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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-232

Filed 17 September 2024

Catawba County, No. 22 CRS 609

STATE OF NORTH CAROLINA

v.

NKOSI ABERNETHY

Appeal by Defendant from judgment entered 19 July 2023 by Judge Bradley B. Letts in Catawba County Superior Court. Heard in the Court of Appeals 29 August 2024.

*Mary McCullers Reece, for the defendant.*

*Attorney General Joshua H. Stein, by Assistant Attorney General Anne G. Kirby, for the State.*

PER CURIAM.

On 21 February 2022, Defendant was indicted in Catawba County on two counts of robbery with a dangerous weapon, breaking and entering, and attempted robbery with a dangerous weapon for an event that occurred on 7 December 2021. On 19 July 2022, Defendant was convicted by a jury of all charges. Defendant gave

notice of appeal in open court during sentencing.

On appeal, Defendant makes a single argument; namely, that the trial court reversibly erred by failing to intervene *ex mero motu* when the prosecutor referenced the 1941 Pearl Harbor attack during her closing argument. After careful review, we conclude Defendant received a fair trial, free of reversible error.

### **I. Factual and Procedural Background**

On 7 December 2021, Morgan Cooper (“Cooper”) and his roommates, Joel Gosda (“Gosda”), and Ethan Specht (“Specht”) were each sleeping in separate bedrooms of Cooper’s house in Hickory when two armed men broke into the residence and woke them each up by surprise. The residents testified to the events of that morning as follows:

The two armed men entered Cooper’s bedroom first. Cooper woke up when they entered his room and saw a semi-automatic rifle aimed at his face. Cooper observed that one of the men was shorter, wearing a mask, and carrying the rifle. The man used the butt of the rifle to strike Cooper in the head. The other man, whose face was not covered by a mask, was taller and stood about two feet away from Cooper.

Cooper did not recognize the shorter man wearing the mask. However, he did recognize Defendant, who was holding a pistol and pointing it at Cooper. Cooper had known of Defendant since elementary school and was “one hundred percent” sure the man without a face covering was Defendant “within two seconds

of seeing him.” Defendant and his masked accomplice demanded money from Cooper, stole his pink SCCY pistol, and took his cell phone. Cooper gave them his wallet but there was nothing in it.

Defendant and his accomplice yelled commands at Cooper. Defendant told him to get up and show them everyone else’s rooms. The men then pushed him through the house with the semi-automatic rifle on his back. They continued to push him until they got to the door of Specht’s bedroom. Defendant then kicked through Specht’s door and entered. At that point, Cooper ran away to his neighbors’ house and called 911. By the time Cooper returned to his house, the men had fled the scene and officers had arrived. Cooper almost immediately advised one of the officers that he recognized Defendant as one of the perpetrators.

Specht was sleeping in his room with his girlfriend, Evelyn Malone (“Malone”), when he heard his door loudly busting open and someone coming in and turning on his overhead light. He then saw a barrel of a semi-automatic rifle pointed six inches away from his face.

Specht saw that two men had entered his room. The shorter one was holding the rifle to his face and repeatedly asking him, “Where’s your money?” Specht told the men that he did not have any money. Specht observed the taller man was holding a handgun and was wearing a face covering. The shorter man was wearing a black COVID mask. At some point, Defendant’s face covering fell when Defendant was about ten feet away from him. Specht did not recognize Defendant

at the time, but he identified Defendant in the courtroom based on his recollection of the events of 7 December 2021.

Malone was lying in bed with Specht when Defendant and his accomplice broke into Specht's room. After demanding money, but finding none, the men moved on. Malone observed Defendant and his accomplice struggling to get into another bedroom and got a good look at Defendant when his mask came down in the struggle. She immediately recognized him because she had known Defendant since high school, and she was "one hundred percent" certain of his identity. She told an officer who arrived at the scene that one of the men's masks came down, and she identified that man as Defendant. Malone also identified Defendant in the courtroom as the man whose face covering came down.

Defendant and his accomplice did not take anything from Specht and left his room to go to Gosda's room. Gosda was awakened by the sound of his bedroom door, which was deadbolted, being kicked down. Two armed men, one taller than the other, then came into his room and stood in front of his bed. The taller man held Gosda's 12-gauge shotgun, which Gosda kept beside his bed. While pointing Gosda's shotgun at him, Defendant asked, "Where's everything at?" Gosda told them that he "was naked." Defendant and his accomplice then searched the room, took what they could, and left through the back door. Gosda had previously hung out with and smoked marijuana with Defendant. Based on that prior interaction, he believed that Defendant, who he pointed out in the courtroom, was

the same person he had seen in his bedroom that morning.

The police responded to the emergency call from Cooper, took statements, collected evidence, and canvased the area. Based on witness testimony, a warrant was issued for Defendant; however, the other suspect was never identified. Defendant was indicted in Catawba County on two counts of robbery with a dangerous weapon, breaking and entering, and attempted robbery with a dangerous weapon.

Defendant came on for trial during the 17 July 2023 session of Catawba County Superior Court. During closing arguments, the prosecutor made an analogy between the surprise attack at Pearl Harbor on 7 December 1941, and the surprise attack at Cooper's home eighty years later on 7 December 2022. The defense did not object during the trial, and the trial court did not intervene. On appeal, Defendant contends that the statement was grossly improper, and the trial court should have intervened *ex mero motu*. Defendant contends he was prejudiced by the error and requests a new trial.

## **II. Analysis**

Defendant contends the trial court committed prejudicial error by failing to intervene *ex mero motu* during the prosecutor's closing arguments. In reviewing Defendant's argument, we must determine whether the prosecutor's remarks were "so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Barden*, 356 N.C. 316, 358, 134 (2002) (citations omitted). To

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determine whether the statements were grossly improper, this court “must examine the context in which it was given and the circumstances to which it refers.” *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998).

“[T]he reviewing 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 and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.”

*State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). In order for a new trial to be granted, “the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair.” *State v. Mann*, 355 N.C. 294, 307-308, 560 S.E.2d 776, 785 (2002) (citations omitted).

Here, the prosecutor began closing arguments by stating:

It is somewhat ironic that this crime occurred on December 7, 2021. December 7 is a date in history that is associated with trauma. Trauma from a surprise attack at Pearl Harbor. This crime occurred exactly 80 years to the hour after that surprise attack at Pearl Harbor, 80 years to the hour. That was at 7:55 AM on December 7, 1941. This happened just after 8:00 AM. It was a traumatic time for our country, for our young people, as many put their lives at risk. Now, I’m not saying that what happened in Hickory on December 7, 2021, is the scale of what happened there. But it is ironic that these individuals – [names of the victims] – basically were attacked by surprise that morning.

Defendant’s counsel did not object to the brief analogy to the surprise attack on

Pearl Harbor and the prosecutor made it clear that she was not comparing the scale of the two events, solely their date and use of the element of surprise.

Defendant points to *State v. Jones* to argue that the verdict should be vacated. In *Jones*, the prosecutor referred to the Columbine School Shooting and the Oklahoma City Bombing. *State v. Jones*, 355 N.C. 117, 132, 558 S.E.2d 97, 107 (2002). However, this was objected to by the defense and the court failed to sustain the objection. The court also failed to intervene *ex mero motu* when the prosecutor disparaged the defendant with insults and name calling. *Id.* 355 N.C. at 126, 558 S.E.2d at 103.

Due to the timely objection, the Court in *Jones* applied a different standard of review, needing only to find that the trial court “failed to make a reasoned decision when it overruled defendant’s timely objection to the prosecutor’s references.” *Id.* 355 N.C. at 131, 558 S.E.2d at 106.

Here, unlike *Jones*, defense counsel failed to object to the statements and the prosecutor’s arguments were not made in the sentencing phase of a capital case. Therefore, the burden on Defendant to show reversible error is higher. “[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.” *State v. Mann*, 355 N.C. 294, 307, 560 S.E.2d 776, 785 (2002)

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(citing *State v. Davis*, 353 N.C. 1, 31, 539 S.E.2d 243, 263 (2000)).

We have reviewed the record, including the closing argument in its entirety. The statement at issue was but a brief analogy at the beginning of an extended closing argument that focused entirely on the facts of the case. Based on our review, we conclude that the brief mention of Pearl Harbor by the prosecutor did not breach the threshold of “extreme impropriety” to warrant intervention by the trial court. We conclude Defendant received a fair trial, free of reversible error.

NO ERROR.

Panel consists of Judges ARROWOOD, CARPENTER, WOOD.

Report per Rule 30(e).