

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-32

No. COA20-109

Filed 16 February 2021

Davidson County, Nos. 19CRS051462-63

STATE OF NORTH CAROLINA

v.

SHELDON O'BRIAN MCSADDEN, Defendant.

Appeal by Defendant from judgment entered 17 July 2019 by Judge Lori I. Hamilton in Davidson County Superior Court. Heard in the Court of Appeals 12 January 2021.

*Attorney General Joshua H. Stein, by Assistant Attorney General Erika N. Jones, for the State.*

*Irons & Irons, P.A., by Ben G. Irons, II, for the Defendant.*

DILLON, Judge.

¶ 1 Sheldon O'Brian McSpadden ("Defendant") appeals from a judgment finding him guilty of common law robbery, resisting a public officer, and assault on a government official or employee.

I. Background

¶ 2 At night on 12 March 2019, a store clerk at a gas station in Lexington noticed a "suspicious" man placing a wine bottle from the cooler into his pocket. The man

approached the counter and paid for one can of beer. The store clerk moved toward the door and told the man to remove from his pocket the bottle he had taken. The man refused and indicated that he had a gun. The store clerk told the man she would “call the law” and took out her phone. The man shoved the store clerk and ran off.

¶ 3 A detective responded and interviewed the store clerk. He then radioed the clerk’s description of the man to fellow law enforcement personnel. Shortly thereafter, an officer encountered the man, who he was able to identify as Defendant from previous interactions. Defendant attempted to run away from the officer, who then placed Defendant under arrest for resisting a public officer. During the arrest, Defendant kicked the officer in the chest several times, requiring other officers to place him in leg restraints. Pursuant to a search, officers found snacks, stolen alcoholic beverages, and two items of drug paraphernalia on Defendant’s person.

¶ 4 The responding detective testified at trial that he had reviewed the surveillance video at the store and that Defendant was the man depicted on the video who had stolen the bottle. The store clerk also identified the man in the video as Defendant. She initialed the surveillance video after viewing it, and the video was later admitted into evidence. The State also admitted dashcam and bodycam footage from Defendant’s arrest into evidence.

¶ 5 Defendant waived his right to counsel and was tried by a jury. He was convicted on all charges. Defendant timely appealed.

## II. Analysis

¶ 6 Defendant makes two arguments on appeal. We address each in turn.

### A. Admission of Video Surveillance Footage

¶ 7 Defendant argues that the trial court committed plain error by admitting the video surveillance footage with no limiting instruction at the time of admission when it should only have been admitted for illustrative purposes. We disagree.

¶ 8 Because Defendant did not object to the admission of the video surveillance footage at trial, we review for plain error. N.C. R. App. P. 10(a)(4). Plain error is defined as a “fundamental error . . . where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks and citation omitted).

¶ 9 Assuming *arguendo* that the trial court erred in not providing a limiting instruction at the time the video surveillance footage was admitted, said error did not rise to the level of plain error. The jury was highly unlikely to reach a different verdict simply due to a limiting instruction given at a different time. There was overwhelming evidence of Defendant’s guilt apart from the video, such as from the testimonies by the store clerk and by law enforcement officers.

### B. Trial Court’s Failure to Intervene *Ex Mero Motu*

¶ 10 Defendant further argues that the trial court abused its discretion by failing to intervene *ex mero motu* when the prosecutor argued during her opening and closing arguments that “video surveillance footage from the [ ] store was substantive proof of [Defendant’s] guilt[.]” We disagree.

¶ 11 “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 role is to determine whether the trial court “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.

¶ 12 Our courts have repeatedly recognized that “trial counsel are granted wide latitude in the scope of jury argument[.]” *State v. Thomas*, 350 N.C. 315, 360, 514 S.E.2d 486, 513 (1999). The purpose of the opening statement is to forecast the evidence likely to be admitted in the case. *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685 (1986). In closing argument, counsel summarizes the evidence and is “permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence.” *Jones*, 355 N.C. at 128, 558 S.E.2d at 105.

¶ 13 If an alleged improper statement was made by a prosecutor, we evaluate that statement “in its broader context, as particular prosecutorial arguments are not viewed in an isolated vacuum.” *State v. Peterson*, 361 N.C. 587, 603, 652 S.E.2d 216, 227 (2007). And, when there is overwhelming evidence of a defendant’s guilt, our courts have not found a prosecutor’s improper statements to be prejudicial and therefore amount to reversible error. *State v. Huey*, 370 N.C. 174, 181, 804 S.E.2d 464, 470 (2017).

¶ 14 Here, Defendant contends that the prosecutor improperly “declared [in opening statement] that ‘video evidence’ showed that ‘[Defendant] committed a common law robbery.’ ” Defendant further argues that the prosecutor improperly characterized Defendant’s contact with the store clerk on the surveillance video as “violence” in her closing argument. We reject Defendant’s arguments under this assignment of error.

¶ 15 The prosecutor’s full statement was: “[T]hroughout this trial, the State will present you with video evidence and testimony that will show you that [Defendant] committed a common law robbery[.]” The prosecutor did not indicate to the jury that the video evidence was the sole proof of Defendant’s guilt, but rather forecasted testimony the State would present. The video evidence was subsequently admitted for illustrative purposes. Therefore, the prosecutor’s statement was not improper.

¶ 16 As for the prosecutor’s characterization of Defendant’s action in the surveillance video as “violence,” the prosecutor was permitted to make such a

statement. In closing argument, trial counsel is permitted to summarize the evidence and make reasonable inferences that may be drawn from the evidence in favor of their case. The video evidence was not the only evidence that was presented in favor of the prosecutor's statement that Defendant shoved the store clerk and caused her bruises. The store clerk presented live testimony at trial in support of the prosecutor's statement that Defendant committed violence. Therefore, the prosecutor's statement was not improper.

¶ 17 We conclude that the State did not make improper statements to the jury in its opening or closing arguments. Assuming *arguendo* that improper statements were made by the State's attorney, the trial court did not commit reversible error by failing to intervene *ex mero motu* because the statements were not so grossly improper as to require the trial court's intervention.

### III. Conclusion

¶ 18 We conclude that the trial court did not commit plain error in admitting the video surveillance footage without a limiting instruction. Further, the trial court did not reversibly err in failing to intervene *ex mero motu* during the prosecutor's opening and closing statements.

NO ERROR.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).