* rights. A criminal defendant is entitled to remain silent and to refuse to testify. U.S. Const. amend. V. A defendant's silence may not be used against him, and the State may not introduce evidence that defendant exercised the right to remain silent. *State v. Moore*, 366 N.C. App. 100, 104, 726 S.E.2d 168, 172 (2012). The State cannot use or assert the invocation of *Miranda* rights as a basis for impeachment. *Doyle v. Ohio*, 426 U.S. 610, 618, 49 L. Ed. 2d 91, 98 (1976).

In a later case, the Supreme Court of the United States distinguished and limited its statement in *Doyle* and stated the prosecution can use a defendant's prior statement to impeach the credibility of a defendant in limited circumstances:

Doyle [does] not apply to cross-examination that merely inquiries into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda*

warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

Anderson v. Charles, 447 U.S. 404, 407-08, 65 L. Ed. 2d 222, 226 (1980).

Defendant voluntarily spoke with Detective Clark four days after Mr. Borders' killing. Defendant was provided *Miranda* warnings prior to making any statements. The interview was recorded with his knowledge. Defendant never asserted during the recorded interview that Mr. Borders choked him, or that Borders carried or reached for a gun in the altercation.

The State's cross examination challenged Defendant's credibility with his prior voluntary and inconsistent statements and made "no unfair use of silence." *Id.* The holding in *Anderson* is controlling where Defendant's prior inconsistent statements were offered to challenge Defendant's credibility. *Id.* Presuming, without deciding, the cross examination of Defendant was improper Defendant has not shown prejudice under plain error review to warrant a new trial.

VIII. Improper Closing Argument

A. Standard of Review

"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).

Our Supreme Court further expounded: “Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel’s remarks is extreme and is clearly calculated to prejudice the jury.” *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984). Our Supreme Court also cautioned that an appellate court should “not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury.” *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976).

B. Analysis

“The prosecuting attorney should use every honorable means to secure a conviction, but it is his duty to exercise proper restraint so as to avoid misconduct, unfair methods or overzealous partisanship which would result in taking unfair advantage of the accused.” *State v. Holmes*, 296 N.C. 47, 50, 249 S.E.2d 380, 382 (1978). Prosecutors’ arguments must be devoid of appeals to passion or prejudice. *Jones*, 355 N.C. at 135, 558 S.E.2d at 108.

Defendant testified he was celebrating his birthday at his mother’s house with friends, when he received a telephone call to sell and deliver drugs to someone in Shelby. Defendant continued: “I had this - - a little marijuana. He asked me to bring some back to town. And I told him I had just left town and I really didn’t have a ride right now to get to town.”

The State asserted during closing arguments to the jury:

He gets a phone call from somebody. And there was a reason he wanted to go to town. I don't think he just wanted a ride to town. I think the reason is that somebody called him and asked him to bring some weed. Now if you're going to a weed deal in town, it would make sense that you would take a gun. If you going to a drug deal, it would make sense that you would have a gun with you. Okay? Even though you're not - - Well, you're not supposed to be taking weed to anybody and you're not supposed to have a gun because you're a felon. Okay? So he's the one that brought the gun, and he had a reason for having the gun. Not a legal reason, but a reason.

N.C. Gen. Stat. § 15A-1230(a) provides that during closing arguments:

an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230(a) (2019).

Here, the prosecutor argued the evidence tended to show Defendant was seeking transportation to sell and deliver drugs to someone in Shelby and the pending drug deal was a reason for Defendant to carry a gun. This comment was an argument based upon a reasonable inference supported by the facts and evidence introduced during the State's and Defendant's cases-in-chief. The possession and use of guns at illegal drug transactions is well established. *State v. Smith*, 99 N.C. App. 67, 72, 392

S.E.2d 642, 645 (1990) (“as a practical matter, firearms are frequently involved for protection in the illegal drug trade”).

Sufficient and properly admitted evidence and the inferences thereon support the State’s closing argument. *See State v. Frye*, 341 N.C. 470, 498, 461 S.E.2d 664, 678 (1995). Defendant’s assertion of prejudice under plain error review is without merit and overruled. Here, the trial court’s failure to exercise its discretion to intervene *ex mero motu* does not warrant a new trial. *See State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996) (“When [a] defendant does not object to comments made by the prosecutor during closing arguments, only 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.”).

IX. Ineffective Assistance of Counsel

Defendant argues his trial counsel’s failure to object to Mr. Borders’ out-of-court statement to Ms. Miller and the failure to move to redact Detective Clark’s statements during the recorded interview deprived him of effective assistance of counsel. In order to meet this burden, Defendant must satisfy a two-part test. “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the

‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). “The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel’s errors, there would have been a different result in the proceedings.” *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (citing *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698).

Defendant was tried for first-degree murder and was convicted of second-degree murder. His counsel actively participated and advocated for Defendant during all aspects of the trial. Defendant voluntarily waived his rights, made recorded statements, testified at trial and admitted being present at the scene and shooting Mr. Borders. Given our conclusions that Defendant failed to demonstrate plain error or prejudice to award a new trial, Defendant cannot meet the second prong of *Strickland* to show a different result but for the alleged errors. This argument is overruled.

X. Conclusion

When viewed in the light most favorable to the State, including the reasonable inferences thereon, the State presented sufficient evidence to submit first and second-degree murder, voluntary manslaughter, and possession of a firearm by a felon to the jury. The trial court properly denied Defendant’s motion to dismiss.

Under plain error review, Defendant has not shown prejudicial and reversible error in the exercise of the trial court's discretion by: (1) admitting Ms. Miller's corroborative statement; (2) failing to redact *ex mero motu* portions of Detective Clark's and Defendant's recorded interview; or, (3) allowing the prosecutor to cross-examine Defendant about his voluntary and recorded inconsistent statements. Without objection from Defendant, the trial court's discretionary failure to intervene *ex mero motu* during the State's closing argument was not prejudicial error.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. Defendant has failed to demonstrate prejudicial error under plain error review to merit a new trial. We find no prejudicial error in the jury's verdict or in the judgments entered thereon. *It is so ordered.*

NO PREJUDICIAL ERROR.

Judge COLLINS concurs in part and concurs in the result in part.

Judge BROOK concurs in part and concurs in the result in part.

Report per Rule 30(e).

No. COA19-82 – *State v. Clyde*

COLLINS, Judge, concurring in part and concurring in the result in part.

I fully concur in Sections I through VI, IX, and X, and concur in the result only of Sections VII and VIII of the lead opinion. I concur with Judge Brook's separate opinion, setting forth a different analysis of the issues in Sections VII and VIII.

BROOK, Judge, concurring in part and concurring in the result in part.

I join those parts of the lead opinion regarding the motion to dismiss, redacting the recorded interview, the prior consistent statement, and the ineffective assistance of counsel claim. However, I disagree with the lead opinion’s conclusion that the State’s cross-examination of Defendant and that the challenged remarks during the State’s closing argument were proper. With respect, I concur in the result only and write separately as to these issues.

Impeachment Via Right to Remain Silent

“It is well established that a criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution.” *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (citation omitted). The U.S. Supreme Court has held that it is “fundamentally unfair” and a deprivation of a defendant’s due process rights under the Fourteenth Amendment to impeach the defendant on cross-examination by questioning him about his silence. *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 98 (1976). And our Supreme Court has held that “[a] defendant’s decision to remain silent following his arrest may not be used to infer his guilt, and any comment by the prosecutor on

BROOK, J., concurring in part and concurring in the result in part

the defendant's exercise of his right to silence is unconstitutional." *Ward*, 354 N.C. at 266, 555 S.E.2d at 273 (citation omitted).

In order to establish a violation of due process under the 14th Amendment by an attack on [] pre-trial silence, [a] defendant must at least show that he was given Miranda warnings and was thereby implicitly assured that the exercise of his right to remain silent would carry no penalty.

State v. Hunt, 72 N.C. App. 59, 62, 323 S.E.2d 490, 492 (1984) (citation omitted). It is then improper under the Fourteenth Amendment due process clause to cross-examine a defendant regarding his pre-trial silence if he chooses to take the stand. *See Fletcher v. Weir*, 455 U.S. 603, 606, 102 S. Ct. 1309, 1311-12, 71 L. Ed. 2d 490, 494 (1982).

When a defendant chooses to speak voluntarily after receiving Miranda warnings, however, cross-examination on those statements is permissible if it "merely inquires into prior inconsistent statements." *Anderson v. Charles*, 447 U.S. 404, 408, 100 S. Ct. 2180, 2182, 65 L. Ed. 2d 222, 226 (1980). In *Anderson*, the defendant told police he stole a car from the vicinity of Washtenaw and Hill streets in Ann Arbor. *Id.* at 406, 100 S. Ct. at 2181. He then told the jury at trial that he took the car from Kelly's Tire Company. *Id.* at 405, 100 S. Ct. at 2181. The U.S. Supreme Court explained in upholding this impeachment that "[t]he questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." *Id.* at 409, 100 S. Ct. at 2182. However, "cross-examination

BROOK, J., concurring in part and concurring in the result in part

on prior inconsistent statements is improper if it is intended to elicit meaning from, or comment on, the defendant's exercise of his or her right to remain silent." *State v. Fair*, 354 N.C. 131, 156, 557 S.E.2d 500, 519 (2001) (citation omitted).

In *State v. Shores*, 155 N.C. App. 342, 573 S.E.2d 237 (2002), we held that the prosecutor impermissibly commented on the defendant's right to remain silent under the state and federal constitutions. *Id.* at 352, 573 S.E.2d at 242. The defendant had initially waived his right to remain silent and gave police two short statements on the night of his arrest. *Id.* at 345, 573 S.E.2d at 239. He then exercised his right to remain silent from that point until his testimony at trial, where he "testified to a full exculpatory account of the events." *Id.* at 345-46, 573 S.E.2d at 239. "During cross-examination, the State's attorney repeatedly questioned [the] defendant about whether he had ever" told law enforcement the account he gave at trial. *Id.* The prosecutor also made references to the defendant's silence during closing argument. *Id.* at 348, 573 S.E.2d at 240. We held the defendant's testimony "at trial was not inconsistent with the statements given to police" but simply more detailed and, as a result, the defendant's right to remain silent had been violated. *Id.* at 351, 573 S.E.2d at 242.

Here, the prosecutor's cross-examination of Defendant violated Defendant's right to due process. The State cross-examined Defendant at trial about law enforcement's 28 November 2015 interrogation of him, which occurred after he was

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arrested and provided his Miranda rights. Defendant highlights the following exchange on appeal:

[THE STATE]. Now, you have come in here today and testified that Shawn had a gun, right?

[DEFENDANT]. Yes, ma'am.

[THE STATE]. That the gun fell onto the floor and you grabbed it because you were in fear of your life, right?

[DEFENDANT]. Yes, ma'am.

[THE STATE]. Instead of saying [when questioned by law enforcement on 2015 November 28], "Yeah, Shawn had a gun that day while he was choking me out for one to two minutes, it fell on the ground and I grabbed it," you said, "*I ain't going to answer no more questions.*" Would that have been an appropriate time to explain about the gun?

[DEFENDANT]. No, ma'am. *I was ready to talk to my lawyer.*

(Emphasis added). Drawing attention to Defendant's assertion that he was not "going to answer no more questions[,]" constitutes a clear and impermissible effort "to elicit meaning from, or comment on, the defendant's exercise of his or her right to remain silent." *Fair*, 354 N.C. at 156, 557 S.E.2d at 519. Put another way, the State juxtaposed Defendant's trial testimony with his pre-trial silence as opposed to a pre-trial statement. And, as in *Shores*, while more expansive, Defendant's testimony "at trial was not inconsistent with the statements given to police." 155 N.C. App. at 351, 573 S.E.2d at 242. It was therefore a violation of Defendant's due process rights

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under the Fourteenth Amendment to cross-examine Defendant on his post-arrest, post-Miranda statements and did not fall within the prior inconsistent statement exception.

This violation of Defendant's due process rights did not prejudice him, however. As the lead opinion chronicles in its analysis of Defendant's motion to dismiss, there was ample evidence to convict Defendant without the objected to evidence.

Closing Argument

"A prosecutor's argument is not improper where it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911 (1987) (citation omitted). "Language may be used *consistent with the facts in evidence* to present each side of the case." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975) (emphasis in original). Though "counsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence[.]" *State v. Richardson*, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697 (1996) (citation omitted), "wide latitude has its limits," *State v. Jones*, 355 N.C. 117, 129, 558 S.E.2d 97, 105 (2002) (internal marks omitted). Counsel may not "travel outside the record' by injecting into his argument facts of his own knowledge or other

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facts not included in evidence.” *Monk*, 286 N.C. at 515, 212 S.E.2d at 131 (citation omitted).

During closing argument the State argued:

[Defendant] gets a phone call from somebody. And there was a reason he wanted to go to town. I don't think he just wanted a ride to town. I think the reason is that somebody called him and asked him to bring some weed. *Now if you're going to a weed deal in town, it would make sense that you would take a gun. If you going to a drug deal, it would make sense that you would have a gun with you. Okay?* Even though you're not - - Well, you're not supposed to be taking weed to anybody and you're not supposed to have a gun because you're a felon. Okay? So he's the one that brought the gun, and he had a reason for having the gun. Not a legal reason, but a reason.

On this point Defendant testified as follows: “I had this - - a little marijuana. [A friend] asked me to bring some back to town. And I told him I had just left town and I really didn't have a ride right now to get to town[.]” There was no further testimony establishing or even suggesting that Defendant was a drug dealer or engaged in a drug transaction on the evening in question, let alone that he carried a firearm for protection to such alleged transactions. As such, the State stacked an unsupported inference on top of another unsupported inference, impermissibly travelling into the field of conjecture and outside the record.

While improper, I agree with the lead opinion that the closing argument here was not so problematic as to render the proceedings below fundamentally unfair.

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This bar is high pursuant to our case law, especially when defense counsel failed to object. Accordingly, I would hold that this did not constitute prejudicial error.

Conclusion

For the reasons stated above, I concur in the lead opinion in part. Respectfully, I concur only in the result as to the lead opinion's analysis of the cross-examination of Defendant and the closing argument by the State.