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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-574

Filed 16 May 2023

Mecklenburg County, No. 20 CRS 15960

STATE OF NORTH CAROLINA

v.

DANIEL TYLER PARKER, Defendant.

Appeal by Defendant from judgment entered 16 December 2021 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 November 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Locke Milholland, IV, for the State.

William D. Spence for defendant-appellant.

MURPHY, Judge.

To show reversible error when a trial court fails to intervene ex mero motu in a prosecutor's argument, a defendant must demonstrate that the State's argument was so grossly improper that it impeded the defendant's right to a fair trial. To determine whether an argument is grossly improper, we apply the reasonable possibility analysis for prejudice. Here, Defendant does not attempt to show a

possibility of prejudice and merely makes a conclusory statement that he was prejudiced. Defendant fails to prove that, had the trial court intervened ex mero motu in the prosecutor's argument, there is a reasonable possibility that a different result would have been reached. As Defendant fails to show that either issue raised on appeal resulted in prejudice to his case, we hold no prejudicial error.

BACKGROUND

On 24 February 2020, two police officers from the Charlotte-Mecklenburg Police Department arrested Defendant Daniel Tyler Parker for several outstanding warrants. Defendant resisted verbal commands from Officers Taylor Hager and Marquis Turner, and the officers attempted to physically subdue him. Defendant was combative. During the struggle, Officer Hager struck Defendant's face. After the officers handcuffed Defendant and brought him to his feet, Officer Hager bent down to retrieve his body camera, which had fallen during the altercation. When Officer Hager stood up, Defendant "spat blood and spit directly in [Officer Hager's] face" and proclaimed that "he hoped that the spit got in [Officer Hager's] face."

Defendant was indicted for malicious conduct by a prisoner in violation of N.C.G.S. § 14-258.4—the sole charge resulting from this incident—on 16 November 2020, and trial was eventually scheduled to begin on 14 December 2021. On the morning of trial, Defendant made an oral motion to continue the trial in order to obtain new counsel. Defendant's appointed counsel stated he believed their "relationship was irrevocably broken[,]” since Defendant believed his counsel was “in

cahoots with the prosecution.” Defendant himself cited a lack of communication and notice prior to trial as his primary issue with his appointed counsel. Defendant specifically enumerated the several reasons for his oral motion for a continuance to obtain new counsel, including “[1] his case . . . being called with little notice to him, [2] he had not seen the evidence against him, [3] he had not had an opportunity to subpoena his witnesses, and [4] lack of timely communication between [himself] and his court appointed lawyer.” After hearing arguments from all parties, the trial court denied Defendant’s motion, and the trial proceeded.

During its closing argument, the State remarked, “Y’all, you’re not going to hear any defenses by the judge. The judge isn’t going to tell you, if you feel that Officer Hager punched him one too many times, you can—Defendant is justified.” Defendant did not object. The jury returned a guilty verdict on the charge of malicious conduct by a prisoner. After sentencing, Defendant timely appealed.

ANALYSIS

Defendant raises two arguments on appeal: (A) the trial court erred in refusing to continue Defendant’s trial and allow Defendant to hire an attorney of his own choosing to represent him and (B) the trial court erred in failing to intervene ex mero motu during the State’s closing argument.

A. Trial Court’s Denial of Defendant’s Motion to Continue

Defendant argues the trial court erred in refusing to continue his trial and allow him to hire a different attorney. We have held that motions to continue are left

within the discretion of the trial court and are therefore reviewed for abuse of discretion. *State v. Sweezy*, 291 N.C. 366, 371-72 (1976); *State v. Holloman*, 231 N.C. App. 426, 429 (2013). In this case, however, Defendant argues we must review the trial court's decision *de novo* because his motion to continue was based on his Sixth Amendment right to counsel. As motions to continue based on constitutional questions—in this case, the right to counsel—are fully reviewable *de novo*, we agree. *State v. Branch*, 306 N.C. 101, 104 (1982); *State v. McFadden*, 292 N.C. 609, 611 (1977).

Ordinarily, even when a motion to continue raises a constitutional issue, its denial is only grounds for a new trial when a defendant demonstrates “the denial was erroneous and also that his case was prejudiced as a result of the error.” *Branch*, 306 N.C. at 104. However, a defendant need not show prejudice when the trial court committed a structural error—“one that should not be deemed harmless beyond a reasonable doubt because it affects the framework within which the trial proceeds, rather than simply being an error in the trial process itself.” *State v. Goodwin*, 267 N.C. App. 437, 439 (2019) (marks omitted). In *Goodwin*, the trial court committed a structural error because it applied the incorrect ineffective assistance of counsel standard in response to the defendant's request for new chosen counsel. Defendant argues that, as in *Goodwin*, he need not show prejudice to his case because the trial court's denial of his motion constituted structural error. However, because nothing in the Record indicates that the trial court exercised the wrong standard in making

its determination, Defendant must show, as in *Branch*, that the trial court's denial was both erroneous and prejudicial to his case.

Outside of Defendant's assertion that the trial court committed structural error, which requires automatic reversal, Defendant makes no argument to support the assertion that the trial court's ruling prejudiced his case. To demonstrate prejudice, Defendant must show a reasonable possibility that, had the error not been committed, a different result would have been reached at trial. *State v. Rosier*, 322 N.C. 826, 829 (1988); N.C.G.S. § 15A-1443(a) (2022). Defendant makes no assertion or argument that there is a reasonable possibility that a different outcome would have occurred if he had been permitted to continue the trial and hire his own counsel. Since Defendant fails to address prejudice altogether, we hold there was no prejudicial error.

B. District Attorney's Closing Argument

We recently summarized the appropriate standard of review in a case where the defendant fails to object to an alleged improper closing argument in *Norris*:

“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] (2002).

[W]hen defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the 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.

State v. Huey, 370 N.C. 174, 179 (2017). While “we have long recognized that prosecutors 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[,]” *id.* at 180 (marks omitted), it remains the case that “an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record” during closing arguments. N.C.G.S. § 15A-1230(a) (2021).

Furthermore, a defendant appealing based on the trial court's failure to intervene ex mero motu “has the burden to show a reasonable possibility that, had the errors in question not been committed, a different result would have been reached at the trial.” *State v. Goins*, 377 N.C. 475, [478-79 (2021)] (marks omitted). “When evaluating the prejudicial effect of an improper closing argument, we examine the statements in context and in light of the overall factual circumstances to which they refer.” *Id.* . . . (marks omitted). In so doing, “we look to the evidence presented at trial and compare it with what the jury actually found[,]” as “[i]ncongruity between the two can indicate prejudice in the conviction.” *Huey*, 370 N.C. at 185; *see also Goins*, [377 N.C. at 480] (basing a finding that improper statements did not prejudice the defendant, in part, on the jury's re-examination of a piece of evidence during deliberations).

State v. Norris, __ N.C. App. __, 2022-NCCOA-908, ¶ 27-28.

Here, during its closing argument, the State argued, “Y'all, you're not going to hear any defenses by the judge. The judge isn't going to tell you, if you feel that

Officer Hager punched him one too many times, you can—Defendant is justified.” Defendant argues this statement was grossly improper because it suggested “the trial judge had thought it over and determined that the State’s witnesses were credible and had told the truth, that the State’s evidence was sufficient and that, therefore, Mr. Parker has no defenses to the charges against him, and therefore, you have no choice but to find him guilty.”

Defendant argues the trial court’s failure to intervene during the State’s closing argument was improper because the State’s argument amounted to the State having “express[ed] or reveal[ed] to the jury legal rulings which have been made by the trial court,” which might “have the potential for special influence with the jury.” *State v. Wade*, 198 N.C. App. 257, 271 (2009) (citing *State v. Allen*, 353 N.C. 504, 509-10 (2001)). In *Allen*, the State’s argument, “And you heard her words through [O]fficer Barros, because the [c]ourt let you hear it, because the [c]ourt found they were trustworthy and reliable. If there had been anything wrong with that evidence, you would not have heard it,” was improper because it violated N.C.G.S. § 15A-1230(a) by impermissibly traveling outside of the record. *Allen*, 353 N.C. at 508. The State’s closing argument in *Allen* amounted to “a second-hand statement or revelation of the trial judge’s legal determination or opinion on the evidence made during a hearing properly held outside the jury’s presence,” and the defendant was awarded a new trial. *Id.* at 509.

Here, Defendant characterizes the State’s closing argument as “extreme” and

argues it deprived the jury of a choice “to return any verdict except ‘guilty,’” but he does not point to any actual ruling by the trial court to which the State’s remarks alluded, nor does it appear on the face of the State’s remarks that it was referencing any such ruling. Though Defendant declares the State’s remarks to be “clearly calculated to prejudice the jury,” he does not argue in what ways the comments were otherwise improper. Defendant also fails to argue how the use of these statements was prejudicial to him. “[A] defendant appealing based on the trial court’s failure to intervene ex mero motu ‘has the burden to show a reasonable possibility that, had the errors in question not been committed, a different result would have been reached at the trial.’” *Norris*, 2022-NCCOA-908 at ¶ 28 (quoting *State v. Goins*, 377 N.C. 475, 478 (2021)) (marks omitted). “When evaluating the prejudicial effect of an improper closing argument, we examine the statements in context and in light of the overall factual circumstances to which they refer.” *Id.* As the State argues, the closing remarks seem only to indicate that the jury would not hear any instructions on a potential justification defense.

Even if the jury could have formed any prejudice against Defendant based on the State’s closing argument, the trial court gave jury instructions which stated, “You should not infer from anything I may have said or done during the course of the trial that I have any opinion as to whether any fact has been proven or not been proven or that I have any opinion as to what your verdict should be.” This statement cured any prejudice given to the jury. See *State v. Martin*, 248 N.C. App. 84, 91 (2016) (holding

that a trial court's jury instructions to apply the law and instructions given by the court rather than the parties' closing arguments was sufficient to free a defendant's trial from prejudicial error). We conclude that Defendant has failed to show that the State's closing argument was so grossly improper as to impede the Defendant's right to a fair trial.

CONCLUSION

Defendant fails to demonstrate that the trial court relied on an incorrect standard when it denied his motion to continue to obtain new private counsel. Furthermore, he fails to argue that the trial court's ruling caused prejudice to his case. Thus, we hold that the trial court did not commit prejudicial error in its ruling on Defendant's motion to continue and Defendant is not entitled to a new trial.

The State's closing argument was not so grossly improper as to prejudice the Defendant's right to a fair trial. Thus, where Defendant did not raise an objection at trial, the trial court did not err in its lack of intervention in the State's closing argument.

NO PREJUDICIAL ERROR.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).