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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1080

Filed: 2 June 2020

Davidson County, No. 17 CRS 53562

STATE OF NORTH CAROLINA

v.

JEFFREY ARNEZ MCCLURE, JR.

Appeal by defendant from judgment entered 4 April 2019 by Judge Joseph N. Crosswhite in Davidson County Superior Court. Heard in the Court of Appeals 13 May 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Taylor H. Crabtree, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.*

TYSON, Judge.

Jeffrey Arnez McClure, Jr. (“Defendant”) appeals from judgment entered upon a jury’s verdict finding him guilty of possession of a firearm by a felon. We find no error.

I. Background

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*Opinion of the Court*

Thomasville Police Officers initiated a traffic stop of a vehicle displaying an expired license plate on 13 June 2017. Nelson Pagueese, Jr. was driving the vehicle with Defendant sitting in the front passenger seat. Pagueese is Defendant's half-brother.

Officer Jeremy Rowe smelled marijuana emanating from the vehicle immediately upon his approach and observed marijuana crumbs upon Pagueese's lap. Officer Rowe asked Pagueese to exit the vehicle, which he did. Officer Matthew Reeves approached the passenger side of the vehicle and asked Defendant to also exit, which he did.

Officer Rowe searched the vehicle. He found what appeared to be crack cocaine and marijuana inside the vehicle. Officer Rowe arrested Pagueese and continued his search of the vehicle. He then found a bag with a semi-automatic handgun inside on the floorboard of the front passenger side seat. Officer Rowe arrested Defendant as well.

Defendant was read his *Miranda* rights at the police station, then admitted the firearm belonged to him. Defendant gave the officers a voluntary statement, which he initialed each line of and signed at the bottom. The statement read:

Before we got stopped I had the gun in the bag, I didn't know we were going to get searched so I didn't think it was a big deal. I kept the gun in the bag and when the officer noticed the marijuana in my brother's lap that is when y'all searched the car and found the in my [sic] gun in the bag.

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My gun is a Cobra .380 which was in the bag in the floorboard in front of me.

Defendant was indicted for possession of a firearm by a felon and for attaining the status of habitual felon. Officers Rowe and Reeves testified for the State at trial. The State rested its case after the officers testified.

Defendant, Pagueuse, and Samantha Ingram testified for the defense. Pagueuse testified all the drugs inside the vehicle belonged to him. He testified he had sold drugs to a woman, who had introduced him to Ingram. Pagueuse drove Ingram to the grocery store and returned to her home. He testified he had never met Ingram before. Pagueuse testified no bags had been in the car before he drove Ingram. He first noticed the bag in front of the passenger seat once he was on his way to pick up Defendant from his work. Pagueuse testified the bag looked like it contained clothes. He testified he did not see the gun until Officer Rowe removed it from the bag.

Ingram corroborated Pagueuse's testimony that he had driven her to the grocery store in exchange for gas money. She also testified she had left a bag in his car and that the gun inside the bag was hers. Ingram testified she had no relationship with Defendant, nor had she ever met him before that day.

Defendant testified he had never seen the gun before Officer Rowe removed it from the bag. Defendant claimed he was scared of the officers and coerced into signing his statement at the police station. Defendant was not asked about Ingram

during direct or cross-examination. Defendant rested his defense after his testimony. The trial court adjourned for the day.

The next morning, the State moved to re-open the evidence based upon new information that had come to light. The trial court granted the motion over Defendant's objection. Officer Reeves returned to testify he had viewed Defendant's profile on the Facebook social media site. Officer Reeves testified he had found a photograph posted on Facebook of Defendant kissing Ingram on the cheek.

The State then called Ingram to testify. She confirmed the photograph Officer Reeves found on Facebook was of her and Defendant. She confirmed she had lied when she testified she had no relationship with Defendant. She testified she and Defendant were parents of a minor child.

The State then called Defendant to testify. The State asked Defendant if he had denied he knew Ingram during his testimony on the previous day. Defendant replied he had not. The State reminded Defendant he was under oath and asked if he understood he could be indicted for perjury if he lied in his testimony before the jury. Defendant answered, "I never lied."

The State then asked Defendant if he ever corrected Ingram's lie during his testimony. Defendant testified he did not. Defendant admitted he and Ingram had been in a relationship and were parents of a three-year-old child. The State rested its case after Defendant testified. Defendant did not introduce any further evidence.

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The jury found Defendant guilty of possession of a firearm by a felon. Defendant plead guilty to attaining the status of habitual felon. The trial court found the offense was committed while Defendant was “on supervised or unsupervised probation, parole, or post-release supervision” and sentenced Defendant as a prior record level V offender to an active sentence in the presumptive range of 114 to 149 months in prison. Defendant timely filed his notice of appeal.

### II. Jurisdiction

An appeal as of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

### III. Issue

Defendant argues the trial court abused its discretion by not intervening *ex mero motu* and by allowing the State to conduct improper questioning of him.

### IV. Standard of Review

“The long-standing rule in this jurisdiction is that the scope of cross-examination is largely within the discretion of the trial judge, and his rulings thereon will not be held in error” absent an abuse of that discretion. *State v. Woods*, 307 N.C. 213, 220-21, 297 S.E.2d 574, 579 (1982) (citations omitted). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Defendant failed to object to the questioning at trial, which he now alleges to have been improper.

Under this standard, 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. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

*State v. Waring*, 364 N.C. 443, 499-500, 701 S.E.2d 615, 650 (2010) (citations, alterations, and internal quotation marks omitted), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d 53 (2011).

#### V. Analysis

In reviewing the proper bounds of cross-examination, our Supreme Court has held: “(1) the scope of cross-examination is subject to the discretion of the trial judge; and (2) the questions offered on cross-examination must be asked in good faith.” *State v. Aguillo*, 322 N.C. 818, 824, 370 S.E.2d 676, 679 (1988) (citation omitted). Prior cases in which our courts have found an abuse of the trial court's discretion in the scope of cross-examination “have involved instances where the prosecutor has affirmatively placed before the jury his own opinion or facts which were either not in evidence or not properly admissible.” *Id.* (citations omitted).

Defendant argues the State's questioning of him on the second day of trial was grossly improper and so prejudicial to warrant a new trial. Defendant acknowledges he failed to object to the questioning at trial.

1. *State v. Locklear*

On appeal, Defendant compares the State's questioning in this case to the questioning our Supreme Court had found so grossly improper as to merit a new trial in *State v. Locklear*, despite that defendant's failure to object. *See State v. Locklear*, 294 N.C. 210, 218, 241 S.E.2d 65, 70 (1978).

During the cross-examination of a defense witness in *Locklear*, the prosecutor said: "you are lying through your teeth and you know you are playing with a perjury count; don't you?" *Id.* at 214, 241 S.E.2d at 68. Our Supreme Court held "[t]he district attorney's private opinion that defendant's witness Leonard was lying was a step out of bounds" and so prejudiced the defendant to warrant a new trial. *Id.* at 218, 241 S.E.2d at 70.

Here, the prosecutor asked Defendant if he had denied knowing Ingram in his prior testimony. Defendant accurately replied he did not deny knowing Ingram, as he had not been asked any prior questions about Ingram. The prosecutor asked the Defendant if he understood the import of his oath to testify truthfully and his potential liability for perjury if he were to lie while on the stand under oath. The prosecutor then asked Defendant if he had corrected Ingram's lie about their

relationship and asked Defendant to confirm the existence of their relationship and their child. Defendant responded truthfully to both questions.

*2. State v. Jordan and State v. Aguallo*

This Court has previously declined to grant a new trial even when a prosecutor twice admonished a defense witness: “You know that is a lie.” *State v. Jordan*, 49 N.C. App. 561, 568, 272 S.E.2d 405, 410 (1980). At no point did the prosecutor directly accuse Defendant of either lying or being dishonest. The prosecutor did not affirmatively place her own opinion or facts before the jury, which were not in evidence. *See Aguallo*, 322 N.C. at 824, 370 S.E.2d at 679. Instead, the prosecutor attempted to impeach Defendant’s credibility by addressing the discrepancies between his and Ingram’s testimonies.

Our Supreme Court’s analysis in *Aguallo* is instructive:

Here, the prosecutor was cross-examining defendant about his prior testimony . . . to reveal inconsistencies. Prior statements by a defendant are a proper subject of inquiry by cross-examination. The record fails to show that the questions asked were not based on proper information and asked in good faith. The prosecutor did not offer his own opinion or present facts which were not in evidence or not properly admissible.

*Id.* (citations omitted).

The record reveals a good faith basis for the State to cross-examine Defendant about inconsistencies between his and Ingram’s testimonies, on successive days of the trial, over their prior relationship, and who owned the handgun. Although the



prosecutor did not accurately recall that Defendant had not been asked about his relationship with Ingram on the previous day, Defendant has failed to carry his burden to show the prosecutor acted in bad faith when she asked Defendant whether he had denied knowing Ingram. The facts at bar are significantly different from and less egregious than those our Supreme Court found so grossly improper to merit a new trial in *Locklear*. See *Locklear*, 294 N.C. at 218, 241 S.E.2d at 70.

Defendant does not carry his burden to show the trial court abused its discretion in not intervening *ex mero motu* to prevent the questioning to which Defendant failed to object at trial, but now challenges on appeal. See *Waring*, 364 N.C. at 499-500, 701 S.E.2d at 650. Defendant's argument is overruled.

#### VI. Conclusion

Defendant failed to object to the cross-examination questioning at trial that he now alleges to have been so grossly improper to warrant a new trial. The prosecutor's cross-examination of Defendant, though inaccurate, was based on discrepancies between Ingram's and Defendant's testimonies on successive days of the trial. Defendant does not carry his burden to show bad faith by the prosecutor's cross examination of him or Ingram, and consequently, there is no abuse of discretion by the trial court's failure to intervene *ex mero motu*.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no reversible errors to award a new trial. *It is so ordered.*

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NO ERROR.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).