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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1159

Filed: 6 October 2020

Wake County, No. 16 CRS 216135

STATE OF NORTH CAROLINA

v.

REGINA M. SCHMIDT, Defendant.

Appeal by defendant from judgment entered 5 April 2019 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 13 May 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Brittany Pinkham Edwards, for the State.*

*Warren D. Hynson for defendant-appellant.*

YOUNG, Judge.

Where officers providing a single photograph to a witness for identification did not give rise to a substantial likelihood of misidentification violating defendant's right to due process, the trial court did not err in denying defendant's motion to suppress the identification. Where defendant cannot show that the trial court's refusal to give an instruction on noncompliance with eyewitness identification procedures

STATE V. SCHMIDT

*Opinion of the Court*

prejudiced defendant, the trial court did not err in denying defendant's request for the instruction. Where defendant was able to introduce evidence of police procedure, the trial court did not abuse its discretion in precluding defendant from eliciting testimony about statutory requirements. Where defendant did not testify, the trial court did not err in precluding defendant from introducing self-serving hearsay testimony through another witness. Where the State's closing arguments did not reference matters outside of the record, the trial court did not err in overruling defendant's objection. Where the State's closing arguments were not grossly improper, the trial court did not err in declining to intervene *ex mero motu*. We find no cumulative error, and no error, in the trial court's judgment.

I. Factual and Procedural Background

Starting in August of 2016, Lauren Tasha Olsen (Olsen) began to work for Regina M. Schmidt (defendant) as a prostitute. Defendant, who did business under the alias "Mistress Scorpio," used the website backpage.com to solicit men to have contact with Olsen. After two such encounters, Olsen escaped from defendant, and attempted to copy the backpage.com advertisements defendant had created to generate business for herself. On 12 August 2016, Olsen received a solicitation for an encounter. When she went to meet him, she immediately recognized defendant, who attacked her and stabbed her with a pocket knife. Olsen escaped and contacted law enforcement and an ambulance. Undercover officers set up an encounter with

defendant through her backpage.com advertisements, and arrested defendant in her hotel room.

The Wake County Grand Jury indicted defendant for assault with a deadly weapon with intent to kill inflicting serious injury. The matter proceeded to trial, and the jury returned a verdict finding defendant guilty of the sole charge in the indictment. The trial court sentenced defendant to a minimum of 96 and a maximum of 128 months, in the presumptive range, in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

## II. Motion to Suppress

In her first argument, defendant contends that the trial court erred in denying her motion to suppress. We disagree.

### A. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000)

B. Analysis

Prior to trial, defendant filed a written motion to suppress Olsen’s out-of-court identification of defendant as the perpetrator of the attack, as well as any in-court identification. Specifically, defendant alleged that the initial out-of-court identification involved a “photographic show up” procedure which, defendant argued, violated the Eyewitness Identification Reform Act (EIRA). The trial court initially declined to rule on this motion. Later, however, the court denied the motion. Defendant subsequently renewed her objection when this evidence was introduced at trial, but the trial court overruled the objection.

On appeal, defendant once again insists that the procedure officers used was an impermissible violation of the EIRA. According to defendant, officers visited Olsen in the hospital the day after the assault, and showed her a single photograph of defendant, asking her to identify her attacker. Defendant contends that this was an impermissible procedure under the EIRA.

The EIRA, N.C. Gen. Stat. § 15A-284-50 *et seq.*, provides guidelines as to how a lawful eyewitness identification may be conducted by law enforcement. Specifically, it requires that a lawful identification must comply with multiple requirements. N.C. Gen. Stat. § 15A-284.52(b) (2019). Failure to comply with these requirements shall be considered by the court in adjudicating a motion to suppress. N.C. Gen. Stat. § 15A-284.52(d)(1).

Defendant contends that none of the procedures of the EIRA were followed, and that therefore the trial court was obligated to grant the motion to suppress. However, even assuming *arguendo* that officers did not follow the EIRA, this does not require suppression.

The question, on a motion to suppress identification, is whether the identification procedure used by officers was “so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification violat[ing] a defendant’s right to due process.” *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984). In examining such an issue, we follow a two-step inquiry. “First we must determine whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification. If this question is answered in the negative, we need proceed no further.” *Id.* If it is answered in the positive, “the second inquiry is whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification.” *Id.*

Even assuming *arguendo* that the officers’ method of showing Olsen a single photograph constituted an “impermissibly suggestive procedure,” we must still examine whether this gave rise to “a substantial likelihood of irreparable misidentification.” On examining the totality of the circumstances, we hold that it did not. Olsen was not identifying a stranger that she had met once, in the heat of an attack. Olsen identified defendant based on their numerous encounters, her

personal knowledge of the defendant, and specifically testified that she recognized defendant's voice, her distinctive blue eyes, and her height and body shape. After being attacked, Olsen explained to officers not only who her attacker was, but why she believed she was attacked. She identified defendant by her street name, "Mistress Scorpio." We find it highly unlikely that Olsen, having known defendant for some time prior to the attack, would misidentify defendant in a photograph. Moreover, the jury weighed Olsen's credibility in making its determination, and we decline to reweigh the credibility of a witness. We therefore hold that the trial court did not err in denying defendant's motion to suppress Olsen's out-of-court or subsequent in-court identification of defendant as the perpetrator.

### III. Jury Instruction

In her second argument, defendant contends that the trial court erred in denying her request to instruct the jury on the requirements for a photographic lineup. 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). "The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. Under such a standard of review, it is not enough for the appealing party to show

that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.” *State v. Blizzard*, 169 N.C. App. 285, 297, 610 S.E.2d 245, 253 (2005) (citation and quotation marks omitted).

### B. Analysis

During the jury charge conference, defendant argued that, due to the alleged noncompliance with EIRA, the jury should be instructed pursuant to the North Carolina Pattern Instructions on noncompliance with eyewitness identifications. The trial court denied this request, and on appeal, defendant contends that this was error.

The Pattern Instruction at issue, N.C.P.I.-Crim. 105.65, is designed to allow a jury to consider credible evidence of compliance or noncompliance with eyewitness identification procedures to determine the reliability of an eyewitness’ identification. It outlines the statutory procedural requirements set out in the EIRA, and permits a jury to determine whether those procedures were followed and what impact, if any, that may have on eyewitness identification.

Even assuming *arguendo* that defendant did present evidence of officers’ noncompliance with EIRA, however, defendant bears the burden of showing prejudice; that is, that the omitted instruction “was likely, in light of the entire charge, to mislead the jury.” We hold that defendant cannot do so. The jury was extensively instructed on credibility – opinion testimony by a lay witness,

impeachment or corroboration of a prior statement, and credibility of a witness generally, were all instructions given by the trial court. The jury was clearly informed that it had the duty to determine just how credible Olsen's identification of defendant was, and presumably followed those instructions in finding defendant guilty. Defendant has not shown, to the satisfaction of this Court, that had the jury been instructed on identification procedures and officers' noncompliance therewith, it would have instead found Olsen's testimony to be incredible. Absent some showing that the verdict was affected by the lack of an instruction, we cannot hold that defendant has shown error. We therefore hold that the trial court did not err in denying defendant's request for the proposed instruction.

#### IV. Cross-Examination

In her third argument, defendant contends that the trial court erred in precluding her from questioning officers about certain subjects. We disagree.

##### A. Standard of Review

"The rule is well established that the scope of cross-examination rests largely within the discretion of the trial court, and its rulings thereon will not be disturbed absent a clear showing of abuse of discretion." *State v. Hinson*, 310 N.C. 245, 254, 311 S.E.2d 256, 263 (1984). "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).

B. Analysis

In ruling on defendant’s motion to suppress, the trial court further held that, while defendant could inquire of testifying officers what they could have done differently in their eyewitness identification procedure, she could not inquire as to the requirements for an identification under EIRA. Later, defendant sought to introduce evidence that she spoke with law enforcement, but the trial court excluded this evidence, holding that “mentioning any interview is somewhat self-serving.” On appeal, defendant contends that these exclusions were error.

As a preliminary matter, defendant attempts to couch this argument as a constitutional one. However, notwithstanding defendant’s arguments, defendant was not prevented from confronting the witnesses against her, which admittedly would have raised a constitutional issue. Rather, defendant’s cross-examination of witnesses was curtailed, not completely precluded. Under these circumstances, we review defendant’s arguments merely for abuse of discretion.

With regard to officers’ compliance with EIRA requirements, we note that defendant was permitted to inquire as to the procedure officers followed with Olsen at the hospital. And although EIRA was not mentioned by name, defendant did in fact elicit some testimony as to the procedure those officers typically followed. In

sum, defendant was permitted to, and did in fact, inquire as to what steps officers took in identifying defendant. In doing so, defendant was able to attempt to raise a defense that the procedure used was not a credible one. That defendant was unable to specifically cite the statute is not relevant; it is clear that defendant was permitted to attempt to accomplish her goal. As such, we hold that it was not “manifestly unsupported by reason” for the trial court to limit defendant’s cross-examination of officers on their EIRA compliance.

With regard to defendant’s interview with law enforcement, we note that a defendant who does not testify cannot seek to introduce self-serving statements unless they fall under some hearsay exception. This Court has held, for example, that where a defendant did not testify, it was not error to exclude his statements, which “were self-serving, were sought to be admitted for the truth of the matter asserted, and were not evidence of defendant’s state of mind.” *State v. Wiggins*, 159 N.C. App. 252, 261, 584 S.E.2d 303, 311 (2003).

In the instant case, defendant did not testify. Moreover, in defendant’s offer of proof, she specifically detailed how the interview presented defendant in a sympathetic and positive light. This interview constituted the textbook definition of self-serving hearsay. Certainly, to permit defendant to present this self-serving statement while simultaneously letting her avoid cross-examination on her words would have been inconsistent with policies of fundamental fairness. Defendant was

not required to testify, but absent the State opening the door to this issue – which defendant cannot show – defendant was not permitted to seek to introduce her own testimony through another witness. As such, we hold that the trial court did not abuse its discretion in excluding this interview.

## V. Closing Arguments

In her fourth argument, defendant contends that the trial court erred by overruling her objection to, and failing to intervene *ex mero motu* in, the State’s closing arguments. We disagree.

### A. Standard of Review

“The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection. In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision.” *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations and quotation marks omitted).

“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.” *Id.* at 133, 558 S.E.2d at 107 (citation omitted).

“[O]n appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.” *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41 (1994). Moreover, we must consider their brevity and overall significance to the entire closing argument. *State v. Fletcher*, 354 N.C. 455, 485, 555 S.E.2d 534, 552 (2001).

### B. Analysis

During closing arguments, defendant objected to a statement made by the State. The trial court overruled this objection. On appeal, defendant contends that the trial court’s decision in overruling defendant’s objection, as well as its decision to not intervene *ex mero motu* in other statements to which defendant did not object, was error.

First, defendant objected to the State making comments about a rolling suitcase and its contents. On appeal, defendant contends that these comments constituted statements based on matters outside of the record. However, the record shows that a witness testified that a security camera captured defendant leaving her

building with an unknown person pulling a black rolling suitcase, and shortly later returning to the building with a different person and no suitcase. The State's comments consisted of a reasonable inference as to what may have been in the suitcase, rather than pure conjecture. As such, the trial court did not abuse its discretion in overruling the objection.

Next, with regard to those statements to which defendant did not object, defendant claims they violated two rules: one, that a prosecutor must not express belief as to the truth or falsity of the evidence, and two, that a prosecutor must not express belief as to the guilt or innocence of the defendant.

The State's argument spanned roughly 25 pages of transcript. Of this, defendant isolates roughly eight sentences to support her position that the State's comments were grossly improper. We do acknowledge some degree of impropriety in the State's argument – for example, the State explicitly argued that Olsen was credible. However, for the most part, these statements, taken in context, are mere summations of the evidence. For example, in one of the comments with which defendant takes issue, the State claims that “the obvious answer, based on all the evidence in this case, is that it was the Defendant who did these things.” While it would be inappropriate for a prosecutor to express a general opinion of guilt, it is not inappropriate – and certainly not grossly improper – for the State to make its argument as to what the evidence tends to show. And in examining the other

comments with which defendant takes issue, in light of their brevity and in the context of the State's arguments as a whole, we decline to find that they rose to a level of gross impropriety requiring the trial court to intervene *ex mero motu*. We therefore hold that the trial court did not err in overruling defendant's objection, or in declining to intervene *ex mero motu* in the State's closing arguments.

#### VI. Cumulative Error

In her fifth argument, defendant contends that the cumulative effect of these errors prejudiced her defense. We have held that these issues did not individually rise to the level of prejudicial error. Further, we decline to find that these issues, in the aggregate, constituted cumulative error which may have prejudiced defendant's case. Accordingly, we find no error.

NO ERROR.

Judges STROUD and DILLON concur.

Report per Rule 30(e).