IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-54

No. COA20-110

Filed 2 March 2021

Wake County, Nos. 16 CRS 206998-99, 207001

STATE OF NORTH CAROLINA

v.

KARL LAFAYETTE JOHNSON, Defendant.

Appeal by Defendant from judgments entered 13 May 2019 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 27 January 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennifer T. Harrod, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Karl Lafayette Johnson appeals from judgments entered upon a jury's verdicts finding him guilty of three counts each of statutory rape, statutory sex offense, and taking indecent liberties with a minor. Defendant argues that the trial court erred by (1) allowing expert testimony that failed to assist the jury; (2) admitting irrelevant evidence of a prior bad act in violation of Evidentiary Rules 401

and 404(b); and (3) failing to intervene *ex mero motu* in response to improper remarks made by the State during its closing argument. Upon review, we conclude that Defendant received a fair trial, free from prejudicial error.

I. Factual and Procedural Background

¶ 2 On 31 December 2013, Defendant married Shameka Johnson in Suffolk, Virginia, where they both lived at the time. Shameka is the mother of two children, Tevin and T.L., both of whom became Defendant's stepchildren after the marriage. Defendant and Shameka moved to Raleigh, North Carolina, in April 2014, and Shameka's then thirteen-year-old daughter, T.L., initially remained in Virginia so as not to interrupt her spring semester of school.

¶ 3 Shameka eventually brought T.L. to live with her and Defendant in Raleigh in or around June 2014. During the week, Shameka commuted to work in Virginia and "would normally leave on Thursday and come back on Sunday or Monday," during which time T.L. would remain at home with Defendant. While Shameka was out of town, Defendant and T.L. would typically watch movies or go shopping together.

¶ 4 One evening in August 2014, approximately two months after T.L. moved to Raleigh, Defendant and T.L. were sitting on the couch watching a movie when Defendant "grabbed [T.L.'s] foot" and began "playing" with it before "rubb[ing] [her] foot on his crotch." T.L. asked Defendant what he was doing, to which Defendant "just said nothing." T.L. stated that she moved her foot several times, but "he would

put [her] foot back." Defendant then got up and "grabbed" T.L. "under [her] arms" and "[p]ulled" her into the master bedroom.

¶ 5 Once inside the master bedroom, Defendant "[p]ushed T.L. on to the bed." At trial, T.L. testified, "I kind of like followed, but kicked him, pushed him, and then he—I eventually gave up and kind of blanked out. He ripped off—I think I had on sweat pants and he took off his clothes and he forced himself inside of me." Afterwards, T.L. "got up and . . . went in the bathroom" to shower.

¶ 6 T.L. testified that Defendant continued to sexually abuse her on multiple occasions until February of 2016. The last such incident occurred on the night of 8 February 2016. Later that night, T.L. called her boyfriend and told him about the incident. Her boyfriend told her that if she did not tell someone what was going on, then he would. Afterwards, T.L. called her cousin, Peaches, and "told her what was happening." Peaches then initiated a three-way call with T.L.'s aunt, Tiffany, and T.L. informed Tiffany that Defendant "was messing with [her] sexually." Tiffany and T.L.'s uncle, Ryan, then travelled through the night from their home in Virginia to North Carolina and picked up T.L. at approximately 3:00 a.m. on 9 February 2016.

¶ 7 Immediately after picking up T.L., Tiffany and Ryan drove her to a local hospital. They eventually arrived at WakeMed Children's Emergency Department in Raleigh where nurse Jennifer Farmer examined T.L. and administered a "forensic

evidence collection" kit. Nurse Farmer found "[n]o acute injuries" to T.L. during her examination.

¶ 8 On 2 May 2016, a Wake County grand jury returned true bills of indictment charging Defendant with three counts each of (1) statutory rape of a person who is 13, 14, or 15 years old; (2) statutory sex offense with a person who is 13, 14, or 15 years old; and (3) taking indecent liberties with a minor. On 6 May 2019, Defendant's case came on for a jury trial in Wake County Superior Court.

¶ 9 At trial, Nurse Farmer was tendered by the State as an expert witness. During her testimony, Nurse Farmer noted that she could not determine whether T.L. had ever engaged in sexual intercourse. She also stated that T.L.'s examination revealed "[n]o acute injuries." Over Defendant's objections, the trial court permitted Nurse Farmer to testify that T.L.'s examination was "consistent with having had engaged in vaginal intercourse."

¶ 10 Defendant elected to testify in his defense. During his testimony, Defendant stated that he was given a medical discharge from the Army after sustaining injuries while serving in Germany. As a result of his injuries, Defendant was left partially disabled and was eventually declared "60 percent" disabled and "unemployab[le]" by the Department of Veterans Affairs. Defendant testified that, due to his disability, he could not lift anything "over 12, 15 pounds" and would not have been able to "pick [T.L.] up or . . . forcibly hold her down." In rebuttal, the State presented courthouse

security footage showing Defendant with his fists raised before attempting to punch his stepson, Tevin, after Tevin attacked him in the courthouse lobby. Over Defendant's objections, the State questioned Defendant about the contents of the video and played it again for the jury just before the close of evidence.

¶ 11 The jury returned verdicts finding Defendant guilty of statutory rape, statutory sex offense, and taking indecent liberties with a minor. Defendant did not give timely notice of appeal at trial but has petitioned this Court for review.

II. Analysis

¶ 12 Defendant argues that the trial court erred by (1) allowing Nurse Farmer to testify about matters that failed to assist the jury; (2) admitting the courthouse security footage into evidence in violation of Evidentiary Rules 401 and 404(b); and (3) failing to intervene *ex mero motu* during the State's closing argument to correct improper remarks made by the prosecutor. We address each issue in turn.

A. Appellate Jurisdiction

¶ 13 As a preliminary matter, we must first address appellate jurisdiction. Pursuant to Rule 4(a) of the North Carolina Rules of Appellate Procedure, a defendant may appeal from a judgment in a criminal case by either "(1) giving notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" N.C. R. App. P. 4(a). "[W]hen a defendant has not properly given notice

of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 321 (2005).

¶ 14 In this case, Defendant failed to comply with Rule 4's notice requirement, thereby depriving this Court of jurisdiction to hear his appeal as of right. *Id.* In acknowledgement of this error, however, Defendant has filed a Petition for Writ of Certiorari requesting discretionary review of his appeal. Appellate Rule 21(a) provides that this Court may issue a writ of certiorari "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1).

¶ 15 This Court has previously granted petitions for writ of certiorari where, as here, "Defendant lost [his] right to appeal through no fault of [his] own but rather due to [his] trial counsel's failure to give proper notice of appeal." *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 232 (2015) (granting a criminal defendant's petition for writ of certiorari where the defendant lost her right to appeal solely because her defense counsel neglected to provide oral notice of appeal at trial). In the instant case, although Defendant's counsel failed to provide oral notice of appeal in open court, the trial court acknowledged Defendant's appeal and appointed appellate counsel to assist him. "We therefore dismiss [his] appeal, exercise our discretion to grant Defendant's petition for writ of certiorari, and proceed to address the merits of [his] arguments." *Id.*

B. Expert Testimony

¶ 16 Defendant first argues that the trial court erred "by allowing [Nurse] Farmer to testify as an expert that the results of her examination of T.L. were consistent with . . . more than one instance of []vaginal intercourse." Defendant contends that, because Nurse Farmer testified that she "could not tell whether T.L. had ever engaged in intercourse[,]" her testimony that T.L.'s examination was consistent with having engaged in intercourse "did not assist the jury in any way and was inadmissible." After careful review, we disagree.

¶ 17 "[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citation omitted). "[A] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citation and internal quotation marks omitted).

¶ 18 Evidentiary Rule 702(a) provides that an expert witness may only testify about matters which "will assist the trier of fact to understand the evidence or to determine

a fact in issue[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a) (2019). To that end, "expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience" and "do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case for its own." *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (citation, brackets, and internal quotation marks omitted).

¶ 19 Our appellate courts have held that "absent physical evidence supporting a diagnosis of sexual abuse," a medical expert is no more qualified than the lay members of the jury to conclude "that sexual abuse has *in fact* occurred." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (citation omitted) (holding that, absent physical evidence to support a diagnosis of sexual abuse, a medical expert's opinion that sexual abuse occurred lacks "an adequate foundation" for admission under Rule 702 and "is an impermissible opinion regarding the victim's credibility"). Nonetheless, "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* at 267, 559 S.E.2d at 789 (citation omitted); *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 567-68 (2012) ("[I]f a proper foundation has been laid, an expert may testify about the characteristics of sexually abused children and whether an alleged victim exhibits such characteristics." (citation omitted)). This Court has previously held that, "after laying

a proper foundation[,]" an expert witness may offer "an opinion that the lack of physical findings of sexual abuse [i]s consistent with the profiles of other similarly developed children who ha[ve] been sexually abused." *State v. Pierce*, 238 N.C. App. 537, 543, 767 S.E.2d 860, 864 (2014).

¶ 20 For example, in *Pierce*, a pediatric nurse practitioner testified that her examination of the victim in the case resulted in no physical findings of sexual abuse. *Id.* at 542, 767 S.E.2d at 864. She further testified that, despite the fact that the victim's "genital findings were normal[,]" such findings were still "consistent with [the victim's] disclosure" of sexual abuse. *Id.* She also "explained that in girls that were going through puberty, it was very rare to discover findings of sexual penetration." *Id.* This Court held that the nurse's testimony was admissible, noting that the nurse "merely testified that the lack of physical findings was consistent with, and did not contradict, [the victim's] account." *Id.* at 543, 767 S.E.2d at 864. Moreover, the nurse provided the testimony only "after laying a proper foundation by explaining her credentials, including her experience and knowledge of the profiles of sexually abused children, and by explaining the examination procedure she used with [the victim]." *Id.*

¶ 21 Despite the holding in *Pierce*, Defendant argues that this Court's decision in *State v. Davis*, 265 N.C. App. 512, 828 S.E.2d 570 (2019), compels us to conclude that Nurse Farmer's testimony was inadmissible. In *Davis*, a nurse similarly testified

that, although her examination of the victim in the case resulted in no physical findings, the examination was still "consistent with people reporting of sexual abuse." *Id.* at 516, 828 S.E.2d 573. This Court held that the nurse's testimony was inadmissible because it was offered "solely on the grounds that [the nurse] did *not* have physical evidence of sexual abuse." *Id.* at 517, 828 S.E.2d at 574. In its reasoning, the Court stated:

> [T]here is nothing in the record to indicate a proper basis for the nurse's opinion. Such testimony should generally be based on the science of how and why the human body does not always show signs of sexual abuse. The nurse's testimony here was not based on any science or other medical knowledge she may have possessed.

Id.

¶ 22 We find this Court's reasoning in *Davis* inapplicable to the facts of the instant case. There is ample evidence "in the record to indicate a proper basis for [Nurse Farmer's] opinion." *Id.* Here, the trial court permitted Nurse Farmer to testify "as an expert in the field of pediatric sexual assault nurse examination." Between occupational experience and clinical training, Nurse Farmer estimated that she had conducted approximately "1,300" sexual assault examinations. She further stated that she held international and state certifications as a sexual assault nurse examiner and thoroughly explained the details of the examination process. Therefore, as in *Pierce*, Nurse Farmer only provided the testimony at issue after

thoroughly "laying a proper foundation by explaining her credentials, including her experience and knowledge of the profiles of sexually abused children, and by explaining the examination procedure she used with [T.L.]." *Pierce*, 238 N.C. App. at 543, 767 S.E.2d at 864.

¶ 23 Additionally, unlike in *Davis*, Nurse Farmer's testimony was "based on the science of how and why the human body does not always show signs of sexual abuse." *Davis*, 265 N.C. App. at 517, 828 S.E.2d at 574. Although Nurse Farmer testified that her examination of T.L. revealed "[n]o acute injuries[,]" she also stated that "[i]t is not common to find physical findings" during an examination of someone who alleges they have been sexually assaulted, explaining that even women who have experienced pregnancy often do not exhibit observable physical changes after delivery. *See Pierce*, 238 N.C. App. at 542, 767 S.E.2d at 864 (noting that the nurse who examined the victim "explained that in girls that were going through puberty, it was very rare to discover findings of sexual penetration"). She also explained the physiological reasons for why injuries resulting from sexual assault are uncommon and tend to heal quickly.

¶ 24 We conclude that the trial court did not abuse its discretion by permitting Nurse Farmer to testify that T.L.'s disclosure of sexual assault was consistent with her examination. Nurse Farmer provided this testimony only after describing her extensive qualifications and experience conducting sexual assault examinations.

Accordingly, "a proper foundation" was laid to establish Nurse Farmer's expertise "as to the profiles of sexually abused children and whether [T.L.] ha[d] symptoms or characteristics consistent therewith." *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789. Between her expertise and explanation of the "science of how and why the human body does not always show signs of sexual abuse[,]" *Davis*, 265 N.C. App. at 517, 828 S.E.2d at 574, we find that Nurse Farmer's testimony "provide[d] insight beyond the conclusions that jurors can readily draw from their ordinary experience" and "d[id] more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case for its own," *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (citation, brackets, and internal quotation marks omitted).

¶ 25 Lastly, assuming *arguendo* that the trial court did err in admitting the testimony at issue, Defendant cannot show prejudice sufficient to warrant a new trial. *See* N.C. Gen. Stat. § 15A-1443(a) (2019) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when 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."). As this Court noted in *Davis*: "We also cannot say that it is reasonably probable that the [members of the] jury, using their common sense, did not understand that a lack of physical evidence can also indicate that no sexual abuse occurred." *Davis*, 265 N.C. App. at 518, 828 S.E.2d at 575. Defendant additionally

had the opportunity to cross-examine Nurse Farmer and alleviate any potential of prejudice:

> [DEFENDANT:] And so you can't really tell with [T.L.], or with anybody that presents in her physical maturation, whether or not they've even had sexual intercourse before?
>
> [NURSE FARMER:] Correct.
>
> . . . .
>
> [DEFENDANT:] Right. So in the same note, you can't – someone comes in says that they've been sexually assaulted and someone who hasn't, the exam's going to be the same[?]
>
> [NURSE FARMER:] It could potentially be the same, yes.

Accordingly, Defendant's argument lacks merit.

C. Video Evidence

¶ 26 Defendant also argues that "[t]he trial court erred by admitting highly prejudicial and irrelevant testimony regarding [the courthouse security footage] showing [Defendant] engaging in a fight" with his stepson. Specifically, Defendant contends that the footage and his testimony about its contents were "irrelevant under Rule 401 and inadmissible character evidence under Rule 404(b)." We disagree.

1. Rule 401

¶ 27 Evidentiary Rule 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). "[T]he appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citing *State v. Alston*, 341 N.C. 198, 237, 461 S.E.2d 687, 708 (1995)). Nonetheless, Rule 401 "gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has any logical tendency to prove any fact that is of consequence." *State v. Murray*, 229 N.C. App. 285, 290, 746 S.E.2d 452, 456 (2013) (citation and internal quotation mark omitted).

¶ 28 For evidence to be relevant, "[i]t is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions." *Jones v. Hester*, 260 N.C. 264, 268, 132 S.E.2d 586, 589 (1963) (citation and internal quotation marks omitted). A trial court is not required to exclude relevant evidence "simply because it may tend to prejudice the accused or excite sympathy for the cause of the party who offers it. On the other hand, if the only effect of the evidence is to excite prejudice or sympathy, its admission may be ground for a new trial." *State v. Mayhand*, 298 N.C. 418, 428, 259 S.E.2d 231, 238 (1979). "The

burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission." *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (citation omitted).

¶ 29 In this case, Defendant chose to make his disability central to his defense, testifying that he could not lift anything "over 12, 15 pounds" and would not have been able to "pick [T.L.] up or . . . forcibly hold her down." The prosecution was thus entitled to present relevant evidence to rebut Defendant's statements once Defendant "opened the door" to material questions of fact surrounding his physical limitations. *State v. Sexton*, 336 N.C. 321, 360, 444 S.E.2d 879, 901 (1994) ("Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially." (citation omitted)).

¶ 30 The courthouse security footage proffered by the State demonstrated Defendant's ability to engage in physical conflict, making the evidence relevant to resolving a material question of fact in the case. Namely, whether the physical limitations imposed by Defendant's disability prevented him from engaging in the acts of force described in T.L.'s testimony. Accordingly, the footage had a "logical tendency to prove a[] fact . . . of consequence" in the case, *Murray*, 229 N.C. App. at 290, 746 S.E.2d at 456, and was relevant for the purposes of "weigh[ing] the

reasonableness of [Defendant's] contentions" about his ability to "pick [T.L.] up or . . . forcibly hold her down," *Hester*, 260 N.C. at 268, 132 S.E.2d at 589. As this is all that is required for evidence to be relevant, Defendant's argument is dismissed.

2. Rule 404(b)

¶ 31 Defendant's argument that the courthouse security footage constituted inadmissible character evidence is also without merit. Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). Rule 404(b) is a "rule of *inclusion* of relevant evidence . . . subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Accordingly, relevant evidence is "*admissible*" pursuant to Rule 404(b) "so long as it is *relevant to any fact or issue other than* the character of the accused." *Id.* at 278, 389 S.E.2d at 54 (citation and internal quotation mark omitted). Whether evidence is within the purview of Rule 404(b) is a legal conclusion reviewed *de novo* on appeal. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

¶ 32 If the trial court determines that the admission of evidence does not violate Rule 404(b), it must then evaluate whether the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice" pursuant to Rule 403.

N.C. Gen. Stat. § 8C-1, Rule 403 (2019); *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. On appeal, we "review the trial court's Rule 403 determination for abuse of discretion." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. "The determination to admit evidence under Rule 403 is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *State v. Paddock*, 204 N.C. App. 280, 287, 696 S.E.2d 529, 534 (2010) (citation and internal quotation marks omitted).

¶ 33 As previously discussed, the security footage and Defendant's testimony were relevant to resolving material questions of fact raised by Defendant's testimony regarding his physical limitations. Accordingly, the evidence was relevant to a "fact or issue other than the character of the accused" and thus did not violate Rule 404(b). *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54 (citation and alteration in original omitted).

¶ 34 With respect to Rule 403, Defendant has not established that the trial court's decision to admit the footage and testimony into evidence "was so arbitrary that it could not have resulted from a reasoned decision." *Paddock*, 204 N.C. App. at 287, 696 S.E.2d at 534. T.L.'s testimony at trial detailed the use of force by Defendant. Indeed, the use of force she described is difficult to reconcile with Defendant's contention that he could not lift anything "over 12, 15 pounds" and would not have been able to "pick [T.L.] up or . . . forcibly hold her down." The courthouse security

footage was pertinent to resolving a material question of fact raised by Defendant in his testimony. Accordingly, the trial court's decision to admit the footage into evidence was not an abuse of discretion.

D. State's Closing Argument

¶ 35 Defendant lastly argues that the trial court erred by failing to intervene during the State's closing argument to correct improper remarks made by the prosecutor. Defendant takes issue with three statements made by the prosecutor during her closing argument. First, in response to T.L.'s mother, Shameka, testifying that she did not believe the allegations against Defendant, the prosecutor stated, "And it should appall you and should offend you that one of the reasons that Shameka doesn't believe her child or doesn't want to support her child is because [T.L.] should have told [someone about the assault] right then." Second, Defendant argues that the following statement impermissibly referred to matters outside of the record: "You know the statistics; . . . one in four girls are sexually abused and many of them never tell." Lastly, the prosecutor stated, "[Defendant] spent one year and 19 days in the military . . . . But since 1975, ladies and gentlemen, he's on 44 years of disability. Making $3,000 maybe a month, I don't know. You can figure out the math."

¶ 36 Although Defendant failed to object to the prosecutor's closing argument, he contends that the trial court was required to intervene *ex mero motu* because the argument "was designed to appeal to the passions and emotions of the jury, it referred

to facts not in evidence, and it invoked racial stereotypes in inviting the jury [to] question the amount of disability assistance [Defendant] had received as a veteran." While we find some of the prosecutor's remarks discourteous and generally unhelpful to the jury, there is nothing in the record to indicate that they were racially motivated as argued by Defendant. We further find that they were not so prejudicial to Defendant that the trial court was required to intervene *ex mero motu*.

¶ 37 N.C. Gen. Stat. § 15A-1230 provides in pertinent part that:

> During a closing argument to the jury 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. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2019). "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*, 255 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). Pursuant to this standard, "[o]nly 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." *State v. Huey*, 370 N.C. 174, 180, 804 S.E.2d 464, 470 (2017) (citation omitted). "For an appellate court to order a new trial, the 'relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation marks omitted)).

¶ 38 In light of our standard of review, we conclude that Defendant has not established that the prosecutor's argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (internal quotation marks omitted). Accordingly, the trial court did not abuse its discretion by failing to correct the prosecutor's remarks, and Defendant's argument is dismissed.

III. Conclusion

¶ 39 For the reasons stated herein, we conclude that Defendant received a fair trial, free from reversible error.

NO ERROR.

Judges INMAN and COLLINS concur.

Report per Rule 30(e).