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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1055

Filed 05 July 2023

Person County, Nos. 20CRS51060, 20CRS701806

STATE OF NORTH CAROLINA

v.

NOREN LAQUAIN DANCY, Defendant.

Appeal by Defendant from judgment entered 2 June 2022 by Judge John M. Dunlow in Person County Superior Court. Heard in the Court of Appeals 25 April 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Phoebe W. Dee for Defendant-Appellant.

RIGGS, Judge.

Defendant Noren Laquain Dancy appeals judgment and sentence for habitual impaired driving, speeding, and driving while license revoked. On appeal, Mr. Dancy argues that the trial court abused its discretion when it allowed the arresting officer to testify about the credibility of another witness. Additionally, Mr. Dancy argues that the trial court abused its discretion by failing to intervene *ex mero motu* when

the prosecutor interjected her personal belief about the defense witness testimony during the closing argument. After careful review, we hold that Mr. Dancy failed to show reversible error.

I. FACTS AND PROCEDURAL HISTORY

In the early morning of 8 August 2020, Person County Sheriff's Sergeant Mark Harris (Sgt. Harris) was parked in a private parking lot when he saw a white Chevrolet Express van, driving at a high rate of speed. Sgt. Harris used his radar to confirm that the van was travelling at a rate of sixty miles-per-hour in a thirty-five mile-per-hour zone. Sgt. Harris engaged his blue lights, pulled out in pursuit of the van, and stopped the van on Ivey Day Road, about a half mile from where he had started following the van. As Sgt. Harris approached the driver's side window, he noticed an open twelve-pack of Heineken beer in the backseat of the van. When Sgt. Harris encountered Mr. Dancy, Mr. Dancy was sitting in the driver's seat, smoking a cigar, and had a twist-top bottle cap sitting on his leg. As part of the investigation, Sgt. Harris asked Mr. Dancy for his license and registration and Mr. Dancy gave Sgt. Harris his state-issued ID. Additionally, Sgt. Harris asked Mr. Dancy if he had anything to drink that evening. Mr. Dancy admitted to having one beer at the drag strip, where he had been that evening. Sgt. Harris observed that Mr. Dancy's eyes were "red and glassy," his speech was "slow and slurred," and he had the "smell of alcohol" on his breath.

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Based upon Mr. Dancy's admission of having a drink and Sgt. Harris' observations, Sgt. Harris decided to administer a field sobriety test. Because Mr. Dancy told Sgt. Harris that he had a rod implanted in his leg, Sgt. Harris decided to perform a horizontal gaze nystagmus (HGN) test, which is a field sobriety test that looks for clues indicating impairment based upon the subject's ability to follow the officer's finger with their eyes. Sgt. Harris testified that he identified six of the six clues for impairment during the HGN test. Then Sgt. Harris administered a portable breath sample exam which gave a positive result. Based upon the HGN test, the portable breath sample, and Sgt. Harris' personal observations, Sgt. Harris placed Mr. Dancy under arrest for driving while impaired.

At the trial, Mr. Sherill Tuck, a longtime friend of Mr. Dancy, testified for the defense that he had been at the drag strip with Mr. Dancy on the evening of 7 August 2020. Mr. Tuck testified that he was actually driving the van in the early morning of 8 August 2020 when they were pulled over by Sgt. Harris and that Mr. Dancy was riding in the back seat. According to Mr. Tuck's testimony, he navigated the van to the side of the road, jumped out of the side door of the van and ran into the woods because he was on probation with a suspended driver's license.

After Mr. Tuck's testimony, the State recalled Sgt. Harris to the stand and asked him the following questions in response to Mr. Tuck's testimony:

[STATE]: . . . So when you encountered Mr. Dancy, again, where was he?

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[SGT. HARRIS]: Driver's seat.

[STATE]: And did it appear that he hastily got into the driver's seat from the back seat?

[SGT. HARRIS]: No, ma'am.

[STATE]: Okay, as a matter of fact, what did you observe? I think you previously testified to?

[SGT. HARRIS]: I saw a beer bottle cap on his leg, which would have been impossible. It would have fallen off if he had to jump from the back seat of [sic] to the front seat.

[STATE]: Okay, and ---

[DEFENSE ATTORNEY]: Judge, I would object. Calls for speculation.

[COURT]: Overruled

After commencement of the trial and before the close of the State's case, the trial court conducted a colloquy with Mr. Dancy pursuant to N.C. Gen. Stat. § 15A-928(c) wherein Mr. Dancy admitted and stipulated to having three prior convictions within the past ten years for impaired driving pursuant to N.C. Gen. Stat. § 15A-928(c), and that his driver's' license had been revoked, and remained revoked, as a result of a prior driving while impaired conviction, and that Mr. Dancy had knowledge of the revocation.

During closing arguments, the defense attorney noted that Mr. Tuck had come into the courthouse, sworn an oath to tell the truth, and subjected himself to prosecution when he testified that he had been driving the van on 8 August 2020

when Sgt. Harris pulled the van over for speeding. In the State's closing argument, the prosecutor characterized Mr. Tucks' testimony as follows:

[Defense Attorney] is absolutely right. [Mr. Tuck] came in this building, he came in this room and he put his hand on that Bible and he told us that story. Y'all heard the store [sic]. Y'all heard it. Just, for argument sake, say, "Okay, we accept what you say. That you opened that door when you saw those blue lights and you got out and you got on your stomach and you crawled." Okay. Okay. But guess what, who did we see back beside the driver's seat? Who did we see? Who did we see come out of that that [sic] driver side. And I don't care how you slice the cake. I don't care how you slice the pie. Noren Dancy was behind the wheel. It took seconds. It only took seconds.

We know it was a lie, but we're going to accept it for just a minute, just entertain it. Let's just entertain this story. This guy climbs over with a beer bottle cap on the side of his leg and he's sitting there smoking. Smoking. "Yeah, man, how you doing." Lights were on. I saw it. I'm sure you did. Tail lights were on. Vehicle was on. What am I telling you? He was operating that vehicle. I don't care how you slice the cake. I don't care how you slice the pie, second. Okay, we'll accept it, seconds. He was still operating that vehicle. Still operating that vehicle.

(Emphasis added).

The jury returned verdicts of guilty of impaired driving, driving while license was revoked, and speeding in excess of fifteen miles over the speed limit. The trial court entered judgment for habitual impaired driving, speeding, and driving while license revoked. Mr. Dancy gave oral notice of appeal on the record after sentencing.

II. ANALYSIS

A. Admission of lay person opinion testimony

On appeal, Mr. Dancy argues the trial court erred when it allowed Sgt. Harris, a lay witness, to offer his opinion about the credibility of another witness. After review of the record, we hold that Sgt. Harris' testimony was allowable lay opinion testimony based upon his first-hand observations and find no error in the ruling of the trial court.

1. Standard of Review

Where a defendant has objected to testimony at trial as inadmissible lay opinion testimony, this Court applies the abuse of discretion standard of review on appeal. *State v. Collins*, 216 N.C. App. 249, 254, 716 S.E.2d 255, 259 (2011). A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision. *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

2. Admission of police officer testimony was proper

It is well established that the question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone. *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784 (1995). North Carolina Rule of Evidence 701(a) requires that when a witness is not testifying as an expert, their testimony in the form of opinions or inferences is limited to those opinions which are (a) rationally based upon the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. N.C. Gen. Stat. § 8C-1, Rule 701 (2021); *see also State v. Mitchell*, 342 N.C. 797, 808, 467 S.E.2d 416, 422 (1996)

(allowing the opinion of a lay witness even when it was equivocal and holding the weight and credibility of the evidence was a question for the jury). “Ordinarily, opinion evidence of non-expert witnesses is inadmissible because it tends to invade the province of the jury.” *Collins*, 216 N.C. App. at 255, 716 S.E.2d at 260 (quoting *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980)).

However, a lay witness is entitled to utilize “shorthand statements of facts” during the course of their testimony. *State v. Dew*, 225 N.C. App. 750, 757, 738 S.E.2d 215, 220 (2013). This shorthand statement of facts can consist of “instantaneous conclusions of the mind as to the appearance, condition, or physical state of things, derived from observation of a variety of facts presented to the senses at one and the same time.” *State v. Mills*, 221 N.C. App. 409, 414, 726 S.E.2d 926, 930 (2012) (cleaned up); *see also State v. Cook*, 273 N.C. 377, 381, 160 S.E.2d 49, 52 (1968) (holding it was proper for an officer to describe the condition of a defendant and opine that the defendant appeared to be under the influence of drugs); *State v. Johnston*, 344 N.C. 596, 609, 476 S.E.2d 289, 296 (1996) (holding witnesses’ testimony that defendant was “going to do something” and that victim did not have time to leave before defendant approached represented an instantaneous conclusion based on her observation of a variety of facts, and, as such, the testimony may be characterized as a “shorthand statement of fact”).

However, the North Carolina Supreme Court has affirmed that when one witness provides an opinion about the truthfulness of another witness, that opinion

goes beyond the limit of lay opinion testimony that is allowed by Rule 701. *State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286, *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008). Specifically, when an attorney asks whether another witness' testimony is mistaken or untruthful, the testimony is impermissible lay opinion, and it calls for an opinion that would not be helpful to the jury. *State v. Robinson*, 355 N.C. 320, 334-35, 561 S.E.2d 245, 255 (2002).

Here, Sgt. Harris was testifying as a lay witness rather than an expert witness; therefore, Rule 701, opinion testimony by lay witness applies to his testimony. Mr. Dancy argues that Sgt. Harris's statement "it would have been impossible" was improper opinion evidence. According to Mr. Dancy, because the testimony was rebuttal testimony after a defense witness had testified to a different version of the events that evening, it was an improper opinion about the prior witness' truthfulness. That argument is unpersuasive.

In this case, Sgt. Harris' testimony was based upon his first-hand observation of seeing Mr. Dancy being present and seated in the driver's seat of the van during the traffic stop. Just prior to Sgt Harris' rebuttal testimony, Mr. Tuck testified for the defense that Mr. Tuck—not Mr. Dancy—was driving the van when Sgt. Harris pulled over the van for speeding. On rebuttal, Sgt. Harris explained that he saw a bottle cap on Mr. Dancy's leg and then expressed his opinion that it would have been impossible for Mr. Dancy to have this bottle cap on his leg if he had just hastily jumped into the driver's seat while Sgt. Harris was walking up to the driver's window.

While Sgt. Harris' statement that "it would be impossible" was his opinion, it was an instantaneous conclusion based upon his firsthand observation of seeing Mr. Dancy in the driver's seat "within seconds" of the traffic stop. The question posed to Sgt. Harris was "what was your observation?" In the context of the speed of the interaction, smoking a cigar, and a small lightweight object sitting on Mr. Dancy's leg, Sgt. Harris indicated that he would have been able to tell if there had been the rapid movement necessary for Mr. Dancy to change seats from the back to the front so dramatically and quickly. Sgt. Harris' testimony was not focused on whether Mr. Tuck's testimony was truthful or credible; his testimony was based on what he had observed during the stop and what he concluded from those observations. His statement was helpful to the jury, who would be called upon to decide which version of the facts—Mr. Tuck's or Sgt. Harris'—was more credible. Because Sgt. Harris' statement was allowable opinion testimony of a lay witness according to N.C. Gen. Stat. § 8C-1, Rule 701, we find no error in the decision of the trial court to allow the testimony of Sgt. Harris.

B. Intervention by the trial court *ex mero motu*

In his second assignment of error, Mr. Dancy argues that the trial erred when it failed to intervene *ex mero motu* during the closing argument of the State because the State impermissibly expressed an opinion as to the credibility of Mr. Dancy's witness. While the statement by the State was an impermissible statement of

opinion, Mr. Dancy fails to establish that he was prejudiced by the statement such that a new trial is warranted. Therefore, we find no reversible error.

1. Standard of Review

The North Carolina Supreme Court has held that the standard of review for assessing allegedly improper closing argument, to which a timely objection was not entered, is whether the remarks are 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) (citing *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998)).

2. Improper statement was not prejudicial

North Carolina General Statute § 15A-1230 places limitations on arguments to juries and specifically precludes an attorney from “express[ing] his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant.” N.C. Gen. Stat. § 15A-1230 (2021). Within the statutory confines “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.” *State v. Huey*, 370 N.C. 174, 180, 804 S.E.2d 464, 469 (2017) (quoting *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007)).

When considering whether a closing argument, which was not objected to, constitutes an improper argument such that the trial court should have intervened *ex mero motu*, this Court uses the following two-step analysis: (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. *Huey*, 370 N.C. at 179, 804 S.E.2d at 469-70; *See also Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986) (stating that is not enough that the prosecutor’s comments were undesirable or even universally condemned, the relevant question is whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process).

While an appellate court may review the argument, even though the defendant raised no objection at trial, the impropriety must be gross for this Court to hold that a trial judge abused their discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when they heard it. *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). “In determining whether a prosecutor’s statement reaches this level of gross impropriety we consider the statement in context and in light of the overall factual circumstances[.]” *Huey*, 370 N.C. at 180, 804 S.E.2d at 470. *Compare Jones*, 355 N.C. at 134, 558 S.E.2d at 108 (holding that prosecutor’s name-calling and degrading the defendant improperly led the jury to base its decision not on the evidence relating to the issues submitted but on misleading characterizations and emotions) *with State v. Sexton*, 336 N.C. 321, 363, 444 S.E.2d 879, 903 (1994) (holding that while it is improper for a district attorney to characterize a witness as a liar, defendant failed to show the error was prejudicial).

Here, the prosecutor's statement "[w]e know it was a lie" was an improper statement commenting on the truthfulness of a witness because it was her personal belief about the truth of Mr. Tuck's testimony. *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978) ("It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar." (internal citation and quotations omitted)). Even the trial court, in its preamble to the closing arguments, told that jury that it is improper for a lawyer to express a personal belief as to the truth or falsity of the evidence. However, the dispositive question before this Court is whether that statement, taken in context, was so "grossly improper" as to impact Mr. Dancy's right to a fair trial.

To understand the State's comment in context, we first look at the closing argument for the defense. In the defense counsel's closing argument, he emphasized how Mr. Tuck had come into a court of law, placed his hand on the Bible and swore to his story. Defense counsel argued that swearing on the Bible and subjecting himself to prosecution makes him "as reliable as anything." In the prosecutor's closing argument leading up to her statement of "[w]e know it was a lie" she was responding to this argument by the defense. She was arguing Mr. Tuck's statements were not reliable and was not consistent with the facts. During this discussion, she improperly interjected her personal belief and opinion in support of her argument, with the statement "[w]e know it was a lie."

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It is the province of the jury to weigh the credibility of witnesses. *State v. Jones*, 241 N.C. App. 132, 143, 772 S.E.2d 470, 478 (2015). In this case, there was conflicting testimony as to an ultimate question for the jury: whether Mr. Dancy was operating the vehicle when he was pulled over for speeding and found to be intoxicated. Mr. Tuck testified that he, not Mr. Dancy, was operating the vehicle. Sgt. Harris testified that his observations led to the conclusion that Mr. Dancy was operating the vehicle. Both attorneys were trying to persuade the jury to believe their witnesses. After her inappropriate statement, the prosecutor highlighted portions of Sgt. Harris's testimony for the jury to rely upon to find Mr. Dancy guilty. Additionally, in context, the impropriety of the prosecutor's statement is mitigated by the fact that the State was arguing that even if Mr. Tuck had been driving earlier, by getting into the driver's seat, Mr. Dancy was legally operating the vehicle and could still be found guilty. That is, the prosecutor was presenting a path to the jury for it to arrive at a guilty verdict even without disbelieving Mr. Tuck. We cannot conclude the statement was so grossly improper to show the trial court abused its discretion by failing to intervene *ex mero motu*, when considering her statement within the context of both closing arguments.

We hold the statement of the prosecutor was improper because it included her personal belief about whether a witness was lying. However, when considered within the context of her entire argument and the evidence presented at trial, Mr. Dancy failed to show the statement prejudiced or interfered with his right to a fair trial.

Accordingly, we do not find that the trial court committed prejudicial and reversible error.

III. CONCLUSION

After review of the issues presented in this appeal, we find no error in the admission of Sgt. Harris' testimony and no prejudicial and reversible error in the prosecutor's closing arguments.

NO ERROR; NO PREJUDICIAL ERROR.

Judge TYSON and COLLINS concur.

Report per Rule 30(e).