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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-717

Filed 04 April 2023

Robeson County, No. 19 CRS 53971

STATE OF NORTH CAROLINA

v.

EMMANUEL TRAVIS POWERS, Defendant.

Appeal by Defendant from judgment entered 22 November 2021 by Judge Jason C. Disbrow in Robeson County Superior Court. Heard in the Court of Appeals 21 February 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Taylor H. Crabtree, for the State.

Glover & Petersen, P.A., by James R. Glover, for Defendant-Appellant.

RIGGS, Judge.

Defendant Emmanuel Travis Powers appeals from a judgment entered following a jury verdict convicting him of second-degree murder. On appeal, and by petition for writ of *certiorari*, Mr. Powers contends that the trial court erred in failing to intervene *ex mero motu* for allegedly grossly improper statements by the prosecutor during closing arguments. After careful review, we allow Mr. Powers' petition and

hold that he has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

In the late evening hours of 30 June 2011, Tawanda Hunt was in her Orrum, North Carolina home across the street from Tommy's Country Store when she heard several gunshots outside. Ms. Hunt exited her house and observed Mr. Powers running by her home with a gun in hand. She shouted at Mr. Powers, asking him who was shooting; Mr. Powers did not respond and continued running away. Ms. Hunt was very familiar with Mr. Powers, as he rode the bus with her, had visited her home, and was a customer at her store. In fact, Mr. Powers had come by Ms. Hunt's home a week before the shooting to ask her for ammunition.

After watching Mr. Powers run from the scene, Ms. Hunt walked across the street to the store and saw her former employee, Nathan Johnson, lying on his back with a bullet wound to his chest and back. She also saw Mr. Powers' brother, W.R. "Doug" Hill, getting into a car saying he had been shot. Ms. Hunt and her fiancé rendered first aid to Mr. Johnson while she called 911. Ms. Hunt told the 911 operator that Mr. Powers had shot Mr. Johnson and he needed help, though she noted she had not witnessed the shooting. Mr. Johnson died from his injuries.

Timothy Nealey, who knew Mr. Powers well, was the clerk on shift at Tommy's Country Store on the night of the shooting. At the time of the shooting, Mr. Nealey was working inside the store, which was noisy with video games, music, and customers playing pool. Mr. Nealey first heard a noise outside, but did not know what

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it was over the din of the store; it was only when he heard the sound again that he recognized the sound as gunshots. He then went to the glass front door to check what had happened, at which time he saw Mr. Johnson approaching the door, trying to get inside. As Mr. Johnson was making his way to the door, Mr. Nealey saw Mr. Powers shoot him in the back. Mr. Nealey watched Mr. Johnson fall to the ground with his legs against the door. He also witnessed Mr. Powers stand over Mr. Johnson's body with a gun in hand. Mr. Nealey forced the door open, pushing Mr. Johnson's legs out of the way; by the time he managed to open the door, Mr. Powers had fled the premises.

Shortly after the shooting occurred, Glen Hill, brother to Mr. Powers and Doug Hill, called 911 to report that Doug had been shot in the hip and that they were on their way to the hospital. He stated that another person had been shot at the store, and that he had the gun used in the shooting in the car with him. When the Hills arrived at Southeast Regional Medical Center, several security officers had Glen drop the gun to the ground and kick it away. A Robeson County Sheriff's Deputy arrived a short time later and collected the gun as evidence.

Law enforcement interviewed several additional individuals about Mr. Powers. Joshua Lowery, a long-time associate of Mr. Powers, reported that he was driving a car with Mr. Powers one night during the first week of June 2011 when they were pulled over for driving under the influence. Mr. Lowery gave Mr. Powers a gun that was stowed in the vehicle and told him to throw it away before they were caught with

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the weapon. Mr. Powers later told Mr. Lowery that he had thrown away the gun; however, when Mr. Lowery returned to the scene of the stop after his release, he was unable to locate the firearm. Mr. Lowery was later shown a picture of the gun recovered from the hospital parking lot and confirmed it was the one he had given to Mr. Powers.

A detective also spoke with Jerry McCormick, father of one of Mr. Powers' friends. That detective took a written statement from Mr. McCormick, in which he said he had seen Mr. Powers the week before the shooting with a long black revolver with a white and brown grooved handle. This description matched the gun recovered at the hospital and claimed by Mr. Lowery.

Mr. Powers was indicted for first-degree murder on 2 March 2020. Trial began on 15 November 2021, with Ms. Hunt, Mr. Nealey, and Mr. Lowery testifying consistent with the above recitation of the facts. Mr. McCormick's testimony was less straightforward; he could not recall many details and was unable to read his prior written statement because he failed to bring his reading glasses. To rectify the issue, the State was permitted to read aloud portions of the statement for corroborative or impeachment purposes only, with Mr. McCormick then testifying whether he recalled making those remarks to investigators. Mr. McCormick was unable to remember giving a specific description of the gun he saw in Mr. Powers' possession, but he did testify that he recalled seeing Mr. Powers with a black revolver a week before the shooting. A medical examiner who performed an autopsy on Mr. Johnson also

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testified, telling the jury that the bullet entered Mr. Johnson in the back and exited through his chest, and it was possible that he was shot in the back while the shooter was standing over him given the path of the bullet through his body.

In closing, the prosecutor argued the following to the jury without objection:

Next witness you heard from, Jerry McCormick. And if you remember Jerry sat here in this chair and said he didn't really remember a whole lot about what was going on. . . . [A]nd this statement was offered to show that he had a prior inconsistent statement.

. . . .

I want you all to look at the gun and look at the way he described it. Long pistol with a thing that's (inaudible) a revolver. The handle is white. Handle's white and brown with grooves. The rest of the gun is black. (As read): "I saw Travis with the gun—the last time I saw Travis with the gun was Wednesday evening when he was walking down the road. He showed it to me and said, look, pops, I still got it." Is there any doubt in anybody's mind that it's this gun?

. . . .

[An] [e]yewitness looked out the [store] window and saw [Mr.] Powers standing over [Mr.] Johnson and he fired the shot. . . . He said he actually saw . . . that [Mr.] Powers was the shooter.

. . . .

You have an eyewitness who saw [Mr.] Powers standing over [Mr.] Johnson, shoot him with a gun.

The jury convicted Mr. Powers of second-degree murder after deliberating for just over one hour. The trial court sentenced Mr. Powers to 157 months' to 198

months' imprisonment, within the presumptive range. A written judgment consistent with that sentence was entered on 22 November 2021. On 7 December 2021, Mr. Powers, through counsel, filed a written notice of appeal, mistakenly noticing the appeal "from Superior Court to the North Carolina Appellate Defender." Appellate counsel filed a petition for writ of *certiorari* with this Court on 5 October 2022 in light of this defect.

II. ANALYSIS

Mr. Powers' sole argument on appeal contends that the trial court erred in failing to intervene *ex mero motu* during the prosecutor's closing arguments, arguing that the statements excerpted above were grossly improper as misrepresentative of the competent evidence introduced at trial. We first address Mr. Powers' petition for writ of *certiorari* before holding that he has failed to demonstrate error on the merits.

A. Appellate Jurisdiction and Petition for Writ of *Certiorari*

Mr. Powers concedes that his Notice of Appeal, filed through counsel, fails to comply with N.C. R. App. P. 4(b) (2021) because it fails to identify the judgment appealed and the court to which his appeal is taken. The State notes that this is a jurisdictional defect, but does not substantively oppose allowing Mr. Powers' petition.

Certiorari is available in cases where a defendant has lost the right of appeal "through no fault of [their] own but rather due to [their] trial counsel's failure to give proper notice of appeal," as counsel's mistake amounts to "failure to take timely action" under N.C. R. App. P. 21(a) (2022). *State v. Holanek*, 242 N.C. App. 633, 640,

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776 S.E.2d 225, 232 (2015). We have granted *certiorari* review when the defendant's intent to appeal the judgment is clear from the defective notice given by counsel. *State v. Smith*, 246 N.C. App. 170, 174-75, 783 S.E.2d 504, 507-08 (2016). "In such circumstances, the defendant's appeal is dismissed and this Court issues *writ of certiorari* to address the merits of the defendant's argument." *State v. Robinson*, 279 N.C. App. 643, 645, 865 S.E.2d 745, 748 (2021), *aff'd*, ___ N.C. ___, 881 S.E.2d 260 (2022). And while a defendant must generally show adequate merit in his petition, we may still allow *certiorari* review even when ultimately ruling against the defendant on the merits of their appeal—particularly when the defendant's right to direct appeal is lost due to no fault of their own. *See id.* (allowing *certiorari* review of a defendant's no-merit brief "[b]ecause defendant has lost the right to appeal without fault" before holding there was no error at trial); *State v. Ore*, 283 N.C. App. 524, 535, 874 S.E.2d 222, 230 (2021) (Dillon, J., concurring) ("[I]t is not uncommon for our Court to issue a writ in order to review a defendant's appeal where there is a jurisdictional defect in his or her notice of appeal, where the State has not been prejudiced by the defect, *even where said defendant's appeal has little, if any merit.*"), *vacating in part and remanding on denial of certiorari for the reasons stated in the concurrences*, ___ N.C. ___, 880 S.E.2d 677 (2022).

The State does not argue that Mr. Powers' appeal is so lacking in merit that allowing his petition would amount to an abuse of discretion; to the contrary, the State acknowledges that we have discretion to grant *certiorari* review in this case.

Consistent with the reasoning set forth in the above caselaw and in light of the State's concession, we dismiss Mr. Powers' appeal and grant his petition for writ of *certiorari* in our discretion. *Robinson*, 279 N.C. App. at 645. 865 S.E.2d at 748.

B. Standard of Review

We examine closing arguments made without objection to discern whether the identified statements "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). Comments are grossly improper if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Rose*, 339 N.C. 172, 202, 451 S.E.2d 211, 229 (1994) (citations and quotation marks omitted). This is a high bar, as "only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial court 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. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996).

In applying this standard:

The primary focus of our inquiry is not solely on the frequency of the improper arguments or [their] substance While certainly taking such variables into consideration, a reviewing court must focus on the statements' likely effect on the jury's role as fact-finder, namely whether the jury relied on the evidence or on prejudice enflamed by the prosecutor's statements.

State v. Huey, 370 N.C. 174, 185, 804 S.E.2d 464, 473 (2017) (citation omitted). As for the propriety of the remarks:

A prosecutor may . . . “argue to the jury the law, the facts in evidence and all reasonable inferences drawn therefrom,” but is prohibited from “placing before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence.”

State v. Bradley, 279 N.C. App. 389, 407, 864 S.E.2d 850, 864 (2021) (cleaned up) (quoting *State v. Flowers*, 347 N.C. 1, 36-37, 489 S.E.2d 391, 412 (1997)). Stated differently, a prosecutor’s arguments must:

(1) be devoid of counsel’s personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial.

Jones, 355 N.C. at 135, 558 S.E.2d at 108.

C. References to Mr. McCormick

Mr. Powers first argues that the prosecutor improperly used Mr. McCormick’s written statement, admitted for corroborative or impeachment purposes only, as substantive evidence of Mr. Powers’ guilt. *See State v. Tucker*, 317 N.C. 532, 544, 346 S.E.2d 417, 424 (1986) (holding impeachment evidence could not be relied on by a prosecutor in closing as substantive evidence of guilt). Setting aside that the closing arguments in *Tucker* garnered objections at trial and were thus reviewed under a lower standard of error, *id.* at 540, 346 S.E.2d at 422, the prosecutor’s statements

regarding Mr. McCormick's identification and description of the gun were not grossly improper when viewed in context.

Mr. McCormick testified at trial that he saw Mr. Powers with a black revolver a week before the shooting, that testimony was corroborated by his prior written statement to police, and both sets of statements were consistent with the gun recovered at the hospital. Thus, the prosecutor could properly rely on Mr. McCormick's direct testimony and corroborative statements for the proposition that the gun recovered at the hospital was the gun Mr. McCormick previously saw in Mr. Powers' possession. And while it is true that the prosecutor described the handle of the gun—a detail Mr. McCormick could not recall on the stand—when recounting Mr. McCormick's testimony and prior statements, that detail was elsewhere provided by Mr. Lowery's testimony that he gave the gun matching that description and recovered at the hospital to Mr. Powers a few weeks prior to the shooting. *See State v. Bishop*, 343 N.C. 518, 544, 472 S.E.2d 842, 855 (1996) (holding prosecutor's reference to non-substantive evidence, admitted for impeachment purposes only, in arguing the defendant shot and killed the victim was not improper because the argument was otherwise "adequately supported by facts in evidence other than" the impeachment evidence). Further, the jury was properly instructed to strictly limit their consideration of Mr. McCormick's written statement for corroborative or impeachment purposes only, and the jury is presumed to have followed that instruction. *See State v. Stokes*, 357 N.C. 220, 227-28, 581 S.E.2d 51, 56 (2003)

(holding a prosecutor's reference and reliance on the defendant's out-of-court statement, admitted for impeachment purposes only, during closing argument was not grossly improper in part because the trial court gave the appropriate limiting instruction). To the extent there was any impropriety in the prosecutor's description of the handle while surveying Mr. McCormick's testimony, it does not rise to the level of grossly improper argument.

D. References to Mr. Nealey's Eyewitness Testimony

Mr. Powers also asserts that the prosecutor's summation of Mr. Nealey's eyewitness testimony was grossly improper. Specifically, he contends that Mr. Nealey's testimony did not establish Mr. Powers shot Mr. Johnson in the back while standing over him. He further argues that this could not have happened because Ms. Hunt testified that she heard two gunshots and saw Mr. Johnson laying face up when she arrived at the store. However, the existence of conflicts in the evidence do not render argument improper; to the contrary, prosecutors are expressly permitted to argue that one witness's testimony is more probative than another's. *See State v. Strickland*, 283 N.C. App. 295, 306, 872 S.E.2d 594, 604 (2022) (“[T]he State is ‘allowed to argue that the State’s witnesses are credible and that the jury should not believe a witness.’” (cleaned up) (quoting *State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005))).

Mr. Nealey plainly testified that he saw Mr. Powers: (1) shoot Mr. Johnson in the back; and (2) stand over Mr. Johnson's body with a gun pointed at him. This is

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largely consistent with the prosecutor’s statement that Mr. Nealey “saw [Mr.] Powers standing over [Mr.] Johnson and he fired the shot. . . . He said he actually saw, direct evidence, that [Mr.] Powers was the shooter. . . . You have an eyewitness who saw [Mr.] Powers standing over [Mr.] Johnson, shoot him with a gun.” This series of events was corroborated by the medical examiner’s testimony. The prosecutor could certainly argue that Mr. Nealey saw Mr. Powers shoot Mr. Johnson in the back and stand over him based on the evidence presented at trial.

To be sure, the prosecutor did expressly state elsewhere that Mr. Powers stood over Mr. Johnson’s body before shooting him. But context shows that the prosecutor did so in an effort to convince the jury that the shooting was premeditated: “[S]tanding above someone and pulling that, making the decision to pull that back and firing that gun, [that is] premeditation and deliberation.” To the extent this argument was improper as misrepresenting Mr. Nealey’s testimony—and it is not clear that it did misrepresent his testimony—it does not appear to have actually prejudiced Mr. Powers, as the jury found him guilty of second-degree murder only. *See Huey*, 370 N.C. at 185, 804 S.E.2d at 473 (noting that whether a closing argument is sufficiently prejudicial to be considered grossly improper requires “look[ing] to the evidence presented at trial and compar[ing] it with what the jury actually found”). In any event, any alleged impropriety in the prosecutor’s summation of Mr. Nealey’s eyewitness account is comparatively minor in the face of: (1) Mr. Nealey’s direct testimony that he saw Mr. Powers shoot and kill Mr. Johnson; (2) Ms. Hunt’s

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testimony that she saw Mr. Powers flee from the scene and believed him to be the shooter; and (3) testimony from Mr. Lowery and Mr. McCormick matching the gun recovered to the one previously in Mr. Powers' possession. Given this evidence and the facts as found by the jury, it is unlikely that any improper recounting of the events witnessed by Mr. Nealey was so prejudicial as to amount to gross impropriety. *Id.*

III. CONCLUSION

For the foregoing reasons, we dismiss Mr. Powers' appeal, allow his petition for writ of *certiorari*, and hold that he received a fair trial, free from reversible error.

APPEAL DISMISSED; NO ERROR.

Judges ZACHARY and FLOOD concur.

Report per Rule 30(e).