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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-187

Filed 21 February 2023

Yadkin County, Nos. 18 CRS 50638, 18 CRS 50640, 18 CRS 50894-95, 18 CRS 50916, 18 CRS 50918-21, 18 CRS 50923

STATE OF NORTH CAROLINA

v.

TAMMY LYNETTE CASS

Appeal by Defendant from Judgments entered 18 August 2021 by Judge John O. Craig, III in Yadkin County Superior Court. Heard in the Court of Appeals 21 September 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexander G. Walton, for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Tammy Lynette Cass (Defendant) appeals from Judgments entered 18 August 2021 upon jury verdicts finding her guilty of one count of Trafficking in Methamphetamine by Possession; one count of Trafficking in Methamphetamine by Manufacturing; Manufacturing Methamphetamine; Possession of an Immediate

Precursor with Intent to Manufacture Methamphetamine; Intentionally Maintaining a Dwelling for Keeping and Selling Controlled Substances; Conspiracy to Sell a Schedule II Controlled Substance; and six counts of Conspiracy to Manufacture Methamphetamine. The Record before us tends to reflect the following:

On 28 January 2019, Defendant was indicted for Possession of an Immediate Precursor with Intent to Manufacture Methamphetamine; Maintaining a Dwelling for Keeping and Selling Controlled Substances; one count of Trafficking in Methamphetamine by Manufacturing; one count of Trafficking in Methamphetamine by Possession; Manufacturing Methamphetamine; Conspiracy to Sell or Deliver a Schedule II Controlled Substance; Conspiracy to Sell or Deliver Marijuana; and seven counts of Felony Conspiracy to Manufacture Methamphetamine with a host of co-conspirators. On 22 April 2019, Defendant was also indicted for one count of Trafficking in Methamphetamine by Possession and one count of Trafficking in Methamphetamine by Manufacturing.

Defendant filed a Motion *in Limine* to exclude all information referencing or obtained from the National Precursor Log Exchange (NPLEx) regarding Defendant's transactions of pseudoephedrine. Relevant here, Defendant sought to exclude statements regarding: the number of times Defendant made purchases of pseudoephedrine; the number of times Defendant was denied the purchase of pseudoephedrine; and Defendant's activity that was monitored through NPLEx. The

trial court reserved its ruling on the admissibility of statements regarding the NPLEx records until trial.

The matter came on for trial on 9 August 2021.¹ The trial court heard testimony from Sergeant Detective Brian Booe (Detective Booe) and Detective Lieutenant A.C. Shores, III (Detective Shores). Detective Booe testified this investigation began in 2016 when he was monitoring NPLEx² for pseudoephedrine purchases. While monitoring NPLEx, Detective Booe identified four individuals—including Defendant—making “an abnormally large amount of pseudoephedrine purchases.” Further, he observed three of the four individuals shared the same reported address and many of the purchases were on Friday evenings and weekends, which indicated to Detective Booe the purchases were designed to avoid law enforcement.

During Detective Booe’s testimony, the trial court admitted, over Defendant’s objection, NPLEx records of Defendant’s purchases from September 2012 to April 2018 into evidence. The NPLEx records revealed Defendant engaged in 145 transactions, including purchases and attempted purchases of pseudoephedrine.

The trial court summarized its earlier bench conference regarding the admissibility of the NPLEx records outside the presence of the jury:

¹ Defendant’s case was joined, over Defendant’s Motion for a Separate Trial, with a Co-Defendant for trial. Co-Defendant is not a party to this appeal.

² During his testimony, Detective Booe explained NPLEx is a database that monitors pseudoephedrine purchases through retail establishments.

There are a couple things we need to get on the record before we bring the jury back in. First, with regard to the NPLeX exhibits, [Defense Counsel] raised an objection at the bench concerning the time frame of the document. And I told him at the bench that I was going to allow them in despite his objections that a lot of the purchases related to the time frame that was before this detective started his investigation. I'm allowing it in under Rule 401. And I have balanced it in accordance with the requirements of Rule 403 and in my discretion, I am going to allow that to come in and in fact it did come in.

Detective Shores corroborated Detective Booe's testimony, stating the NPLeX records reflecting purchases made on Fridays, Saturdays, and Sundays were indicators of criminal activity. The State also called many of Defendant's alleged co-conspirators, and each testified to Defendant's use, selling, and/or manufacturing of methamphetamine. Defendant presented no evidence in her defense.

During closing argument, the State—without objection—argued:

Meth is illegal for a reason. It's addictive. Think back to your own voir dire. Do you remember what several of you talked about? Overdoses. Meth kills people. That's why this is a serious crime.

....

It's up to you to help us put an end to the drug problem in Yadkin County. And that's what you have the opportunity to do here today. We need your help with that. I ask you to find [Defendant] guilty. Thank you very much.

The jury returned guilty verdicts for one count of Trafficking in Methamphetamine by Possession; one count of Trafficking in Methamphetamine by Manufacturing; Manufacturing Methamphetamine; Possession of an Immediate

Precursor with Intent to Manufacture Methamphetamine; Intentionally Maintaining a Dwelling for Keeping and Selling Controlled Substances; Conspiracy to Sell a Schedule II Controlled Substance; and six counts of Conspiracy to Manufacture Methamphetamine.

On 18 August 2021, the trial court entered two Judgments against Defendant. The first Judgment consolidated the two Trafficking in Methamphetamine convictions and sentenced Defendant to an active term of 90 to 120 months. The trial court consolidated the remaining convictions and entered a second Judgment, sentencing Defendant to a consecutive, active term of 72 to 99 months.

Appellate Jurisdiction

On 18 August 2021, Defendant timely filed written Notice of Appeal consistent with N.C.R. App. P. 4(a)(2). Defendant, however, acknowledges the Notice of Appeal may be defective in that it references only a single judgment and only partially lists with any specificity the convictions contained in the two Judgments entered against Defendant. Therefore, Defendant has also filed a Petition for Writ of Certiorari, requesting this Court grant review of Defendant's appeal in the event we deem the Notice of Appeal fatally defective. The State takes no position on the Petition for Writ of Certiorari, leaving the decision whether to issue the writ to our discretion. Indeed, any fair reading of Defendant's Notice of Appeal—even if drafted imprecisely—demonstrates Defendant intended to appeal both Judgments and each of her convictions. Given that Defendant's Notice of Appeal was timely, and it is readily

apparent Defendant intended to appeal both Judgments including each of the convictions, it may well be that this appeal is properly before us and any defects in the Notice of Appeal are non-jurisdictional defects. However, to the extent the failure to properly identify the Judgments from which appeal is taken or there is any doubt as to Defendant's intent to appeal each of the convictions, we exercise our discretion to allow the Petition for Writ of Certiorari to ensure our appellate jurisdiction to review the merits of the appeal.

Issues

The issues on appeal are whether the trial court erred by: (I) admitting the NPLEx records reflecting purchases and attempted purchases of pseudoephedrine by Defendant and other alleged conspirators and (II) failing to intervene *ex mero motu* when the State referenced statements jurors made during the unrecorded *voir dire*, indicating that overdoses of methamphetamine kill people.

Analysis

I. Admissibility of the NPLEx Records

Defendant first contends the trial court erred in admitting evidence of Defendant's pseudoephedrine purchases between 20 September 2012 and October 2016, when the investigation began. Specifically, Defendant contends the purchases of pseudoephedrine in 2012, which pre-date law enforcement's investigation in this case, were not relevant and should have been excluded under Rule 401.

A. Relevance

Rule 401 defines relevant evidence as: “evidence having 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 (2021). “Although the trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.” *State v. Allen*, 265 N.C. App. 480, 489, 828 S.E.2d 562, 570, *appeal dismissed, disc. rev. denied*, 373 N.C. 175, 833 S.E.2d 806 (2019) (citation and quotation marks omitted).

“‘[E]vidence need not bear directly on the question in issue if it is helpful to understand the conduct of the parties, their motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.’” *State v. McCutcheon*, 281 N.C. App. 149, 153, 867 S.E.2d 572, 577 (2021) (quoting *State v. Roper*, 328 N.C. 337, 356, 402 S.E.2d 600, 611 (1991) (citation omitted)). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994) (citing *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986)). “‘[I]n a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible.’” *State v. Bruton*,

344 N.C. 381, 386, 474 S.E.2d 336, 340 (1996) (quoting *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994)).

N.C. Gen. Stat. § 90-95(d1)(2)(a) makes it unlawful for any person to “[p]ossess an immediate precursor chemical with intent to manufacture methamphetamine[.]” N.C. Gen. Stat. § 90-95(d1)(2)(a) (2021).

Here, the NPLEx records, viewed in the light most favorable to the State, reflect that Defendant was consistently purchasing or attempting to purchase large quantities of pseudoephedrine.³ Further, the NPLEx records—including those beginning in 2012—show a consistent pattern of behavior by Defendant, indicating she was engaged in the manufacturing and trafficking of methamphetamine. The NPLEx records—which reveal Defendant’s pattern of behavior of purchasing, or attempting to purchase, large quantities of pseudoephedrine—have a “logical tendency to prove” Defendant engaged in the manufacture and trafficking of methamphetamine. As we give “great deference” to the trial court’s Rule 401 rulings, we decline to disturb the trial court’s relevancy ruling here. *Allen*, 265 N.C. App. at 489, 828 S.E.2d at 570.

B. Rule 403 Balancing

³ Defendant is not challenging her constructive possession of pseudoephedrine, an identified controlled substance and precursor chemical. See N.C. Gen. Stat. §§ 90-95 (d2)(37), 90-87(5) (2021).

Defendant also argues the trial court abused its discretion in admitting the NPLEx records because of the records' unfairly prejudicial effect of making it appear that Defendant was the trafficker among many users instead of one of many.

After determining evidence is offered for a proper purpose and is relevant, the trial court must balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. *State v. Bynum*, 111 N.C. App. 845, 848-49, 433 S.E.2d 778, 780 (citation omitted). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2021). "Unfair prejudice . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (citation and quotation marks omitted). We review a trial court's decision to admit or exclude evidence under Rule 403 for an abuse of discretion. *Bynum*, 111 N.C. App. at 849, 433 S.E.2d at 781 (citation omitted). The trial court abuses its discretion where "its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Jones*, 151 N.C. App. 317, 325, 566 S.E.2d 112, 117 (2002) (citation and quotation marks omitted).

"[M]ere prejudice is not the determining factor in the Rule 403 balancing test[;]" the burden is on the defendant to prove unfair prejudice, and the trial court must make that determination. *State v. Walters*, 209 N.C. App. 158, 163, 703 S.E.2d 493, 497 (2011). "[A]ll evidence offered by the State will have a prejudicial effect on a

defendant; however, the prejudicial effect will vary in degree.” *State v. Golphin*, 352 N.C. 364, 434, 533 S.E.2d 168, 215 (2000) (citations omitted).

Here, the trial court heard Defendant’s pre-trial arguments on her Motion *in Limine* to exclude the NPLeX records. Further, after hearing Defendant’s objections to the admissibility of the NPLeX records during trial, the trial court expressly stated: “I’m allowing [the NPLeX records] in under Rule 401. And I have balanced it in accordance with the requirements of Rule 403 and in my discretion I am going to allow [the records] to come in[.]” The Record before us reflects the trial court engaged in a balancing test weighing the admissibility and probative value of the NPLeX records under Rule 401 and any unfair prejudicial impact of this evidence under Rule 403. As such, the trial court complied with the requirements of Rule 403 and did not abuse its discretion in admitting the NPLeX records.

II. The State’s Closing Argument

Next, Defendant contends the trial court erred when it failed to intervene *ex mero motu* during the State’s closing argument. We disagree.

“‘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. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (quoting *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted)). This 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[.].” *Id.* “[T]he standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and if so, (2) whether the argument was so grossly improper as to impede the defendant’s right to a fair trial.” *Id.* (citations omitted). “[P]rosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.’” *State v. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145, *cert. denied*, 537 U.S. 1008, 154 L. Ed. 2d 403 (2011). “[T]o warrant a new trial, the prosecutor’s remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair.” *Id.* at 180, 804 S.E.2d at 470 (quoting *State v. Mann*, 355 N.C. 294, 307-08, 560 S.E.2d 776, 785 (2002)).

Defendant contends “the trial court erred when it allowed the prosecutor to urge jurors to convict [Defendant] based on statements jurors made during the unrecorded *voir dire* indicating that overdoses of methamphetamine kill people.” Even assuming, without deciding, the State’s statements during closing argument were improper, the statements do not rise to the level of prejudice necessitating a new trial.

“Our standard of review dictates that [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.’” *Huey*, 370 N.C. at 180, 804 S.E.2d at 470 (quoting *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001)). In order to demonstrate prejudicial error, a defendant must show “‘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.’” *State v. Lanier*, 165 N.C. App. 337, 354, 598 S.E.2d 596, 607 (2004) (quoting N.C. Gen. Stat. § 15A-1443(a)). “The burden of showing such prejudice . . . is upon the defendant.” N.C. Gen. Stat. § 15-1443(a) (2021). Here, Defendant has failed to meet this burden. Defendant has failed to show the State’s comments “so infected the trial with unfairness that they rendered the conviction fundamentally unfair.” *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted).

Indeed, “[w]hen this Court has found the existence of overwhelming evidence against a defendant, we have not found statements that are improper to amount to prejudice and reversible error.” *Huey*, 370 N.C. at 181, 804 S.E.2d at 470 (citation omitted). Here, the evidence against Defendant was indeed overwhelming. According to the NPLEx records, Defendant was involved in 145 total transactions purchasing or attempting to purchase pseudoephedrine. The Sheriff’s Department was alerted to Defendant’s activity because of “the frequency [of purchases], the number of block[ed purchases and], the fact that the majority of these transactions took place on Friday nights or Saturday or Sunday[,]” which indicated Defendant was involved in manufacturing methamphetamine. Further, multiple witnesses testified

Defendant was actively engaged in the manufacture and sale of methamphetamine. Thus, in light of the evidence presented at trial, the jury did not have to rely on the State's statements in closing arguments.

Thus, the State's statements were not so "grossly improper" and prejudicial to Defendant as to require the trial court's intervention on its own motion. *Id.* at 179, 804 S.E.2d at 468. Therefore, the trial court did not commit reversible error by failing to intervene *ex mero motu*. Consequently, we affirm the trial court's Judgments against Defendant.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial, and we affirm the Judgments entered against Defendant.

NO ERROR.

Judges ARROWOOD and GORE concur.

Report per Rule 30(e).