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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-26

Filed 3 December 2024

Edgecombe County, No. 20 CRS 51485

STATE OF NORTH CAROLINA

v.

RASHAWN LESLEY GRANT, Defendant.

Appeal by Defendant from judgment entered 29 September 2022 by Judge L. Lamont Wiggins in Edgecombe County Superior Court. Heard in the Court of Appeals 25 September 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alvin W. Keller, Jr., for the State.

Sharon L. Smith for Defendant.

GRIFFIN, Judge.

Defendant Rashawn Lesley Grant appeals from the trial court's judgment entered after a jury found him guilty of first-degree murder. Defendant raises four issues on appeal. Defendant contends the trial court erred by (1) denying his Motion to Dismiss the charge of first-degree murder based on insufficient evidence of identity; (2) allowing the jury to convict on the theory of acting in concert; and (3)

failing to intervene ex mero motu in closing argument. Defendant also argues he received ineffective assistance of counsel. We hold the trial court did not err, and Defendant did not receive ineffective assistance of counsel.

I. Factual and Procedural Background

This case arises from the murder of Namir Davis in Rocky Mount, North Carolina. The evidence presented at trial tended to show as follows:

Around 3:00 a.m. on 1 September 2019, officers received a call that a shooting had occurred at 116 St. Francis Court. Upon arriving at the scene, Officer Brandon Sherrod found Davis lying on his back on the ground, bleeding from his head, and not breathing. Anthony Horne, another victim, was shot in the left arm and shoulder. Horne did not suffer any fatal injuries. While Officer Sherrod was rendering aid to Horne, Corporal Jerry Judd arrived at the scene and discovered a cell phone on the pavement in the middle of St. Francis Court. He took photographs of the phone and marked its location. Officer Judd directed Detective Joshua Talley to the location of the cell phone. Detective Talley was present when the phone was picked up off the ground. In addition to the cell phone, officers recovered multiple handguns, an AR-15 style rifle, and several bullet casings for various calibers: including 9-millimeter, .45 caliber, and one shotgun shell. Detective Talley testified the cell phone and shotgun shell were both located about “two and a half feet” from “a crack or a divider” in the middle of the parking lot.

Multiple cars at the scene sustained damage from the shooting. In particular,

STATE V. GRANT

Opinion of the Court

a green Toyota Camry and a black Audi incurred significant amounts of damage. The green Toyota Camry had one hole to the hood, four holes to the driver and rear passenger doors, two holes to the trunk, and one hole to the front tire. Additionally, blood splatter was found on the front driver door, front passenger door, the trunk, and on the concrete around the vehicle. The black Audi had several bullet holes on the front and rear doors of the passenger side of the vehicle, two holes on the driver's side, and a large dent above the rear tire.

During the investigation, officers interviewed witnesses and discovered information linking Defendant to the murder. Detective Talley interviewed Tony Avent, a witness to the shooting, on four separate occasions: 1 September 2019, 3 September 2019, 31 October 2019, and 16 December 2019. Although Avent testified he was intoxicated during the interviews, Detective Talley testified "there were no signs of impairment" when they were speaking. In one interview, Avent told Detective Talley that there were four men with guns at the shooting, three of which were wearing ski masks, and he believed one man carried a shotgun. Avent also stated the man who shot Davis was the same man who shot at Avent. Avent described the person with the shotgun as "a taller male with a ski mask and no dreads."

Leading up to the day of the shooting, officers discovered Defendant's brother, Tyrone Martin, and Avent were involved in a dispute. The dispute was over an incident that occurred on 30 August 2019, where Martin allegedly hit his ex-girlfriend, Tiffany Henderson. Henderson is Horne's sister and Avent's cousin.

Christopher Willis, Martin's cousin, was allegedly present at the incident but did not intervene. Immediately following the incident, Avent and Martin engaged in a back and forth over Facebook messenger where Avent sent several explicit and threatening messages to Martin.

That same day, 30 August 2019, Defendant messaged Abed Hadi and purchased a shotgun for \$50.00. Defendant and Hadi exchanged several messages, including a message Defendant sent around 5:33 p.m. stating, "I need it ASAP. It got shells?"

On 31 August 2019, Davis filmed a music video for Avent on St. Francis Court involving money and guns. After completing the video, Avent went to Martin's house and knocked on the door to draw Martin outside. At 11:48 p.m., Avent sent Martin a message stating, "B****, I'm at 116 St. Francis Court. That same evening, Avent went to Club Da BoatRyde where he watched his friend Aaron Chandkira perform. He left the club around 1:00 a.m., 1 September 2019 and headed back to St. Francis Court in a car with Davis and Chandkira. Avent had been drinking and using drugs. Upon returning to St. Francis Court, they backed into a parking spot. Avent told Detective Talley that he, Davis, and Chandkira, were in a black car, and that Horne owned the green Toyota Camry that was parked in a nearby parking space. Around 3:00 a.m., Avent heard gunshots. He got out of the car and hit the ground. Davis was behind Avent outside of the same car, and Davis fell to the ground once he was shot. The autopsy report revealed Davis was killed by a "perforating shotgun wound

to the head.”

Katina Horne departed St. Francis Court after hearing gunshots but returned five minutes later to pick up her husband. Upon her return, she saw a “grey car” speeding and spinning in the road. She saw four or five males wearing black ski masks jump out of the car and scatter near a 3 O’s Store.

Upon accessing the cell phone found at the scene, officers discovered a significant amount of evidence linking the phone to Defendant. Additionally, when Detective Talley opened the phone, the cell phone’s GPS coordinates revealed a transit to 116 St. Francis Court with an arrival time of about 3:00 a.m., approximately the time the shooting was reported to the police. The cell phone revealed several missed calls and messages from Martin, messages which Defendant read minutes before the shooting occurred. Around 2:25 a.m. on 1 September 2019, Defendant responded to a message from Hadi stating, “I was knocked out but I’m up now. N****s pulled up at my brother’s house trying him. On my way over there.” This was approximately thirty-five minutes before the shooting was reported to the police.

On 1 June 2021, a grand jury indicted Defendant for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant’s matter came on for trial on 26 September 2022 in Edgecombe County Superior Court before the Honorable L. Lamont Wiggins. At the close of the State’s evidence, Defendant moved to dismiss the charges. The assault charge was dismissed, but the court denied Defendant’s Motion on the murder charge. At the end of trial and after

all evidence was presented, Defendant renewed his Motion. The court again denied Defendant's Motion, and the murder charge was submitted to the jury. The jury found Defendant guilty of first-degree murder. The judgment was entered on 29 September 2022. Defendant gave notice of appeal in open court.

II. Analysis

Defendant contends the trial court erred by (1) denying his Motion to Dismiss the charge of first-degree murder based on insufficient evidence of identity; (2) allowing the jury to convict on the theory of acting in concert; and (3) failing to intervene ex mero motu in closing argument. Defendant also argues he received ineffective assistance of counsel. We hold the trial court did not err, and Defendant did not receive ineffective assistance of counsel.

A. Motion to Dismiss

Defendant argues the trial court erred by denying his Motion to Dismiss for insufficient evidence. Specifically, Defendant contends the State failed to present sufficient evidence to prove Defendant was the perpetrator of the murder.

We review a trial court's denial of a defendant's motion to dismiss *de novo*. *State v. Golder*, 374 N.C. 238, 249–50, 839 S.E.2d 782, 790 (2020). To survive a motion to dismiss for insufficient evidence, the State must present substantial evidence of (1) each essential element of the charged offense, and (2) the defendant being the perpetrator of the offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind

STATE V. GRANT

Opinion of the Court

might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). Substantial evidence may be direct or circumstantial. *State v. Wright*, 275 N.C. 242, 249–50, 166 S.E.2d 681, 686 (1969). “Direct evidence is that which is immediately applied to the fact to be proved, while circumstantial evidence is that which is indirectly applied, by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred.” *Id.* “[T]he law does not distinguish between the weight given to direct and circumstantial evidence[.]” *State v. Parker*, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001). “The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both[.]” *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984), and that is “whether a [r]easonable inference of the defendant’s guilt of the crime charged may be drawn from the evidence.” *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

In ruling on a motion to dismiss, the court must consider all evidence “in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]” *Id.* at 99, 261 S.E.2d at 117. The trial court should only be concerned with “the sufficiency of the evidence to carry the case to the jury and not with its weight.” *Id.* If the court determines there is sufficient evidence presented, it is then for the jury to decide “whether the facts, taken singly or in combination, satisfy them beyond a reasonable

doubt that the defendant is actually guilty.” *Id.* (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)).

To support a conviction for first-degree murder, the State must prove beyond a reasonable doubt the defendant engaged in “(1) the unlawful killing of another human being; (2) with malice; and (3) premeditation and deliberation.” *State v. Haynesworth*, 146 N.C. App. 523, 531, 553 S.E.2d 103, 109 (2001); N.C. Gen. Stat. § 14-17(a) (2021).

Here, Defendant does not dispute whether the victim died because of a criminal act, he only asserts the evidence presented was insufficient to support a reasonable finding that Defendant was the perpetrator of the offense. Therefore, “we review the evidence for ‘proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime.’” *State v. Miles*, 222 N.C. App. 593, 600, 730 S.E.2d 816, 822–23 (2012), *aff’d*, 366 N.C. 503, 750 S.E.2d 833 (2013) (quoting *State v. Bell*, 65 N.C. App. 234, 238, 309 S.E.2d 464, 467 (1983)). This Court must “assess the quality and strength of the evidence as a whole[,]” as there is not “an easily quantifiable bright line test” for determining sufficiency of the evidence to identify the defendant as the perpetrator. *Id.* at 600, 730 S.E.2d at 823 (citations and internal quotations omitted).

Here, the State presented overwhelming circumstantial evidence demonstrating Defendant was the individual who shot and killed Namir Davis. The evidence shows Defendant purchased a shotgun from Abed Hadi on the same day

Tony Avent threatened his brother, Tyrone Martin. Text messages admitted into evidence reflect Martin received several explicit and threatening messages from Avent, making comments such as “Better call out ‘cause every time they see you, they smashing you”; “Go get your big brother, Jersey, LMAO. I’ll beat him up right now. Link”; “I’ll shoot n****s like you for fun on gang. And I’ll spit in your momma’s face when I see that b****.” Hadi testified that on 30 August 2019, the date Defendant purchased the shotgun, Defendant messaged him stating, “I need it ASAP. It got shells?” Moreover, testimony demonstrated Defendant’s street name was Jersey.

The next day, on 31 August 2019, Avent showed up at Martin’s door attempting to draw Martin outside. Shortly thereafter, Martin received a message from Avent at 11:48 p.m., stating, “B****, I’m at 116 St. Francis Court,” the location where the shooting occurred. Just an hour before the shooting took place in the early morning of 1 September 2019, Defendant responded to a message from Hadi stating, “I was knocked out but I’m up now. N****s pulled up at my brother’s house trying him. On my way over there.”

Moreover, the cell phone found at the scene contained a significant amount of evidence linking the phone to Defendant. The home address associated with the cell phone was 2011 Bridgewood Road, Rocky Mount, North Carolina, which was the home address of Defendant and Quayama Wheeler. The cell phone’s number was identified as Defendant’s, and there were numerous pictures of Defendant, and his family, found on the phone. The cell phone also contained various pictures of

important personal documents, including a statement of Defendant's utility bill and Defendant's driver's license liability insurance certification. Detective Talley testified when he opened the phone, the cell phone's GPS coordinates revealed a transit to 116 St. Francis Court with an arrival time of about 3:00 a.m., approximately the time the shooting was reported to the police. The cell phone also showed several missed calls and messages from Martin, messages which Defendant read leading up to the time of the shooting.

Detective Talley testified that at the crime scene, the cell phone and shotgun shell were both located about "two and a half feet" from "a crack or a divider" in the middle of the parking lot. In an interview with Avent, Avent told Detective Talley that there were four men with guns at the shooting, three of which were wearing ski masks, and he believed one man carried a shotgun. Avent also stated that the individual who shot Namir Davis was the same man who shot at Avent. The autopsy report revealed that Davis was killed by a "perforating shotgun wound to the head."

Viewing the evidence in the light most favorable to the State, we hold the State presented substantial evidence of Defendant being the perpetrator of the offense. Despite Defendant's contention the shotgun used in the crime was never located and that there were no eyewitnesses, fingerprints, or DNA evidence linking Defendant to the crime scene, the circumstantial evidence presented by the State of Defendant's guilt is overwhelming. *See State v. Banks*, 210 N.C. App. 30, 36, 706 S.E.2d 807, 813 (2011) ("Most murder cases are proved through circumstantial evidence.").

STATE V. GRANT

Opinion of the Court

Our Supreme Court and this Court have affirmed a trial court's denial of a motion to dismiss where there was substantial circumstantial evidence "from which jurors could draw a reasonable inference that [the] defendant was the perpetrator of the murder[.]" *See State v. Stone*, 323 N.C. 447, 452-53, 373 S.E.2d 430, 434 (1988) (holding circumstantial evidence sufficient where the defendant "had access to a weapon and bullets which could have caused the death of the victim, had the time and opportunity to commit the murder, and drove a car which could have made the tire tracks found at the dump site"); *State v. Miles*, 222 N.C. App. 593, 600, 730 S.E.2d 816, 823 (2012) (holding circumstantial evidence sufficient where the "defendant possessed the motive, means, and opportunity to murder the victim" - the victim owed the defendant money; the defendant threatened the victim the morning of the murder, had access to a murder weapon, and was "in the vicinity of [the] victim's home and the scene of the crime at the time of death"). *But see State v. Lee*, 294 N.C. 299, 303, 240 S.E.2d 449, 451 (1978) (holding evidence not substantial where the defendant may have had the mental state to commit the murder, but there was insufficient evidence connecting the defendant to the murder scene).

Here, similar to the facts of *Stone*, Defendant had access to a weapon and ammunition which could have caused the death of the victim. Defendant had access to a shotgun and shells, which he purchased just two days prior to the shooting. The autopsy report revealed Davis was killed by a shotgun wound to the head, and a shotgun shell was found at the scene. Defendant also had the time and opportunity

STATE V. GRANT

Opinion of the Court

to commit the murder. Defendant was up sending messages to Hadi shortly before the shooting occurred stating his brother was being “tried” and that he was on the way over. There were also several missed calls and messages from Martin, messages which Defendant read minutes before the shooting. The cell phone found at the scene contained a significant amount of evidence linking the phone to Defendant, and the phone’s GPS coordinates revealed a transit to 116 St. Francis Court with an arrival time of about 3:00 a.m., the location of the shooting and approximately the time the shooting was reported to the police. Further, the cell phone and the shotgun shell were found in proximity. All this evidence taken together supports a reasonable inference that Defendant was the perpetrator of the murder.

Additionally, like the facts in *Miles*, Defendant had the “motive, means, and opportunity to murder the victim.” *Miles*, 222 N.C. App. at 600, 730 S.E.2d at 823. The evidence shows Defendant’s brother was being threatened by Avent, prompting Defendant to purchase a shotgun the very same day, thereby establishing motive and means. Although the victim here was not the intended target, the doctrine of transferred intent allows Defendant’s intent to transfer to the victim itself. *See State v. Andrews*, 154 N.C. App. 553, 559, 572 S.E.2d 798, 802 (2002) (“[I]t is immaterial whether the defendant intended injury to the person actually harmed; if he in fact acted with the required or elemental intent toward someone, that intent suffices as the intent element of the crime charged as a matter of substantive law.” (citation and internal quotations omitted)). Here, Avent stated the man who shot Davis was the

same man who shot at Avent, and based on the evidence presented, it is reasonable to believe Defendant intended to shoot Avent. Thus, we hold the theory of transferred intent applies, and Defendant's intent to kill Avent transferred to the victim.

Additionally, there was sufficient evidence to support Defendant being at the crime scene at the time of the murder, thereby establishing opportunity. In *Miles*, evidence was sufficient to establish opportunity when around the time the crime was committed, the defendant used one of "three cell phone towers in Wilkesboro, thereby pinpointing his location to Wilkesboro, in the vicinity of the victim's home and site of the crime." *Miles*, 222 N.C. App. at 601, 730 S.E.2d at 823. Here, even more compelling than the facts in *Miles*, Defendant left his phone at the crime scene with substantial evidence on the phone connecting him to the murder. Thus, all the evidence, considered collectively and taken in the light most favorable to the State, supports a reasonable inference that Defendant was the perpetrator of the murder.

Accordingly, we hold there was sufficient evidence to support submitting the charge to the jury. Thus, the trial court did not err by denying Defendant's Motion to Dismiss.

B. Acting in Concert

Defendant contends the trial court committed reversible error because it allowed the jury to convict Defendant of acting in concert without any evidence he joined in a common purpose or undertook any joint action in connection with the shooting. We disagree.

This Court reviews a properly preserved challenge to jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Instructions pertaining to material matters “must be based on sufficient evidence.” *Id.* “[T]o support a jury instruction on acting in concert, the State must prove that the defendant is ‘present at the scene of the crime’ and acts ‘together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.’” *Id.* (quoting *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979)).

Acting in concert may be actual or constructive. *State v. Hardison*, 243 N.C. App. 723, 726, 779 S.E.2d 505, 507 (2015). “[I]t is not necessary that the defendant do any particular act constituting a part of the crime charged, if he is present at the scene and acting together with another or others pursuant to a common plan or purpose to commit the crime.” *State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367 (1994).

Here, despite Defendant’s contention that there was “no evidence to support an acting-in-concert instruction[,]” we hold there was sufficient evidence presented that a reasonable juror could conclude that Defendant was acting in concert. Detective Talley testified that in an interview with Avent, Avent stated there were four men with guns at the shooting, three of which were wearing ski masks, and he believed one man carried a shotgun. Avent also stated the man who shot Namir Davis was the same man who shot at Avent. Another witness testified that after she heard

the gun shots, she witnessed a “grey car” speeding out of St. Francis Court. She saw four or five males wearing ski masks get out of the car and flee in opposite directions near a 3 O’s Store. In addition to the shotgun shell, officers testified that they found multiple guns and gun casings at the scene. Detective Talley testified that based on his review of the crime scene, he believed there were “multiple people firing weapons at the scene” and that it was a “crossfire situation.” Defendant’s phone contained messages stating that he was up and on his way to defend his brother, and the phone log revealed several missed calls and messages from Martin, messages which Defendant read minutes before the shooting occurred. There were also several FaceTime calls between Defendant and Christopher Willis around the time of the shooting.

The State’s evidence tended to show the shooting was committed by multiple individuals discharging firearms at the same time. Based on testimony at trial, statements collected from people present at the shooting, and officer testimony of their review and inspection of the crime scene, we hold there was sufficient evidence to support an instruction on acting in concert.

C. Failure to Intervene Ex Mero Motu in Closing Argument

Defendant argues the trial court erred by failing to intervene ex mero motu during the State’s closing argument. “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. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (quoting *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002)). In other words, this Court must determine “whether the argument in question strayed far enough from the parameters of propriety” that the trial court should have intervened on its own accord to “protect the rights of the parties and the sanctity of the proceedings[.]” *Id.*

This analysis requires a two-part 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.” *Id.* Only when both elements are satisfied will this Court hold that the error warrants appropriate relief. *Id.*

Lawyers are to conduct themselves in a professional and ethical manner, conforming to the rules of professional conduct. N.C. R. PROF’L. CONDUCT. (N.C. STATE BAR 2022). While every lawyer has a duty to be a zealous advocate for their client, advocacy has its rules and limitations. *Id.* See also *State v. Wiley*, 355 N.C. 592, 632, 565 S.E.2d 22, 50 (2002) (stating the substance of closing arguments is “dictated by statute”). We recognize in closing arguments “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. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011) (citation and internal quotations omitted). However, “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[.]” N.C. Gen. Stat. § 15A-1230(a) (2021); *Huey*, 370 N.C. at 180, 804 S.E.2d at 469.

When the prosecution makes an improper statement and opposing counsel fails to object, a defendant must show that their “right to a fair trial was prejudiced by the trial court’s failure to intervene.” *Huey*, 370 N.C. at 180, 804 S.E.2d at 469–70. It is not enough for a prosecutor’s remarks to be “undesirable or even universally condemned.” *Id.* at 180, 804 S.E.2d at 470 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). For this Court to order a new trial, the relevant question we must consider “is whether the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* (citation and internal quotations omitted). In determining whether the prosecution’s statements were so grossly improper, we consider the statements in the context they were made and the factual circumstances to which they refer. *Id.*

Our Supreme Court has held that improper statements do not rise to the level of prejudice and reversible error when the evidence against a defendant is overwhelming. *Id.* at 181, 804 S.E.2d at 470. *See State v. Sexton*, 336 N.C. 321, 363–64, 444 S.E.2d 879, 903 (1994) (holding the defendant failed to show that an error of the prosecution calling the defendant a liar was prejudicial when there was “overwhelming evidence against the defendant”). *But see State v. Rogers*, 355 N.C. 420, 462, 562 S.E.2d 859, 885 (2002) (noting “we have found grossly improper the

practice of flatly calling a witness or opposing counsel a liar when there has been no evidence to support the allegation” (citation omitted)).

Conversely, our Supreme Court has held a closing argument to be grossly improper and prejudicial when the prosecution made statements degrading the defendant and made personal conclusions that amounted to more than name calling. *See Jones*, 355 N.C. at 133–34, 558 S.E.2d at 107–08 (holding comments grossly improper where the prosecution stated, “[y]ou got this quitter, this loser, this worthless piece of - who’s mean He’s as mean as they come. He’s lower than the dirt on a snake’s belly”). The Court in *Jones* recognized the need to “strike a balance between giving appropriate latitude to attorneys to argue heated cases and the need to enforce the proper boundaries of closing argument[.]” *Id.* at 135, 558 S.E.2d at 108. Because the prosecution’s statements deviated outside of the statutory parameters and the trial court allowed the prosecution “undue latitude in closing argument[.]” the Court held the defendant was entitled to a new sentencing hearing. *Id.* at 135, 558 S.E.2d at 109.

Here, Defendant argues the prosecutor mischaracterized evidence, injected his own opinion, and commented on Defendant’s Fifth Amendment privilege against self-incrimination. Defendant contends the prosecutor’s remarks were grossly improper and he was prejudiced by the trial court’s failure to intervene.

Specific to mischaracterizing evidence, Defendant contends the prosecution argued the “gun battle started with a shotgun blast that killed Namir Davis.” The

prosecution stated the following: “you heard from Tony Avent what started that gun fight was when this shotgun was fired. And we know that that shotgun was what was responsible for killing Namir Davis.” Defendant contends that the prosecution’s statements contradicted what Avent said which was that he was asleep in the car when he awoken by “gunshots.”

The evidence is unclear as to what specific gunshot awoke Avent, however the evidence is clear in that Defendant was killed by a shotgun wound to the head. Dr. Karen Kelly, a forensic pathologist, performed an autopsy on Davis, and the autopsy report was admitted into evidence. The report demonstrated, and Dr. Kelly testified, that Davis was killed by a perforating shotgun wound to the head. Additionally, Avent told Detective Talley that he saw a man with a shotgun at the scene and stated that the person with the shotgun was a “taller male with a ski mask and no dreads.” We hold that the prosecution’s statement pertaining to the gunshot was not such a mischaracterization of evidence that it was grossly improper and prejudicial for the trial court not to intervene. Defendant has not shown that the prosecutor’s comment “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Huey*, 370 N.C. at 180, 804 S.E.2d at 470.

Next, Defendant argues that the prosecution mischaracterized evidence when the prosecutor told the jury that the shotgun shell was found “right next” to Defendant’s cell phone, and when the prosecution stated that the GPS had him arriving to St. Francis Court at 3:00 a.m., “the exact time Davis was shot in the head.”

STATE V. GRANT

Opinion of the Court

Defendant contends there is contradictory evidence as to how close in proximity the shotgun shell was found to the cell phone, and that the State failed to establish the exact time of the shooting. Despite Defendant's contention, there was evidence presented to the trial court to support the prosecution's statements. Detective Talley testified the shotgun shell and cell phone found at the scene were both located about "two and a half feet" from "a crack or a divider" in the middle of the parking lot. Additionally, Detective Talley testified that once he was able to access the phone, the GPS coordinates revealed a transit to 116 St. Francis Court with an arrival time of about 3:00 a.m., approximately the time the shooting was reported to the police. Because the prosecution's statements were supported by sufficient evidence, we hold the prosecutor's statements were not grossly improper, and Defendant was not prejudiced by the trial court's failure to intervene.

Lastly, Defendant argues the prosecution erred by injecting his opinion of Defendant's guilt by stating he was "sure" the shotgun Defendant purchased from Hadi was the firearm used to kill Davis, and that the prosecution violated Defendant's constitutional rights by commenting on Defendant's pre-arrest silence. Specifically, the prosecution stated the following in closing argument:

He wouldn't talk to the police. He wasn't under arrest, but he wouldn't come forward. If you were in a situation where, you know, they're looking at you for a murder and you had nothing to do with it, you know, you would think you'd come and talk to them and explain what's going on.

It has long been recognized by statute and common law that it is improper for

STATE V. GRANT

Opinion of the Court

an attorney to insert their opinion or comment on a Defendant's Fifth Amendment privilege against self-incrimination. See N.C. Gen. Stat. § 15A-1230(a) ("During a closing argument to the jury an attorney may not . . . express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant."); *State v. Mendoza*, 206 N.C. App. 391, 395, 698 S.E.2d 170, 174 (2010) ("[A] defendant's pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial."); *State v. Boston*, 191 N.C. App. 637, 651 n.4, 663 S.E.2d 886, 896 n.4 (2008) ("[T]he State may use a defendant's pre-arrest silence [only] for impeachment purposes if the defendant chooses to testify at trial.").

Here, the prosecution inappropriately inserted his own opinion and improperly commented on Defendant's pre-arrest silence in closing argument. Defendant did not testify at trial, and therefore the statements made in closing argument were not offered for impeachment purposes but only as substantive evidence of Defendant's guilt. We hold it was error for the prosecution to insert his opinion and comment on Defendant's pre-arrest silence.

Despite this error, Defendant has failed to demonstrate how this error was prejudicial. See *Huey*, 370 N.C. at 180, 804 S.E.2d at 469-70 (explaining when prosecutorial argument is improper, and opposing counsel fails to object at trial, the burden is on the defendant to show that the argument "is so grossly improper that a

STATE V. GRANT

Opinion of the Court

defendant's right to a fair trial was prejudiced by the trial court's failure to intervene"). *But see* N.C. Gen. Stat. § 15A-1443(b) (2021) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.").

In evaluating constitutional errors, this Court can consider a variety of factors, including whether the State's other evidence of the defendant's guilt was substantial. *See Boston*, 191 N.C. App. at 652–53, 663 S.E.2d at 896–97 (holding harmless error beyond a reasonable doubt where the State's evidence of the defendant's guilt was overwhelming despite the prosecution commenting on the defendant's "refusal to speak to the police prior to her arrest").

In *State v. Ward*, our Supreme Court reviewed challenged statements on appeal where the defendant failed to object at trial, but asserted his constitutional rights were violated by the prosecution commenting on his Fifth Amendment right to remain silent. 354 N.C. 231, 251, 555 S.E.2d 251, 265 (2001). The Court stated, "[a] defendant who fails to interpose an objection at trial to statements made by the prosecutor must demonstrate on appeal 'that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene ex mero motu.'" *Id.* at 250, 555 S.E.2d at 264 (emphasis removed) (quoting *State v. Mitchell*, 353 N.C. 309, 324, 543 S.E.2d 830, 839 (2001)). Commenting on a defendant's right to remain

silent, while it may be erroneous, does not automatically warrant a new trial “if, after examining the entire record, this Court determines that the error was harmless beyond a reasonable doubt.” *Id.* at 251, 555 S.E.2d at 265. In *Ward*, the prosecution stated the following at trial:

In addition to his decision, choice, privilege, whatever, to put on evidence, the defendant may also testify, put his hand on the Bible and testify. Again, that’s his choice. Nobody can make him do it. He can do it if he wants to. If he doesn’t want to he doesn’t have to. Okay? Is there anything about that that bothers you, about whether or not he puts on evidence or whether or not he testifies? You understand that’s his decision?

Id.

The Court held the prosecution’s statements were not improper because “the prosecutor merely informed prospective jurors of the nature of [the] defendant’s right and described the testimonial process.” *Id.* at 252, 555 S.E.2d at 265. However, the Court went a step further and stated, “[a]ssuming, *arguendo*, that the prosecutor’s statements crossed constitutional boundaries, we conclude that the error was harmless beyond a reasonable doubt.” *Id.* The Court reasoned the trial court properly instructed the jury and “cured any error that may have arisen by way of the trial court’s failure to intervene *ex mero motu*” when the trial court stated the following: “[t]he defendant in this case has not testified. The law of North Carolina gives him this privilege. This same law also assures him that his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision

in any way.” *Id.* (emphasis removed). Because the trial court gave this “curative” instruction, and because there was “overwhelming evidence of [the] defendant’s guilt,” this Court determined the defendant suffered “no prejudice.” *Id.* at 252, 555 S.E.2d at 265–66.

Here, we recognize the prosecution’s statement in closing argument commenting on Defendant’s pre-arrest silence was error. *See Boston*, 191 N.C. App. at 652–53, 663 S.E.2d at 896–97 (holding the prosecution’s comment on the defendant’s pre-arrest silence was error, but harmless error beyond a reasonable doubt). However, we hold the prosecution’s statement was harmless beyond a reasonable doubt, and Defendant did not suffer prejudice by the trial court’s failure to intervene ex mero motu. Similar to the facts of *Ward*, the trial court did give a curative jury instruction in the present case when it stated the following:

[D]efendant in this case has not testified. The law gives [D]efendant this privilege. The same law also assures [D]efendant that this decision not to testify creates no presumption against [D]efendant. Therefore, the silence of [D]efendant is not to influence your decision in any way.

Additionally, as we explained in the first section of this opinion, the circumstantial evidence of Defendant’s guilt is overwhelming, and the evidence presented by the State “leads us to conclude beyond a reasonable doubt that the jury would have reached the same verdict even had the trial court disallowed the contested testimony.” *Boston*, 191 N.C. App. at 653, 663 S.E.2d at 897. Thus, we hold the comment made by the prosecution, although improper, was not so grossly improper

that Defendant was prejudiced by the trial court's failure to intervene.

D. Ineffective Assistance of Counsel

Defendant argues he received ineffective assistance of counsel because his trial counsel failed to object to and move to strike the testimony of Tony Avent, withdrew his objection to the transferred intent instruction, and failed to object to the State's closing argument. Considered together, Defendant asserts that his trial counsel's performance was deficient, and he was prejudiced by his performance. We disagree.

While the preferred method of raising an ineffective assistance of counsel claim is by a motion for appropriate relief in the trial court, "a defendant may bring his ineffective assistance of counsel claim on direct appeal. On direct appeal, [a] defendant's ineffective assistance of counsel claim 'will be decided on the merits when the cold record reveals that no further investigation is required[.]'" *State v. Phifer*, 165 N.C. App. 123, 127, 598 S.E.2d 172, 175 (2004) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)).

To challenge a conviction based on ineffective assistance of counsel, a defendant must establish that his counsel's conduct "fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). To meet this burden, the defendant must satisfy a two-part test. *Id.* at 562, 324 S.E.2d at 248. First, the defendant must prove that his counsel's performance was deficient, such that "counsel made errors so serious that counsel was not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment.” *Id.* Second, the defendant must prove his counsel’s performance was prejudicial, such that “counsel’s errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*” *Id.* An error made by counsel, even an unreasonable one, “does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel’s errors, there would have been a different result in the proceedings.” *Id.* at 563, 324 S.E.2d at 248.

Here, Defendant first argues his trial counsel should have objected to and moved to strike the testimony of Tony Avent. Defendant contends Avent testified he was intoxicated at the time of the shooting, during all his police interviews, and while testifying at trial. Instead of impeaching Avent’s ability to recall events, Defense counsel stated: “Okay, good for you. Thank you.” Defendant asserts that Avent’s statement to Detective Talley that he was the intended target of the shooting was the only basis for the transferred intent instruction, and had Defendant’s trial counsel impeached Avent, the theory of transferred intent would not have been presented to the jury.

While we recognize being under the influence of alcohol can impair one’s ability to “observe, recollect, and recount,” *State v. Williams*, 330 N.C. 711, 719, 412 S.E.2d 359, 364 (1992), the weight and credibility of testimony is a question for the jury. *See Burkey v. Kornegay*, 261 N.C. 513, 513–14, 135 S.E.2d 204, 205 (1964) (“The credibility of the witness and the weight of her testimony were matters solely for the determination of the jury[.]”). Here, the jury heard Avent testify that he was

intoxicated, but they also heard Detective Talley testify that Avent did not appear intoxicated and “there were no signs of impairment” when he interviewed him. Thus, even if Defendant’s trial counsel would have impeached Avent, the jury heard testimony that “there were no signs of impairment.” Defendant has not demonstrated a reasonable probability that, had his trial counsel impeached Avent, the outcome of trial would have been different.

Defendant is quick to criticize his trial counsel for not impeaching Avent at trial, but Defendant relies on certain statements made by Avent to support his arguments on appeal. Defendant’s argument is not compelling, and we hold any lack of objection or impeachment by Defendant’s trial counsel does not rise to the level of deficient and prejudicial performance necessary for an ineffective assistance of counsel claim.

Next, Defendant argues his trial counsel erred by withdrawing his objection to the transferred intent instruction. Defendant contends the evidence presented by the State only established that Defendant “may have been at the . . . shooting” and “none of the evidence supported a finding that [Defendant] formed the intent to shoot Tony Avent.” Defendant claims there was “no possible strategic reason for counsel to withdraw his objection.”

There is “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. Counsel is given wide latitude in matters of strategy, and the burden to show that counsel’s performance fell short of the

required standard is a heavy one for [the] defendant to bear.” *State v. Oglesby*, 382 N.C. 235, 243, 876 S.E.2d 249, 256 (2022) (citations and internal quotations omitted). Defendant has not met this burden. The evidence presented by the State to support the transferred intent instruction is overwhelming, and Defendant has failed to demonstrate a reasonable probability that had defense counsel not withdrawn his objection to the transferred intent instruction, the outcome of trial would have been different.

Lastly, Defendant argues his trial counsel erred by failing to object during the prosecution’s closing argument. Defendant contends the prosecution made “multiple mischaracterizations of the evidence” and argued Defendant’s “pre-arrest silence was evidence of guilt.” Without addressing the merits of the prosecution’s closing statements because they are addressed in the preceding section, we hold that even if the prosecution’s remarks were improper, any lack of objection on Defendant’s trial counsel does not rise to the level of deficient and prejudicial performance for an ineffective assistance of counsel claim. Defendant has not shown that had his trial counsel objected during closing argument, the outcome of the trial would have been different.

Defendant’s arguments for his ineffective assistance of counsel claim, even considered collectively, do not rise to the level of deficient and prejudicial performance. We hold that Defendant’s ineffective assistance of counsel claim is without merit.

III. Conclusion

We hold the trial court properly denied Defendant's Motion to Dismiss, properly instructed the jury on the doctrine of acting in concert, and did not err by failing to intervene ex mero motu. Additionally, we hold Defendant did not receive ineffective assistance of counsel.

NO ERROR.

Judges ZACHARY and STADING concur.

Report per Rule 30(e).