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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1063

Filed 15 October 2024

Buncombe County, No. 22CRS085558

STATE OF NORTH CAROLINA

v.

OMAR SANTIAGO CORTEZ

Appeal by Defendant from judgment entered 25 January 2023 by Judge Jacqueline D. Grant in Buncombe County Superior Court. Heard in the Court of Appeals 28 August 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Cannon E. Lane, for the State-Appellee.

Blackrose Law, by Gina Balamucki, for Defendant-Appellant.

COLLINS, Judge.

Defendant Omar Santiago Cortez appeals from judgment entered upon a guilty verdict of communicating threats. Defendant argues that the trial court erred by failing to intervene ex mero motu in the State's allegedly improper racially-charged closing argument, denying his motion for a mistrial, and admitting improper character evidence. We find no error.

I. Background

Defendant and Christina were married for more than seven years before legally separating on 4 January 2022. Christina began dating a sheriff's deputy named Andrew after the separation. The weekend before 11 May 2022, Andrew gave Christina a promise ring. Christina was working an overnight shift on 11 May 2022 as a registered nurse at Mission Hospital when, at approximately 11:30 p.m., Defendant called her on the telephone. Defendant was upset because he knew Christina had accepted the promise ring from Andrew. Defendant told her that he was "going to put a .380 in Andrew." Christina began to record the phone call with a second phone.

During the recorded phone call, Defendant said to her, "I swear to God that if you let this fuckin leprechaun motherfucker touch my kids, I will chop you and him up into pieces. And I don't fuck around. You know I don't fuck around."

Based on Christina's complaint, a warrant was issued for Defendant's arrest for communicating threats under N.C. Gen. Stat. § 14-277.1. The case came on for trial on 9 November 2022 in the district court, and Defendant plead guilty to communicating threats. Defendant appealed to superior court. After a trial in superior court, Defendant was found guilty of communicating threats. Defendant noticed appeal to this Court.

II. Discussion

A. Closing Argument

Defendant first argues that the trial court erred by not intervening *ex mero motu* in the State's allegedly improper racially-charged closing argument.

"The standard of review for assessing alleged improper closing arguments that fail[ed] 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, 558 S.E.2d 97, 107 (2002) (citation omitted). "To make this showing, the defendant must demonstrate 'that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.'" *State v. Campbell*, 359 N.C. 644, 676, 617 S.E.2d 1, 21 (2005) (citations omitted). "[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. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996) (citation omitted).

"It is well settled in North Carolina that counsel is allowed wide latitude in the argument to the jury." *State v. Johnson*, 298 N.C. 355, 368, 259 S.E.2d 752, 761 (1979) (citations omitted). "Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (citations omitted). "[A]rguments are to be viewed in the context in which they are made and the overall factual circumstances to which they refer." *State v. Peterson*, 350 N.C. 518, 531, 516

S.E.2d 131, 139 (1999) (citation omitted). “[O]vert appeals to racial prejudice, such as the use of racial slurs, are clearly impermissible.” *State v. Williams*, 339 N.C. 1, 24, 452 S.E.2d 245, 259 (1994), *disapproved of on other grounds by State v. Warren*, 347 N.C. 309, 320, 492 S.E.2d 609, 615 (1997). “Nonderogatory references to race are permissible, however, if material to issues in the trial and sufficiently justified to warrant ‘the risks inevitably taken when racial matters are injected into any important decision-making.’” *Id.* (citation omitted).

During the phone call with Christina, Defendant referenced his Mexican nationality, his disdain for law enforcement and the United States legal system, and his connections, including the following:

I’m going to tell you this once, and make sure you record it so you can show the fucking judge, if you or this fucking leprechaun cop – sheriff fucker – Andrew whatever the fuck his last name is, lays a hand on my kids, I swear to God, and you know I don’t fuck with God like that, but I swear to God that if you let this fucking leprechaun motherfucker touch my kids, I will chop you and him up into pieces. And I don’t fuck around. You know I don’t fuck around.

. . . .

If he touches my kids, I don’t give a fuck if he is a sheriff, I’ve got people. . . .I’ve got people that would fuck his shit up. . . . You’re psyched he’s a cop? I’m connected and I know where the fuck he lives.

. . . .

And I’m fine with that, with these fucking judges here. Whatever the fuck. Well, that’s the last time a man will

touch my kids because they will be done for and you will be done for. You know that? You psyched – you – you know, just cause you’re American, and all this bullshit – I know people [indistinct] and like they say it’s not what you know but who you know.

. . . .

He won’t get chopped up into pieces, he’ll get dissolved, one limb at a time. And you know me. I’ve got people. And fuck the goddamn US border government. Test me baby. Please I swear to God, test me. This motherfucker will not be found. Keep pushing it.

. . . .

I don’t give a fuck if he’s a pig. Fuck the police. And you’ve known that since day one. I don’t give a fuck about the police. I’m a Mexican a hundred fucking-god-damn percent.

During closing arguments, the prosecutor argued that the manner and circumstances of Defendant’s threat would cause a reasonable person to believe that the threat would happen. The prosecutor also summarized Defendant’s own references to his Mexican nationality, disdain for law enforcement and the United States legal system, and connections as follows:

Then he gets a little more angry during the course of the call and says, “You know what? I wouldn’t even chop him up. I would dissolve him piece by piece. He would never be found.” Makes vague references to Mexico, to people he knows. He has no respect for the justice system. Is this the kind of person that would turn to the justice system if he perceived some kind of wrong happening in his household? No. He’s made that clear over 13 years.

Defendant argues that this statement “was a highly improper appeal to racial

prejudice on the basis of [Defendant's] Mexican ethnicity.” Defendant grossly mischaracterizes the statement. The prosecutor does not inject Defendant’s race or appeal to racial prejudice; rather, the prosecutor simply summarizes what Defendant himself said about his Mexican ethnicity. Thus, the prosecutor’s closing argument was not improper, much less grossly improper such that the trial court committed reversible error by failing to intervene ex mero motu.

B. Motion for a Mistrial

Defendant next argues that the trial court erred by failing to grant his motion for a mistrial.

“A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law.” *State v. Blackstock*, 314 N.C. 232, 243–44, 333 S.E.2d 245, 252 (1985) (citation omitted). A trial court’s denial of a motion for a mistrial is reviewed under an abuse of discretion standard. *State v. Simmons*, 191 N.C. App. 224, 227, 662 S.E.2d 559, 561 (2008). “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. Miles*, 221 N.C. App. 211, 216, 727 S.E.2d 375, 378 (2012) (citation omitted).

At trial, Christina testified that she got off work at 7 a.m. on 5 May 2022, the morning after receiving the phone call, “and drove straight . . . to the magistrate’s office and took the charges out. However, . . . there was a clerical error, and the wrong

name was put on the warrant.” She further testified that on 2 June 2022, she found out that Defendant “had been arrested in Henderson County and was processed through their jail, and [she] never had heard anything back from Buncombe County about him being served on those warrants that [she] had taken out.” She then had “to get the warrant re-issued under the correct name.” She testified, over objection, that she had a second warrant issued on 29 June 2022 in Defendant’s name.

Defense counsel requested a copy of the warrant Christina testified had been taken out in the wrong name. The trial court ordered the State to produce the warrant, but only if the warrant was in its possession. The warrant was not able to be produced. Defense counsel then moved for a mistrial, arguing that his defense was centered around Christina waiting 49 days to seek a warrant, and that if he had known about an earlier warrant, he may have advised Defendant not to go to trial. Defendant now argues that the trial court abused its discretion by denying his motion. We disagree.

“[A] defendant has a right to statutory discovery only in ‘cases within the original jurisdiction of the superior court.’” *State v. Marino*, 229 N.C. App. 130, 138, 747 S.E.2d 633, 639 (2013) (quoting N.C. Gen. Stat. § 15A-901). “In North Carolina, no statutory right to discovery exists for criminal cases originating in district court.” *State v. Cornett*, 177 N.C. App. 452, 455, 629 S.E.2d 857, 859 (2006) (citation omitted). The official commentary to N.C. Gen. Stat. § 15A-901 describes the rationale behind this policy:

As cases in district court are tried before the judge, and usually on a fairly expeditious basis, the Commission decided there was no need at present to provide for discovery procedures prior to trial in district court. As misdemeanors tried in superior court on trial de novo have already had a full trial in district court, there is little reason for requiring discovery after that trial and prior to the new trial in superior court.

N.C. Gen. Stat. § 15A-901 (2023) (Official Commentary).

Because this case originated in district court, Defendant had no statutory right to discover an earlier warrant. *See* N.C. Gen. Stat. § 15A-901. Furthermore, Defendant had the opportunity to, and did vigorously, cross examine Christina about the warrant. *See, e.g., State v. Jaaber*, 176 N.C. App. 752, 755–56, 627 S.E.2d 312, 314 (2006) (trial court did not abuse its discretion by not declaring a mistrial as sanctions for the State’s failure to provide defendant with witness statements because, among other things, defendant had the opportunity to cross examine both witnesses about any statements they might have given). Therefore, we cannot say that the trial court’s ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision. Defendant’s argument is overruled.

C. Character Evidence

Finally, Defendant argues that the trial court plainly erred by admitting certain character evidence under Rule 403.

“Whether . . . to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be

disturbed on appeal absent a showing of an abuse of discretion.” *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995) (citation omitted). The North Carolina Supreme Court has specifically refused to apply the plain error standard of review “to issues which fall within the realm of the trial court’s discretion[.]” *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000).

Here, Defendant argues that Christina’s testimony, which drew no objection from Defendant, that Defendant “had been arrested in Henderson County and processed through their jail” was improper under Rule 403 and should be reviewed by this Court for plain error. The balancing test of Rule 403 is reviewed by this court for abuse of discretion, and we do not apply plain error “to issues which fall within the realm of the trial court’s discretion.” *Id.* See *State v. Cunningham*, 188 N.C. App. 832, 836–37, 656 S.E.2d 697, 700 (2008) (refusing to evaluate Rule 403 balancing test for plain error because it falls within the trial court’s discretion). Accordingly, Defendant’s argument is overruled.

III. Conclusion

For the reasons stated above, Defendant’s arguments are meritless. We find no error.

NO ERROR.

Judges ARROWOOD and WOOD concur.

Report per Rule 30(e).