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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-818

No. COA22-34

Filed 6 December 2022

Duplin County, No. 18CRS52832

STATE OF NORTH CAROLINA

v.

CHARLES DUNN, Defendant.

Appeal by defendant from judgment entered 23 April 2021 by Judge Clint D. Rowe in Duplin County Superior Court. Heard in the Court of Appeals 21 September 2022.

Joseph P. Lattimore for defendant-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew E. Buckner, for the State-appellee.

GORE, Judge.

¶ 1 Defendant, Charles Dunn, appeals from the trial court's judgment and sentence imposed upon a jury's verdict of guilty for habitual impaired driving. This Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a). Defendant raises three issues on appeal: (i) whether the trial court committed plain error in admitting testimony regarding defendant's post-arrest silence; (ii) whether

the trial court committed plain error by admitting a law enforcement officer's testimony about how the motor vehicle collision occurred and his report detailing the same; and (iii) whether the trial court abused its discretion by not intervening *ex mero motu* during the State's closing argument. We discern no plain error or prejudicial error in this case.

I.

¶ 2 On 25 December 2018, defendant celebrated the Christmas holiday with his girlfriend, Jessie Smith, and her son, James Smith, at their residence in Kenansville, North Carolina. Defendant drank an unknown quantity of Busch Ice beer throughout the day, beginning between 9:00 a.m. and 10:00 a.m. By the evening, everyone in the group, including defendant, was "wasted."

¶ 3 That night, defendant was involved in a motor vehicle collision while operating a silver Toyota passenger car down West Best Road in Kenansville. The vehicle was found straddling a ditch line. At approximately 10:00 p.m., defendant called Mr. Smith to report that he had "wrecked" Ms. Smith's rental car.

¶ 4 Around the same time, Steven Miller was traveling on West Best Road when he observed a silver car in a ditch and a man in the road. Miller called 911 to report his observations, and emergency responders were dispatched to the scene. Upon arrival, no one could be located.

¶ 5 Between 10:00 p.m. and 10:40 p.m., Shawn Batts was traveling down West

Best Road with his family when he encountered a man[1] walking down the road. Because it was cold outside, and the man was in shorts with no jacket, Batts offered him a ride. The man told Batts he needed a ride to a friend's house, and Batts obliged. Batts could smell an odor of alcohol and could tell that the man had been drinking. The man stated he had been driving the car behind them, which Batts could see was in a ditch. Batts testified the man rode in the car for 2-3 minutes before being dropped off at the intersection of West Best Road and Bowdens Road. The man did not have any difficulty getting into Batts's car, nor was there anything unusual about what the man was saying during his conversation with Batts.

¶ 6 Batts recalled he returned to the scene after he went home with his family. He saw a police vehicle driving in that area. On the way back home, Batts called 911 to report his observations. Batts's 911 call was registered at 10:46:13 p.m.

¶ 7 At approximately 10:39 p.m., Highway Patrolman Curtis Tripp responded to the area of West Best Road and Perry Miller Road, where he observed a silver Toyota vehicle "straddling the ditch-line." Fire Department personnel were securing the vehicle, which was abandoned. Patrolman Tripp assessed the scene, called for a tow, and then proceeded to investigate reports of a suspicious man walking in the area.

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[1] Batts could not identify defendant as the man he provided a ride to that evening. However, defense counsel acknowledged defendant was the man whom Batts had transported.

¶ 8 After receiving a call about a stolen motor vehicle, Duplin County Sheriff's Deputy Jevon Robinson saw defendant walking on West Best Road. Defendant indicated that everything was okay and that he was just walking. Deputy Robinson then encountered Patrolman Tripp, who was in the area investigating the report of the vehicle in the ditch. After speaking, the two returned to the location where Deputy Robinson initially observed defendant.

¶ 9 At approximately 10:51:37 p.m., while heading toward Bowdens Road, Deputy Robinson and Patrolman Tripp encountered defendant. Deputy Robinson noticed defendant appeared to be "on something." Defendant allowed Deputy Robinson to frisk him. Deputy Robinson patted defendant down, and located a set of keys, which were later matched to the wrecked rental car. At that point, Patrolman Tripp took control of the investigation.

¶ 10 Patrolman Tripp initially asked defendant what was going on, to which defendant stated something about a deer. Deputy Robinson stated he was going to follow up on the stolen vehicle investigation, to which defendant stated he "was coming from his house, that was the address of the stolen car, and said how can you steal something when it's your girlfriend's and you live in the same house."

¶ 11 Patrolman Tripp noticed defendant emitted a moderate odor of alcohol, was unsteady on his feet, and had red, glassy eyes. Based on his observations of defendant, Patrolman Tripp formed the opinion that defendant was appreciably

impaired and placed defendant under arrest. Patrolman Tripp confirmed the key recovered from defendant's person started the ignition of the crashed vehicle in the ditch. He then transported defendant to Duplin County Jail.

¶ 12 At the station, defendant refused Patrolman Tripp's request to perform physical tests. Chemical testing of defendant's breath indicated his blood alcohol concentration was 0.14.

¶ 13 On 18 March 2019, a Duplin County grand jury returned an indictment against defendant for habitual impaired driving and obtaining habitual felon status. Prior to trial, defendant stipulated to his three prior convictions for driving while impaired. This matter came on for trial on 21 April 2021 in Duplin County Superior Court. On 23 April 2021, the jury found defendant guilty of driving while impaired. Thereafter, defendant pleaded guilty to having obtained habitual felon status.

¶ 14 The trial court imposed an active sentence in the presumptive range of 110-144 months' imprisonment. Defendant gave oral notice of appeal in open court.

II.

¶ 15 Defendant argues the trial court committed plain error when it allowed Patrolman Tripp to testify that defendant refused to answer questions following his arrest. Trial counsel did not object to the testimony regarding defendant's post-arrest, post-*Miranda* silence. Accordingly, defendant "specifically and distinctly" contends the admission of this evidence amounted to plain error in the circumstances

of this case. N.C.R. App. P. 10(a)(4).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings . . . .

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quotation marks and citations omitted).

¶ 16 The 5th Amendment to the United States Constitution provides "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. Similarly, Article 1, Section 23 of the North Carolina Constitution states, "[i]n all criminal prosecutions, every person charged with crime has the right to . . . not be compelled to give self-incriminating evidence . . . ." N.C. Const. art. I, § 23. Consequently, our Courts have consistently held that it is constitutionally impermissible for the State to "introduce evidence that a defendant exercised his fifth amendment right to remain silent." *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 171 (1983) (citation omitted); *see also State v. Moore*, 366 N.C. 100, 104, 726 S.E.2d 168, 172 (2012) (quotation marks and citation omitted) ("If a defendant has been given his *Miranda* warnings, his silence may not be used against him.").

¶ 17 At trial, Patrolman Tripp testified he arrested defendant on the side of the road and transported him to the Duplin County Jail for processing. Thereafter, the following exchange occurred between the prosecutor and Patrolman Tripp:

> Q. Did you read him his Miranda rights?
>
> A. That's correct, I did.
>
> Q. And did he indicate that he would answer questions for you?
>
> A. No. He refused those also.

¶ 18 Our Supreme Court has held that the admission of such testimony is erroneous. *See id.* However, "[w]hether defendant is entitled to a new trial is to be determined by application of our plain error rule." *Id.* at 106, 726 S.E.2d at 173.

> [T]he following factors, none of which should be deemed determinative, must be considered in ascertaining whether a prosecutorial comment concerning a defendant's post-arrest silence constitutes plain error: (1) whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; (2) whether the record contained substantial evidence of the defendant's guilt; (3) whether the defendant's credibility was successfully attacked in other ways in addition to the impermissible comment upon his or her decision to exercise his or her constitutional right to remain silent; and (4) the extent to which the prosecutor emphasized or capitalized on the improper testimony by, for example, engaging in extensive cross-examination concerning the defendant's post-arrest silence or attacking the defendant's credibility in closing argument based on his decision to refrain from making a statement to investigating officers.

State v. Richardson, 226 N.C. App. 292, 302, 741 S.E.2d 434, 441-42 (2013).

¶ 19 The prosecutor elicited the statement regarding defendant's *post-Miranda* silence. Additionally, during the State's closing argument, the prosecutor argued, "Further, the defendant never makes any mention to law enforcement about drinking after the wreck. Never makes any mention of that at all. Never even mentions Robert to Trooper Tripp." However, contrary to defendant's assertion, this argument is consistent with other evidence of defendant's pre-arrest statements. In context, it cannot be said that the prosecutor impermissibly "emphasize[d] or highlight[ed] defendant's exercise of his rights." *Moore*, 366 N.C. at 107, 726 S.E.2d at 173. This case is also unlike *Richardson*, where the prosecutor extensively cross-examined the defendant about his failure to make a statement to the detective. 226 N.C. App. at 304-07, 741 S.E.2d at 443-44.

¶ 20 Here, the erroneous admission of Patrolman Tripp's testimony did not amount to plain error. The prosecutor did not capitalize on or emphasize Patrolman Tripp's testimony; did not cross-examine defendant about his post-arrest silence; and the record contains substantial evidence of defendant's guilt. *See Moore*, 366 N.C. at 109, 726 S.E.2d at 175.

III.

¶ 21 Defendant argues the trial court plainly erred by admitting Patrolman Tripp's testimony regarding how the accident occurred and his accident report into evidence. We disagree.

¶ 22 Patrolman Tripp was permitted to give his conclusion that the accident occurred because defendant failed to negotiate a sight curve in the road and subsequently overcompensated and lost control. This was error because Tripp did not witness the crash and was not qualified as an expert in accident reconstruction. *See State v. Maready*, 205 N.C. App. 1, 17, 695 S.E.2d 771, 782, *disc. rev. denied*, 364 N.C. 329, 701 S.E.2d 246 (2010) (citation omitted) ("Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury."); *see also State v. Wells*, 52 N.C. App. 311, 314, 278 S.E.2d 527, 529 (1981) ("[W]hile it is competent for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of an accident, his testimony as to his conclusions from those facts is incompetent."). To constitute plain error, it must be established that the erroneous admission of the challenged evidence had a probable impact on the outcome at trial. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

¶ 23 Here, the fact that defendant was in a motor vehicle collision on 25 December 2018 was not in dispute. Defendant acknowledged to multiple witnesses that he was involved in a wreck that evening. The only contested issue was whether defendant was impaired at the time of the collision. Patrolman Tripp's opinion about how the

accident occurred did not go to a contested issue in the case and could not have had a probable impact on the jury's verdict. Further, the State presented substantial evidence of defendant's impairment prior to the collision from which the jury could reasonably find defendant's guilt. Thus, defendant fails to demonstrate prejudice.

IV.

¶ 24 Defendant contends the trial court erred when it failed to intervene *ex mero motu* during the State's closing argument. Specifically, defendant argues the prosecutor improperly gave her personal opinion on the credibility of Robert Herring's testimony; insinuated Herring conspired with defendant to commit perjury; and misstated the testimony of another witness concerning a fact that was critical to the defense.

¶ 25 Ordinarily, "[w]hen counsel makes an improper remark in arguing to the jury, an exception must be taken before the verdict or the impropriety is waived." *State v. Davis*, 305 N.C. 400, 421, 290 S.E.2d 574, 587 (1982) (citation 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*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002).

> 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) (*purgandum*). Only where this Court discerns "both an improper argument and prejudice will this Court conclude that the error merits appropriate relief." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 468 (2017).

¶ 26 "In closing arguments to the jury, an attorney may not: (1) become abusive, (2) express his personal belief as to the truth or falsity of the evidence, (3) express his personal belief as to which party should prevail, or (4) make arguments premised on matters outside the record." *Jones*, 355 N.C. at 127, 558 S.E.2d at 104. "[C]ounsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *Id.* at 128, 558 S.E.2d at 105; *see also* N.C. Gen. Stat. § 15A-1230(a) (2021). In determining whether a prosecutor's remarks are grossly improper, "we consider the statements in context and in light of the overall factual circumstances to which they refer." *Huey*, 370 N.C. at 180, 804 S.E.2d at 470 (quotation marks and citation omitted).

¶ 27 Here, defendant highlights several statements in the State's closing argument

as impermissible expressions of the prosecutor's personal opinion about the falsity of defendant's evidence. These remarks include: references to "this rigamarole that they're claiming in regards to Robert [Herring];" reference to Mr. Herring as a "red herring;" assertion that defendant and Mr. Herring "had a chance to talk about it, get the story together;" and statement that "the defense is trying to come up with a random friend of the defendant to try to be a red herring here, and we would just ask that you don't fall for it." Additionally, defendant contends the prosecutor twice misstated the evidence about the timing of when defendant left Shawn Batts's car and Batts's subsequent call to 911.

¶ 28 Assuming *arguendo*, the challenged remarks were improper, the trial court was not presented with a contemporaneous exception and is only required to intervene *ex mero motu* "when the State's comments stray so far from the bounds of propriety as to impede the defendant's right to a fair trial . . . ." *State v. Harris*, 308 N.C. 159, 169, 301 S.E.2d 91, 98 (1983) (quotation marks and citation omitted). The prosecutor is permitted to challenge the credibility of a witness based on facts in the record, and to draw reasonable inferences from that evidence in arguing before the jury. *See State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005) (quotation marks and citation omitted) ("[A] lawyer can argue to the jury that they should not believe a witness."); *see also State v. Small*, 328 N.C. 175, 185, 400 S.E.2d 413, 418 (1991) (quotation marks and citation omitted) ("A prosecutor's argument is not

improper when it is consistent with the record and does not travel into the fields of conjecture or personal opinion."). Here, defendant fails to demonstrate extreme impropriety by the prosecutor, fundamental unfairness, or "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2021).

V.

¶ 29 For the foregoing reasons, defendant received a fair trial free from prejudicial error.

NO PLAIN ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).