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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-703

Filed: 7 April 2020

Durham County, No. 18CRS52574

STATE OF NORTH CAROLINA

v.

JEFFREY RAY LAUDERMILT, III, Defendant.

Appeal by Defendant from judgment entered 15 November 2018 by Judge Carolyn J. Thompson in Durham County Superior Court. Heard in the Court of Appeals 18 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Julianne L. Bradshaw, for the State.

Kellie Dorise Mannette for Defendant-Appellant.

INMAN, Judge.

Jeffrey Ray Laudermilt, III, (“Defendant”) appeals his conviction following a jury verdict finding him guilty of assault on a female. Defendant argues that the trial court erred by: (1) instructing jurors about bad acts by Defendant absent evidence that he committed any prior bad acts; and (2) failing to intervene *ex mero motu* following grossly improper statements by the prosecutor during her closing

arguments. After careful review, we hold that Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence introduced at trial tends to show the following:

Defendant and his girlfriend, Sarah,¹ attended a barbeque at a friend's residence in Orange County on 14 April 2018. Sarah is a divorcee and occupies a house in Durham County with her two children where Defendant often was present. Both Defendant and Sarah had been drinking throughout the party. Sometime in the late hours of 14 April or early morning of 15 April, Defendant and Sarah left the party in Sarah's truck.

The two then stopped at another friend's residence nearby. Defendant, in the truck's driver's seat was speaking with his friend in the driveway. Sarah, who was in the front passenger's seat, made a comment that made Defendant upset. Defendant exited the truck. Sarah then shuffled into the driver's seat and backed out of the driveway. Defendant tried to stop Sarah from leaving but she drove away.

Sarah inadvertently drove away in the wrong direction to reach her home and she stopped at a gas station before turning around. While there, she received messages that Defendant was hurt and walking to her house. Sarah then saw Defendant walking on the side of the road and pulled over and let him into the truck.

¹ We use the above pseudonym to protect the victim's anonymity.

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Sarah pulled into her driveway and then started an audio recording with her phone. Defendant became enraged and grabbed the phone from Sarah, then grabbed her hair and neck, including with the arm Defendant claimed was hurt. He slammed Sarah against the truck door. He also punched Sarah in the face, giving her a black eye. Sarah tried to push Defendant away with her hand but he bit her right index finger.

The fight continued when Sarah exited the truck. Defendant grabbed Sarah again around the head and brought her down to the driveway, pressing her head against the gravel to the point that she thought she was going to lose consciousness. When Defendant eventually released her, Sarah quickly got into the driver's seat of the truck and locked the doors. Defendant jumped onto the truck bed and tried to kick open the back window. Sarah then drove to the house of her neighbor across the street, John Hoyle ("Hoyle"), while honking the horn and screaming for help.

Sarah was in the process of leaving Hoyle's 750-foot driveway when Defendant leapt from the truck. Sarah then drove all the way up to Hoyle's house, this time waking him up and getting his attention. Hoyle met a frantic and crying Sarah who was yelling that Defendant was "going to kill me" at his front door and let her inside the house. Hoyle looked for Defendant in and around the truck, but he was nowhere to be found. Hoyle called the sheriff's office and deputies arrived 20 minutes later.

Deputy David Neve ("Deputy Neve") started taking Sarah's statement at Hoyle's house around 2:35 am on 15 April. Sarah kept getting sidetracked due to her

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concern that Defendant was at her house across the street, possibly stealing her belongings. Deputy Neve, Sarah, and the other deputies went to Sarah's house and found no one there. Sarah completed and signed a written statement and another form diagraming where on her body Defendant injured her.

Sometime after Sarah finished giving her statement, Defendant arrived at her house while the deputies were still there. Defendant proclaimed that he was the victim in his fight with Sarah and that she ran him over with the truck at his friend's house and he had just walked all the way there. Deputy Neve observed that Defendant looked disheveled—with some abrasions and bruising—but was not as upset as Sarah. Defendant gave a verbal statement and refused to give a written one. Deputy Neve arrested Defendant for assault on a female.

A few days later, Sarah visited Hoyle's house again and told him that she had just pepper sprayed Defendant and that "she needed help." Hoyle and his wife advised Sarah to obtain a restraining order against Defendant, but Sarah never did. Hoyle then forbade Sarah from visiting his home.

Defendant was tried and found guilty of assault on a female in Durham County District Court and appealed his conviction to the superior court for a trial *de novo*. Defendant's second trial proceeded before a jury in superior court on 14 November 2018. Following the State's evidence, Defendant called Sarah as a witness. Sarah testified that she was heavily intoxicated at the time she sought protection and

Defendant was arrested and that her encounter with Defendant was a “complete drunken misunderstanding.” Defendant presented no other witnesses or any evidence.

The jury found Defendant guilty of assault on a female. The trial court sentenced Defendant to 150 days in prison, with credit of 78 days for time spent in custody before trial.

Defendant gave written notice of appeal.

II. ANALYSIS

A. Notice of Appeal

Defendant filed a petition for writ of certiorari in the event we determine his notice of appeal is defective. In his written notice, Defendant failed to designate the North Carolina Court of Appeals as the court to which his appeal was taken, in violation of our Rules of Appellate Procedure. *See, e.g.*, N.C. R. App. P. 4(b) (2020). However, we have held “that [an appellant’s] failure to designate this Court in its notice of appeal is not fatal to the appeal where the [appellant’s] intent to appeal can be fairly inferred and the [appellees] are not mislead [sic] by the [appellant’s] mistake.” *State v. Ragland*, 226 N.C. App. 547, 552-53, 739 S.E.2d 616, 620 (2013) (quotation marks and citations omitted) (alterations in original). Because Defendant’s intent to appeal to this Court is apparent, N.C. Gen. Stat. § 7A-27(b)(1) (2017), and the State “does not suggest that it was in any way misled by the notice of

appeal,” *id.* at 553, 739 S.E.2d at 620, we hold Defendant’s notice of appeal was valid and dismiss his writ as moot.

B. Jury Instruction

During the charge conference, defense counsel objected to the trial court instructing the jury that he had committed prior bad acts, contending that no evidence showed Defendant committed any other assaults. The trial court disagreed and read the following instruction to the jury:

Evidence has been received tending to show that there were prior incidents of assaults against the witness, [Sarah], by the defendant. The evidence was received solely for the purpose of showing:

That the defendant had the intent which is a necessary element of the crime charged in this case;
That the defendant had the opportunity to commit the crime; [or]
The absence of mistake.

If you believe this evidence, you may consider it, but only for the limited purpose for which it is received.

You may not consider it for any other purpose.

See also N.C.P.I. Crim. 104.15 (2020). Defendant makes the same argument on appeal and contends that he was prejudiced as a result.

In reviewing an issue regarding a trial court’s jury instructions:

It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence. Arguments challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this

Court. The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence. A trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial. However, an error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

State v. Locklear, 259 N.C. App. 374, 376-77, 816 S.E.2d 197, 200-01 (2018) (quotation marks, alterations, and citations omitted).

The trial court's "instruction relates to evidence of other crimes admitted pursuant to Rule 404(b) of the Rules of Evidence to show proof of motive, opportunity, intent, preparation, *etc.*" *State v. Cromartie*, 177 N.C. App. 73, 79, 627 S.E.2d 677, 682 (2006). Assuming *arguendo* the trial court erred in giving the instruction, Defendant has failed to demonstrate that, absent the instruction, it is reasonably possible the jury would have reached an alternative decision.

The elements of assault on a female are "(1) an assault (2) upon a female person (3) by a male person (4) who is at least eighteen years old." *State v. Garrison*, 225 N.C. App. 170, 173, 736 S.E.2d 610, 613 (2013) (quotation marks and citation omitted). "Assault on a female may be proven by finding either an assault on or a battery of the victim." *State v. West*, 146 N.C. App. 741, 743, 554 S.E.2d 837, 839-40 (2001) (citation omitted). When a battery occurs, "assault" in this context is the unlawful intentional use of force, "however slight, to cause contact with the alleged

victim.” *Id.* at 742, 554 S.E.2d at 839. Here, the trial court gave the pattern jury instruction on this definition of assault: “an intentional application of force, however slight, directly or indirectly, to the body of another person without that person’s consent.” *Accord* N.C.P.I.—Crim. 120.20 (2020) (providing the recommended pattern instruction).

Defendant posits that the prior bad acts instruction was prejudicial because it allowed the jury to consider “non-existent evidence” in finding that he had the requisite intent to commit the crime. In light of the substantial evidence that Defendant intentionally assaulted Sarah, we disagree.

Both Deputy Neve and Hoyle testified that Sarah told them Defendant assaulted her multiple times that night inside the truck and in the driveway of her house. They also testified that they observed teeth marks on Sarah’s bitten right index finger consistent with her statement that Defendant had bitten her. Hoyle also testified that after the events at issue in this case, Sarah came to his house a second time, claiming she had pepper sprayed Defendant and needed help. Sarah wrote and signed a written statement consistent with Deputy Neve’s and Hoyle’s testimonies and she signed a document diagramming where on her body Defendant injured her. The prosecutor read Sarah’s written statement while she was on the witness stand, and Sarah testified that it was her signature and date of birth on the statement.

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Though Sarah denied that the assault occurred, she could not explain how she received her black eye or why she gave a detailed statement to Deputy Neve about Defendant assaulting her. Sarah did not refute Hoyle's testimony that she visited his home days after Defendant's arrest, saying she had pepper sprayed Defendant and needed help.

Defendant relies on our opinion in *State v. Campos*, 248 N.C. App. 393, 789 S.E.2d 492 (2016), to show that the trial court's alleged error was prejudicial. Defendant's reliance is misplaced. In *Campos*, the defendant was arrested and ultimately convicted of intentional child abuse resulting in serious physical injury to his infant daughter. *Id.* at 393, 789 S.E.2d at 493. At trial, over the defendant's objection, the trial court gave a flight instruction allowing the jury to consider defendant's movements as "an admission or show of a consciousness of guilt." *Id.* at 396, 789 S.E.2d at 495. During deliberations, the jury asked the court for the definition of "intentional." *Id.* The court responded with the same explanation it gave in its original instruction—one seldom proven by direct evidence, but rather "by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw." *Id.*

On appeal, we agreed with the defendant that the flight instruction constituted prejudicial error. *Id.* at 400, 789 S.E.2d at 497. We wrote that, not only was there no evidence that defendant committed flight, but that the trial court's answer to the

jury's clarifying question on intent "left the jury's confusion unassuaged and conceivably vulnerable to the inclusion of the ill-fated flight instruction." *Id.* We concluded that permitting the jury to consider the defendant's flight in the totality of the circumstances to show a consciousness of guilt "created a reasonable possibility that the jury deemed 'consciousness of guilt' synonymous with 'intentional.'" *Id.*

Here, however, no such vulnerability or confusion exists. Unlike in *Campos*, witness testimony and a written statement tend to show that Defendant intentionally struck Sarah multiple times and bit her finger, drawing blood and leaving visible teeth marks.

We therefore hold that, notwithstanding Sarah's testimony and any alleged error in the trial court's jury instruction, Defendant has failed to demonstrate that there is a reasonable possibility that the result of his trial would have been different absent the instruction.

C. Improper Closing Remarks

Defendant also argues that the trial court should have intervened *ex mero motu* in response to the prosecutor's comments during her closing arguments. Because Defendant's trial counsel did not object to any of the prosecutor's closing remarks, we must consider this issue under the following 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

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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). We determine “(1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant’s right to a fair trial.” *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). In determining “whether a prosecutor’s remarks are grossly improper, the remarks must be viewed in context and in light of the overall factual circumstances to which they refer.” *State v. Madonna*, 256 N.C. App. 112, 118, 806 S.E.2d 356, 362 (2017).

Defendant argues that the prosecutor injected her personal belief as to his guilt multiple times when she said: “[w]e believe we have set forth” that Defendant “did, in fact, assault” Sarah; “[w]e have a duty to persons charged with the offenses to not bring cases that we don’t believe are true;” and saying twice that “there’s no question about what happened” on the night in question.

A prosecutor “may not . . . 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

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court may take judicial notice.” N.C. Gen. Stat. § 15A-1230(a) (2017).

None of the challenged statements were so grossly improper that Defendant was denied a fundamentally fair trial. *See, e.g., State v. Waring*, 364 N.C. 443, 500, 701 S.E.2d 615, 651 (2010); *see also State v. Wardrett*, __ N.C. App. __, __, 821 S.E.2d 188, 194 (2018). Here, the prosecutor’s challenged statements were made in the context of explaining the prosecutor’s role as an officer of the court, reminding jurors of the evidence, and arguing reasonable inferences to be drawn from it. These statements, even presuming they were improper, were not grossly improper because they did not “infect[] the trial with [such] unfairness as to make the resulting conviction a denial of due process.” *State v. Peterson*, 361 N.C. 587, 608, 652 S.E.2d 216, 230 (2007) (quotation marks and citations omitted).

III. CONCLUSION

Defendant has failed to demonstrate that the trial court committed reversible error in giving the jury the prior bad acts instruction and failing to intervene *ex mero motu* during the prosecutor’s closing arguments.

NO ERROR.

Judges STROUD and YOUNG concur.

Report per Rule 30(e).