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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-640

No. COA20-851

Filed 16 November 2021

Mecklenburg County, Nos. 17 CRS 7388, 208590-92, 208594

STATE OF NORTH CAROLINA

v.

ROBERT WILSON DRIVER, Defendant.

Appeal by Defendant from judgments entered 5 March 2020 by Judge Louis A. Trosch, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 October 2021.

Attorney General Joshua H. Stein, by Associate Attorney General Brian M. Miller, for the State.

Kimberly P. Hoppin for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Robert Wilson Driver ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of first-degree murder, two counts of assault with a deadly weapon inflicting serious injury, attempted robbery with a firearm, and possession of firearm by a felon. Defendant argues on appeal that (1) the trial court erred in failing to arrest judgment on one of the felony charges

underlying the felony murder conviction, and (2) the trial court erred by failing to intervene *ex mero motu* in response to improper remarks made by the prosecutor during closing arguments. We agree that the trial court erred by failing to arrest judgment on one of the felony charges and disagree that the prosecutor's remarks were improper. We vacate and remand the first issue for resentencing, but otherwise discern no error.

I. Factual and Procedural Background

¶ 2 On 13 March 2017, Defendant was charged with first-degree murder, attempted robbery with a dangerous weapon, possession of firearm by a felon, and two counts of assault with a deadly weapon with intent to kill and inflicting serious injury. Defendant's trial was held from 24 February to 5 March 2020 in Mecklenburg County Superior Court.

A. State's Evidence

¶ 3 Evidence presented by the State tended to show the following:

¶ 4 On the evening of 24 February 2017, Antonio Weston, RaShawn Clement, and Bryan ("BJ") Thompson were drinking and "hanging out" in the Weston garage. RaShawn and BJ were also smoking marijuana, but Antonio was not. The three men were friends. Sometime after 9 pm, a man whom Antonio knew as "Rio" entered the garage, together with another man. Rio greeted Antonio, then left. Antonio described the brief interaction as "friendly" but thought that Rio showing up at his house "was

weird, because he [hadn't ever] been there before."

¶ 5 About thirty minutes after Rio first stopped by, he returned to the garage and pointed a shotgun at Antonio. Next, Rio hit Antonio on the head with the shotgun. Rio said, "I need it," which Antonio interpreted to mean that Rio was trying to rob him. Rio was wearing a mask over his nose and mouth, which he had not been wearing earlier, but otherwise was wearing the same clothing. Antonio recognized the man as Rio based on his clothing, voice, and eyes. Another man, who appeared to be the same person who had accompanied Rio earlier, was standing at the edge of the garage and did not come inside.

¶ 6 After he was struck, Antonio fell and "tried to slide back to . . . the house door." Rio swung around, pointed his shotgun at BJ, and said "BJ, back down." Police officers later found BJ unresponsive in the garage, and a forensic pathologist opined that BJ died from a shotgun wound.

¶ 7 Rio then approached Antonio and shot him in the hip from about two feet away. After Antonio was shot, he saw RaShawn running from the garage. He heard another shot but was unsure whether it hit anyone. He did not hear any other gunshots. RaShawn testified that he was shot from behind, but not by the shotgun, and he did not know who shot him.

¶ 8 Antonio's father pulled him into the house. Inside, Antonio's sister, Catarina Weston, asked who shot him. Antonio responded, "Rio." Defendant was the only

person by the name of "Rio" who Antonio knew. Catarina knew two people named "Rio": one was "a boy named Quin" and the other was Defendant, who she knew from high school. When police officers arrived at the house after the shooting, Catarina told them that Antonio said that Defendant had shot him. During a subsequent interview with law enforcement, Catarina told detectives that she thought Quin had shot Antonio. Catarina described Quin as "not that tall" and possibly five feet, six inches in height. At trial, both Antonio and RaShawn described the man with the shotgun as being taller than six feet and one or two inches. Both Antonio and Catarina identified Defendant in court, and Antonio specifically identified Defendant in court as the person who shot him.

¶ 9 Defendant was arrested and interviewed by a detective on 6 March 2017. Defendant acknowledged that "Rio" had been his nickname for multiple years. He stated that on the evening of 24 February 2017, he had been with his brother at Little Rock Apartments for his brother's birthday party, starting at "10-ish or 11-ish" that night and remaining until a little after midnight. He then went to "an after-hours party on Mount Holly-Huntersville Road" with his girlfriend and several other people, and returned to Little Rock Apartments at around 5 a.m. or 6 a.m. He said that he left Little Rock Apartments only twice on the evening of 24 February 2017: first to take his girlfriend to work, and second to go to a liquor store sometime before 9 p.m. He said that he never went to the south side of Charlotte on 24 February 2017. He

admitted that he had bought cocaine from Antonio during a visit to Antonio's house (where he recognized BJ and several others playing cards) but said that the visit was on Wednesday or Thursday, rather than Friday, 24 February 2017.

¶ 10 Defendant consented to a search of his two phones. A cellular analysis report showed that Defendant's cell phone records were consistent with Defendant being in Antonio's neighborhood around the time the shooting occurred, and then moved to a location in the area of Defendant's brother's party. Defendant also texted an unknown person ninety-eight times on 25 February 2017, but Defendant subsequently deleted those messages.

B. Defendant's Evidence

¶ 11 Defendant did not testify at trial. Five witnesses testified on Defendant's behalf. Their testimony tended to show the following:

¶ 12 Defendant's brother lived parttime at Little Rock Apartments. He was celebrating his birthday on the night of 24 February 2017. Several people who knew Defendant testified that they saw Defendant at the party. Their various estimates of the time Defendant arrived at the party ranged from around 8:30 p.m. at the earliest to around 10 p.m. at the latest.

C. Closing Arguments

¶ 13 During closing arguments, the prosecutor's remarks included the following:

> Why do we even have [the felony murder] law in North

> Carolina? . . . Here's what our State's highest court said many years ago about why we even have this law on the books:
>
> "The felony murder rule was promulgated to deter even accidental killings from occurring during the commission of or attempted commission of a dangerous felony. The rationale of the felony murder rule is that one who commits a felony is a bad person, with a bad state of mind, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended."
>
> So as you can see, the law covers even accidental killing committed during a felony. Where the robber drops the gun and it goes off and kills the victim.

¶ 14 The prosecutor went on to explain the connection between a felony conviction and a felony murder conviction as follows:

> Now, because [Defendant] is charged with both of those felonies, among other felonies, your verdict should be consistent. If you find him guilty of the crime of robbery then you, by definition, would have found he committed that felony under the definition of felony murder.
>
> Same thing with the assault on Antonio. If you find that he's guilty of that crime of assault then you would have, by definition, found that he committed the assault for the purposes of this definition of felony murder.

¶ 15 The prosecutor concluded the State's closing arguments with the following remarks:

> There is only one living person who knew Rio, and saw him in the garage that night, and told the police he did

> it.
>
> BJ cannot come in here and tell you Rio did it. He knew [Defendant], and [Defendant] knew him. [Defendant] admitted that in his interview. But BJ has been silenced by [Defendant], so the evidence has to speak for . . . BJ. For justice to be done, for BJ's family to know that our court system works and that there is justice, and perpetrators are held accountable, the evidence has to do the talking in this case.
>
> And when you deliberate and you look through this evidence, you'll see that Antonio was absolutely correct. That the evidence is that Rio, Robert Driver, is the perpetrator.

¶ 16 Defendant did not object to any of the prosecutor's remarks during the State's closing arguments.

D. Jury Instructions and Verdicts

¶ 17 At the beginning of jury instructions, the trial court admonished the jury that "[i]t is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is or as you might like it to be." The trial court instructed the jury, in pertinent part, that it could find Defendant guilty of first-degree felony murder based on assault with a deadly weapon inflicting serious injury on Antonio Weston, or attempted robbery with a firearm of Antonio Weston.

¶ 18 The parties stipulated that Defendant had a previous felony conviction.

¶ 19 The jury found Defendant guilty of all five crimes with which he was charged. The jury noted on the verdict sheet that the felony murder conviction was supported

by both the assault with a deadly weapon conviction and the attempted robbery conviction.

E. Sentencing and Appeal

¶ 20 The trial court sentenced Defendant to life imprisonment without parole for felony murder. The trial court consolidated for sentencing the remaining four felonies, and sentenced Defendant to a term of 84 to 113 months for these four felonies. Defendant did not move to arrest judgment and did not object on double jeopardy grounds to the convictions or sentences.

¶ 21 Defendant gave notice of appeal in open court.

II. Analysis

A. The Trial Court Failed to Arrest Judgment.

¶ 22 Defendant argues, and the State concedes, that the trial court erred by failing to arrest judgment on one of the felony charges underlying the felony murder conviction. We agree.

1. Preservation and Rule 2

¶ 23 We note that "[b]y failing to move in the trial court to arrest judgment on either conviction or otherwise to object to the conviction or sentences on double jeopardy grounds, [D]efendant has waived his right to raise this issue on appeal." *State v. Coleman*, 161 N.C. App. 224, 234, 587 S.E.2d 889, 896 (2003) (citation omitted). Nevertheless, we invoke Rule 2 of the North Carolina Rules of Appellate Procedure

to consider the merits of Defendant's argument. *See id.* (applying N.C. R. App. P. 2 to review the issue on appeal).

2. Standard of Review

¶ 24 "Whether to arrest judgment is a question of law[.]" *State v. Curry*, 203 N.C. App. 375, 378, 692 S.E.2d 129, 134 (2010) (citation omitted). "Questions of law receive *de novo* review[.]" *In re Greens of Pine Glen*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted). "'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319).

3. Failure to Arrest Judgment

¶ 25 "[T]he merger rule requires the trial court to arrest judgment on at least one of the underlying felony murder convictions *if two separate convictions* supported the conviction for felony murder[.]" *State v. Stroud*, 252 N.C. App. 200, 215, 797 S.E.2d 34, 45 (2017) (citation and internal quotation marks omitted).

¶ 26 The trial court erred by not arresting judgment on at least one of the two felony convictions supporting Defendant's felony murder conviction. The jury noted on its verdict sheet that the felony murder conviction was supported by both the assault with a deadly weapon conviction and the attempted robbery conviction. The trial court sentenced Defendant to life imprisonment without parole for felony murder,

and consolidated the remaining four felonies for a second judgment. This second judgment included the two felony convictions supporting felony murder.

¶ 27 The term of Defendant's sentence might have been increased by the trial court's error. For the four consolidated felony convictions, Defendant was sentenced to 84 to 113 months. This is within the presumptive range for the most serious of those four offenses for someone with a prior record level of III for felony sentencing: attempted robbery with a firearm, a class D felony. N.C. Gen. Stat. § 14-87(a) (2019) (attempted robbery with a dangerous weapon); N.C. Gen. Stat. § 15A-1340.17(c), (e) (2019) (identifying the presumptive sentencing ranges for levels of felony offenses). If the trial court had arrested judgment on the conviction for attempted robbery with a firearm, the highest remaining conviction would be for assault with a deadly weapon inflicting serious injury, a class E felony. N.C. Gen. Stat. § 14-32(b) (2019) (assault with a deadly weapon inflicting serious injury).

¶ 28 "[T]he trial court is permitted to use its discretion to select which felony conviction would serve as the underlying felony." *Stroud*, 252 N.C. App. at 215–16, 797 S.E.2d at 45 (citation and internal quotation marks omitted). The trial court could have arrested judgment on the conviction for assault with a deadly weapon inflicting serious injury. This would have no effect on the length of the sentence Defendant actually received. Nevertheless, "the separate convictions may still give rise to adverse collateral consequences." *State v. Etheridge*, 319 N.C. 34, 50, 352

S.E.2d 673, 683 (1987) (citations omitted).

¶ 29 We remand this issue to the trial court for resentencing, with an instruction to arrest judgment on one of the convictions underlying the felony murder conviction. *See State v. Wortham,* 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) ("Since it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we . . . remand for resentencing[.]")

B. The State's Closing Arguments Were Not Improper.

¶ 30 Defendant argues that the trial court committed reversible error by failing to intervene *ex mero motu* to strike improper statements made during the State's closing arguments. We disagree.

1. Standard of Review

¶ 31 "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) (citation omitted). On appeal, Defendant "must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Thompson*, 359 N.C. 77, 109–10, 604 S.E.2d 850, 873 (2004) (citations omitted).

2. Comment on Defendant's Character

¶ 32 Defendant first contends that the State improperly commented on Defendant's character by stating, "one who commits a felony is a bad person, with a bad state of mind[.]" Defendant argues that this statement made by the prosecutor qualifies as name-calling.

¶ 33 Name-calling is impermissible in a closing argument. *State v. Maske*, 358 N.C. 40, 59, 591 S.E.2d 521, 533 (2004). "Such tactics risk prejudicing a defendant . . . by improperly leading the jury to base its decision not on the evidence relating to the issues submitted, but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal." *Jones*, 355 N.C. at 134, 558 S.E.2d at 108.

¶ 34 Here, the prosecutor's statement contained no error. The "bad person" phrase was quoted from the dissenting opinion in *State v. Wall*, 304 N.C. 609, 626, 286 S.E.2d 68, 78 (1982) (Copeland, J., dissenting). There, the dissent quoted a criminal law handbook which provided the justification and rationale for the felony murder rule. *Id.* The prosecutor was not interjecting his opinion or calling Defendant names. There was no error.

3. The Statements of Law.

¶ 35 Defendant contends the State's closing argument misstated the law. "The district attorney, in his argument to the jury, may not make erroneous statements of

law[.] . . . However, . . . a new trial is required only where [the] defendant shows on appeal that this error was material and prejudicial." *State v. Harris*, 290 N.C. 681, 695, 228 S.E.2d 437, 445 (1976) (citations omitted).

¶ 36 In *Harris*, the State made two minor misstatements of the applicable law during closing arguments, but the trial judge instructed the jury on the felony murder doctrine and charged the jury to apply the law given by the court. *Id.* The Court reasoned that since the trial judge accurately instructed the jury on the applicable law and prefaced the jury charge "with a direction to apply only the law given to them by the court", the State's misstatement of the law did not amount to a material or prejudicial error. *Id.* at 695–96, 228 S.E.2d at 445.

¶ 37 Defendant has failed to demonstrate that the prosecutor's argument contained erroneous statements of law. Here, the prosecutor explained the felony murder rule by stating that if Defendant was found guilty of a charged underlying offense, then by definition he would be guilty of first-degree murder. Although the jury was not legally required to reach consistent verdicts, *see State v. Applewhite*, 190 N.C. App. 132, 141, 660 S.E.2d 240, 246 (2008) (stating that "a jury is not required to be consistent") (citation omitted), the prosecutor's explanation was true in that consistent verdicts would be a logical result of applying the felony murder rule. *See State v. Pierce*, 346 N.C. 471, 493, 488 S.E.2d 576, 589 (1997) ("First-degree murder by reason of felony murder is committed when a victim is killed during the

perpetration or attempted perpetration of certain enumerated felonies or a felony committed or attempted with the use of a deadly weapon." (citations and internal quotation marks omitted)).

¶ 38 Here, even if the prosecutor's statements qualified as a misstatement of the law, the trial judge accurately instructed the jury on the applicable law and explained that it was "absolutely necessary" for the jury to apply the law as given to them by the judge. There was no material or prejudicial error even assuming *arguendo* that the State misstated the law. *See Harris*, 290 N.C. at 695–96, 228 S.E.2d at 445.

4. Appeal to the Jury's Sympathies.

¶ 39 Defendant's third contention is that the State improperly appealed to the jurors' sympathies during closing arguments. "Counsel must be allowed wide latitude in the argument of hotly contested cases. However, the jury's decision must be based solely on the evidence presented at trial and the law with respect thereto[.]" *State v. Alford*, 339 N.C. 562, 572, 453 S.E.2d 512, 517 (1995) (citations and internal quotation marks omitted).

¶ 40 In *Alford*, the State "mentioned that the victim was 'taken from two parents that care' and 'who loved their son.'" *Id.* at 571, 453 S.E.2d at 517. The defendant argued these statements improperly appealed to the sympathies of the jurors, and that the trial court's failure to intervene in response to the defendant's objection was a material and prejudicial error. *Id.* at 571–72, 453 S.E.2d at 517. On appeal, our

Supreme Court disagreed and concluded that, viewed in context of the entire argument, the State's comments about the victim's family did not improperly induce sympathy. *Id.* at 572, 453 S.E.2d at 517. The Supreme Court reasoned that, "the statements did not imply that the jury should consider accountability to the victim's family or the community in reaching its verdict." *Id.* at 572–573, 453 S.E.2d at 517 (citation omitted).

¶ 41 In the present case, the prosecutor stated, "[f]or justice to be done, for BJ's family to know that our court system works and that there is justice, and perpetrators are held accountable, the evidence has to do the talking in this case." Like in *Alford*, the prosecutor did not tell the jury to consider accountability to the victim's family in reaching a verdict. *See id.* Instead, the prosecutor explicitly told the jury that, "the evidence has to do the talking in this case." "Viewed in the context of [the prosecutor's] entire argument, these comments did not attempt to make sympathy for the victim or his family the focus of the jury's deliberation." *Id.* at 572, 453 S.E.2d at 517. The prosecutor did not improperly appeal to the jurors' sympathies and the trial court did not err by failing to intervene *ex mero motu*.

III. Conclusion

¶ 42 We vacate and remand for resentencing with an instruction to arrest judgment on one of the convictions underlying the felony murder conviction. We otherwise hold Defendant received a trial free from error.

VACATED AND REMANDED IN PART; NO ERROR IN PART.

Judges CARPENTER and JACKSON concur.

Report per Rule 30(e).