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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-720

Filed 16 May 2023

Catawba County, Nos. 16CRS3923-24, 17CRS100, 18CRS4225-26

STATE OF NORTH CAROLINA

v.

JORDAN ALEXANDER RIVERA, Defendant.

Appeal by defendant from judgments entered 7 June 2021 by Judge Athena F. Brooks in Catawba County Superior Court. Heard in the Court of Appeals 12 April 2023.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt B. Orsbon, for defendant-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State-appellee.

GORE, Judge.

Defendant, Jordan Alexander Rivera, was indicted on two counts of murder, one count of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon for an incident that occurred on 12 March 2016. On 10 May 2021, defendant went to trial in Catawba County

Superior Court. On 4 June 2021, the jury returned guilty verdicts for two counts of accessory before the fact to first-degree murder, aiding and abetting first-degree burglary, aiding and abetting robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon.

Defendant raises two issues on appeal: (1) whether the trial court violated defendant's Sixth Amendment right to confrontation by limiting the cross-examination of a witness; and (2) whether the trial court abused its discretion upon timely objection to improper remarks during the State's closing argument. Upon review, we discern no prejudicial error.

I.

A.

In March of 2020, defense counsel obtained *Giglio* material¹ on Captain Turk, the law enforcement officer who interviewed defendant. These documents—a State Bureau of Investigation (“SBI”) report and transcript excerpts from other judicial proceedings—show Captain Turk was allegedly aware of a fellow officer's criminal conduct but had failed to timely report it to the SBI.

The morning defendant's trial began, the State filed a motion to prevent the defense from questioning Captain Turk about his delayed reporting of a fellow

¹ Under *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 2d 104 (1972), due process requires the prosecution to disclose evidence or information tending to discredit or impeach any government witnesses. See also *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481 (1985).

officer's crimes. The trial court declined to rule on the motion before hearing Captain Turk's testimony, indicating it would revisit the motion if it became an issue on cross-examination.

At trial, the State introduced defendant's 21 July 2016 recorded statement through Captain Turk. On cross-examination, defense counsel asked Captain Turk whether it was a crime for someone to witness a crime and not report it:

[DEFENSE COUNSEL]: And so, again, you would agree that just seeing a crime, even reporting a crime, does not necessarily make you guilty of a crime. Is that correct?

[CAPTAIN TURK]: Again, simply if you are a witness and you've had no actionable or conspiratorial involvement, then you would not be committing a crime, no.

[DEFENSE COUNSEL]: Now, that duty is different if you are a law enforcement officer, isn't it?

[CAPTAIN TURK]: To witness a crime?

[PROSECUTOR]: Objection. Relevance.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Well, Captain Turk, would you agree that, as a sworn law enforcement officer, that you have a duty to report —

[PROSECUTOR]: Objection. Relevance.

THE COURT: Sustained at this point.

Outside the presence of the jury, the trial court allowed defense counsel to make an offer of proof that Captain Turk had failed to immediately report a crime he had witnessed.

[DEFENSE COUNSEL]: Okay. Well have you yourself ever been in a situation where you received information about criminal activity by a . . . fellow officer and you did not report it at the time you learned about it?

[CAPTAIN TURK]: Yes.

Both parties proffered context of this prior incident: sometime in 2017, a police captain put a police GPS tracker on his ex-girlfriend's car. That police captain called then Lieutenant Turk and asked him whether it was legal. Lieutenant Turk told him it was illegal. When interviewed by the SBI, Lieutenant Turk did not report this incident.

Defense counsel argued the excluded questions were relevant because they attacked Captain Turk's credibility:

[DEFENSE COUNSEL]: [Captain] Turk is on the witness stand. We are entitled under the Sixth Amendment and the Fourteenth Amendment a wide array of cross-examination, one of which is anything that might be information for the jury as to the credibility of any witness.

. . .

THE COURT: Let's play this through. You ask those questions you just did, that means the State is going to have the ability to ask further questions, That is going to open the door. That is going to allow this officer to say why he didn't say it. We are opening up a whole can of worms and going down a rabbit hole. Talk to me about how that is not violating various rules, not the least of which is relevan[ce] and confusion to the jury.

. . .

[DEFENSE COUNSEL]: Relevance for me is that we have a witness, who, . . . has testified about the fact that part of

his evaluation of [defendant] has been that [defendant] held back information about his friends and didn't bring it up until now. Yet we have a witness, as an . . . internal affairs law enforcement officer, that did the same thing, except that he had a legal duty to report it when he learned about it, but he didn't.

. . .

THE COURT: Is it correct to say the defense is asking this for either bias, or I suppose, maybe, character for untruthfulness?

[DEFENSE COUNSEL]: Credibility, just credibility. I think anything that shows credibility issues, Your Honor.

After hearing arguments, the trial court sustained the State's objection and barred defense counsel from cross-examining Captain Turk with the *Giglio* material:

THE COURT: In this matter the defense has so far been able to ask questions of the jury as to that the — there is no law, other than child abuse, where a person has to report a crime. Questions of that nature. Therefore, those facts are in front of the jury for their use. The [c]ourt finds that further questions as to this officer's specific duties and/or responsibility is going to confuse the jury, mislead, the jury, is going to cause us to go down a rabbit hole of other questions possibly. I'm not saying we will, but we could. The probative value of this evidence is substantially outweighed by its prejudicial value. It will not be admitted.

[DEFENSE COUNSEL]: Your Honor, in that light, if you would please note our objection to that ruling under the Sixth Amendment and the Fourteenth Amendment. We have no further questions of this witness.

Later, during closing argument, the prosecutor stated the following in reference to quoted portions of defendant's recorded statement:

[PROSECUTOR]: "If I tell someone to do something, they

are going to do it. Simple as that.” Shortly after that [defendant] gave you an example. I’m not going to repeat it, but it involved telling the girl to do something.² “And when I tell her to do it, she’ll do it.” I’m sorry. He’s an arrogant bastard.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

B.

On 4 June 2021, the jury returned guilty verdicts for two counts of accessory before the fact to first-degree murder, aiding and abetting first-degree burglary, aiding and abetting robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon. On 7 June 2021, the trial court imposed two consecutive sentences of life imprisonment without parole for the accessory before the fact to first-degree murder convictions, arrested judgment on both aiding and abetting convictions, and consolidated the remaining conspiracy and firearm possession charges into a third consecutive sentence of 33-months to 52-months imprisonment. Defendant gave timely notice of appeal in open court.

C.

Defendant appeals as a matter of right from final judgments entered upon his convictions in superior court. N.C. Gen. Stat. § 15A-1444(a) (2021).

II.

² Here, the prosecutor is referring to, but declining to repeat verbatim, a portion of defendant’s recorded statement to police wherein defendant describes commanding a woman to perform oral sex.

Defendant first contends the trial court violated his Sixth Amendment right to confrontation by barring defense counsel from cross-examining Captain Turk about his failure to timely report a fellow deputy's crimes. We disagree.

A.

“In general, we review a trial court’s limitation on cross-examination for abuse of discretion. If the trial court errs in excluding witness testimony showing possible bias, thus violating the Confrontation Clause, the error is reviewed to determine whether it was harmless beyond a reasonable doubt.” *State v. Bowman*, 372 N.C. 439, 444, 831 S.E.2d 316, 319 (2019) (citations omitted).

B.

“The range of relevant cross-examination is very broad.” *State v. Sams*, 317 N.C. 230, 240, 345 S.E.2d 179, 185 (1986) (citation omitted). Under our Rules of Evidence, “[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” N.C. Gen. Stat. § 8C-1, Rule 611(b) (2021). Credibility is “[t]he quality that makes something (as a witness or some evidence) worthy of belief.” *Credibility*, BLACK’S LAW DICTIONARY (8th ed. 2004). “Rule 608(b) provides in part that specific instances of conduct, if probative of truthfulness or untruthfulness, may be inquired into on cross-examination of the witness concerning her character for veracity.” *State v. Lamb*, 321 N.C. 633, 647, 365 S.E.2d 600, 607 (1988).

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the

witnesses against him.” U.S. Const. Amend. VI. “The principal purpose of confrontation is to secure to the defendant the right to test the evidence of the witnesses against him through cross-examination.” *State v. Mason*, 315 N.C. 724, 729, 340 S.E.2d 430, 434 (1986) (citing *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347 (1974)). “However, the right of cross-examination is not absolute and may be limited in appropriate cases.” *Id.* at 730, 340 S.E.2d at 434 (citation omitted).

“Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19 (1985) (per curiam). “[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 683 (1986).

C.

Defense counsel’s line of questioning into the specifics of Captain Turk’s prior conduct at issue is perhaps broadly relevant for the purposes of challenging credibility. Rule 401 states “[r]elevant evidence means 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) (emphasis added); *see Reis v. Hoots*, 131 N.C. App. 721, 725, 509 S.E.2d 198, 202 (1998) (Our courts “apply the rule of relevance broadly.”). “Although we review a trial court’s ruling on the relevance of evidence *de novo*, we give a trial court’s relevancy rulings great deference on appeal.” *State v. Capers*, 208 N.C. App. 605, 615, 704 S.E.2d 39, 45 (2010) (internal quotation marks and citation omitted).

Assuming, *arguendo*, defense counsel’s line of questioning was relevant for the purposes of attacking Captain Turk’s credibility, it cannot be said that the trial court’s decision to exclude those questions under Rule 403 was manifestly unsupported by reason. Under Rule 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” § 8C-1, Rule 403 (2021).

Captain Turk’s role in the State’s case was primarily limited to admitting the video recording of defendant’s interview with law enforcement. Defendant never objected to Captain Turk’s testimony that “the events depicted” in the video are “a fair and accurate recording of what actually occurred.” The information available to the trial court did not indicate that Captain Turk provided false information, made a false statement, or had a reputation for untruthfulness. Questions as to whether Captain Turk violated a duty to report a crime were irrelevant for the purposes of

disputing the legitimacy of the video recording, and marginally relevant for the purposes of credibility when weighed against potential prejudicial effect.

Further, the trial court permitted defense counsel's thorough cross-examination of Captain Turk as to whether, "in [Captain Turk's] experience in investigating crimes, it's human nature for people to not want to snitch on their friends," and to elicit his agreement that "it is not a crime for a citizen even to stand by while a crime is being committed, other than child abuse, and not report it." The trial court excluded additional questions that were more narrowly focused on whether Captain Turk had personally believed and practiced these behaviors. As observed by the trial court and acknowledged by defense counsel, the excluded questions would have opened the door to further redirect and cross-examination about the circumstances of Captain Turk's alleged prior misconduct. The trial court could reasonably conclude that allowing the parties to litigate whether Captain Turk violated a duty and the circumstances involved would confuse the issues, mislead the jury, or be a waste of time. *Id.*

We determine that the trial court imposed reasonable limitations on the cross-examination of Captain Turk. Because the trial court did not abuse its discretion in finding the probative value of the excluded questions were substantially outweighed by the danger of unfair prejudice, defendant's right to confrontation was not violated.

III.

Defendant also contends the prosecutor calling him an "arrogant bastard"

during closing argument was improper, and further asserts that “[h]ad the trial court sustained defense counsel’s objection and prevented the insult from being ‘uttered,’ there is a reasonable possibility the jury would’ve reached a different result in [defendant’s] case.” We disagree.

A.

“The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection.” *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). The trial court abuses its discretion when “the ruling could not have been the result of a reasoned decision.” *Id.* (quotation marks and citation omitted). Our determination is subject to a two-part test: first, we must determine whether the closing remarks were improper, and, if so, we then determine whether “the remarks were of such a magnitude that their inclusion prejudiced defendant[.]” *Id.* “[I]n the guilt-innocence phase of a non-capital trial, th[is] [C]ourt must look to the evidence of defendant’s guilt as well as to the remainder of the closing argument to determine whether the argument was prejudicial.” *State v. Copley*, 374 N.C. 224, 229, 839 S.E.2d 726, 730 (2020).

B.

We agree with defendant that the prosecutor’s remark was improper. *See Jones*, 355 N.C. at 131, 558 S.E.2d at 106 (noting that “improper remarks include statements of personal opinion, personal conclusions, name-calling, and references to

events and circumstances outside the evidence, such as the infamous acts of others.”). However, we cannot conclude this comment was so prejudicial as to warrant a new trial.

“[T]he purpose of a prejudice analysis is to determine whether there is a reasonable possibility that the jury would have acquitted defendant had his objection to the State’s argument been sustained. It is defendant’s burden to show this.” *Copley*, 374 N.C. at 230, 839 S.E.2d at 730 (citation omitted). “The specific language held to have been prejudicial in prior cases does not necessarily define prejudice in the case before us.” *Id.* In viewing the entirety of the State’s closing argument, the prosecutor’s reference to defendant as an “arrogant bastard” was an isolated remark—not a repeated, flagrant degradation. Moreover, this portion of the prosecutor’s argument “was not prejudicial to defendant in light of the substantial evidence of his guilt.” *State v. Murillo*, 349 N.C. 573, 606, 509 S.E.2d 752, 771 (1998). We are unpersuaded by defendant’s argument that there is a reasonable possibility the jury would have returned a different verdict had the prosecutor refrained from uttering this single objectionable remark.

IV.

For the foregoing reasons, we discern no prejudicial error in the trial court’s judgment. The trial court, in its discretion, imposed reasonable limitations on the cross-examination of Captain Turk, which did not deprive defendant of his right to confrontation. Additionally, we conclude that the prosecutor’s use of a single

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objectionable phrase during closing argument was not so prejudicial as to deprive defendant of a fair trial.

NO PREJUDICIAL ERROR.

Judges WOOD and STADING concur.

Report per Rule 30(e).