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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-225

Filed 3 December 2024

Mecklenburg County, Nos. 21 CRS 203859, 203861

STATE OF NORTH CAROLINA

v.

JAMES ERNEST HENDERSON

Appeal by Defendant from judgment entered 26 May 2023 by Judge Reggie E. McKnight in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 October 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the State.*

*Sandra Payne Hagood for defendant-appellant.*

PER CURIAM.

Defendant James Earnest Henderson appeals a consolidated judgment of conviction on two counts of trafficking in cocaine entered against him in the trial court on 26 May 2023. Defendant contends that a new trial is warranted because the State's closing argument was grossly improper, and the trial court failed to intervene *ex mero motu*. We hold no error.

**BACKGROUND**

Defendant was arrested on 5 February 2021 executing a sale of two kilograms of cocaine to an undercover law enforcement officer. A grand jury indicted Defendant on trafficking in cocaine by sell, trafficking in cocaine by possession, and trafficking in cocaine by transportation, as well as possession with intent to sell or deliver cocaine on 22 February 2021. The State later dismissed the charges of trafficking in cocaine by sell and possession with intent to sell or deliver cocaine. The case was brought for trial before a jury on 23 May 2023. In opening statements to the jury, defense counsel stated that “one of the elements you will hear a lot about is knowing possession . . . . [The State will] have to prove that he knew that that was cocaine . . . .”

At trial, Det. Mauricio Sing, a vice and narcotics detective with the Huntersville Police Department and a smuggling and drug smuggling task force officer with Homeland Security, testified that, working undercover, he had arranged to purchase three kilograms of cocaine from a source outside of the country. The transaction was to take place in Huntersville on 5 February 2021 in the parking lot of a motel. Law enforcement officers were unaware of who would arrive. But, on 5 February 2021, while Det. Sing waited, sitting on the hood of his vehicle under the surveillance of a team of law enforcement officers, three vehicles pulled into the motel parking lot. Each vehicle had one occupant, and Defendant was driving the lead car. The three cars parked near Det. Sing, and Defendant approached. Det. Sing asked if

they were supposed to meet, and Defendant acknowledged that they were. After a short conversation in which Defendant talked about how difficult it had been for them to meet, Det. Sing asked if he could see “the work.” Defendant said yes and led the detective to one of the vehicles that had driven into the parking lot behind him. Defendant retrieved a shipping box from the passenger seat and handed it to Det. Sing. Inside, Det. Sing observed two “bricks” of cocaine. “So initially whenever he handed me the box I asked him if this was the work. He said it was . . . . I asked him, ‘Is this white girl?’ And he said, ‘Yes, it is.’” Det. Sing testified that “[w]hite girl’ is a street slang term for cocaine.” After observing the cocaine, Det. Sing excused himself and signaled the law enforcement officers to make arrests.

At trial, Defendant stipulated that law enforcement officers seized two items of suspected cocaine on 5 February 2021, that the items were analyzed at a laboratory, that the first item was 1,002.5 grams of cocaine, and that the second item was 1,004.7 grams of cocaine, with both weights being within a 0.1 gram margin of error.

During closing arguments, the State recounted the evidence of events in the parking lot and argued that Defendant stipulated to the weight and substance of the cocaine “because he knew” he was transporting cocaine. The jury returned guilty verdicts against Defendant for trafficking in cocaine by possession and trafficking in cocaine by transportation. The trial court consolidated the offenses for entry of judgment and sentenced Defendant to an active term of 175 to 222 months.

Defendant appealed.

ANALYSIS

On appeal, Defendant argues that the State’s closing argument was grossly improper, that the trial court erred by failing to intervene *ex mero motu* to protect the rights of the parties and the sanctity of the proceedings, and that a new trial is warranted. At trial, Defendant stipulated to the lab results identifying the items seized by law enforcement officers as cocaine and the amount of cocaine seized. Defendant’s stipulations satisfied two elements of each trafficking offense charged against him under N.C.G.S. § 90-95(h)(3)c. *Id.* However, the State still had the burden of proof to show that Defendant possessed and transported cocaine “knowingly.” Defendant contends that it was grossly improper for the State to argue before the jury that Defendant made the stipulations “because he knew” the substance he transported was cocaine. He contends the stipulations were not an admission of guilt, and the State’s use of the stipulations to prove Defendant’s knowledge as well as his reason for making them was improper. He further argues the State “misused the stipulation to fill in the missing link of [Defendant]’s knowledge that the substance was cocaine.” Defendant contends that this violated his right against self-incrimination, that the trial court’s failure to intervene rendered the conviction fundamentally unfair, and that a new trial is warranted. We disagree.

When, on appeal, a defendant challenges an argument made during the trial but failed to object to the argument before the trial court, “[the] defendant must

establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*.” *State v. Tart*, 372 N.C. 73, 80-81 (2019) (quoting *State v. Mitchell*, 353 N.C. 309, 324 (2001)). Our courts have long recognized that “trial counsel is allowed wide latitude in argument to the jury and may argue all of the evidence which has been presented as well as reasonable inferences which arise therefrom.” *State v. Barden*, 356 N.C. 316, 364 (2002) (quoting *State v. Guevara*, 349 N.C. 243, 257 (1998)). “The ‘scope of this latitude lies within the sound discretion of the trial court.’” *State v. Meyer*, 353 N.C. 92, 113 (2000), *cert. denied*, 534 U.S. 839 (2001) (quoting *State v. Gregory*, 340 N.C. 365, 424 (1995)). The trial court is required to intervene *ex mero motu* where “the argument strays so far from the bounds of propriety as to impede [the] defendant’s right to a fair trial.” *State v. McNeil*, 350 N.C. 657, 684 (1999), *cert. denied*, 529 U.S. 1024 (2000) (quoting *State v. Atkins*, 349 N.C. 62, 84 (1998)).

Our 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) (citing *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *State v. Jones*, 355 N.C. 117, 133-34 (2002)). However, the argument is not considered in a vacuum. We must “give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.” *State v. Cummings*, 353 N.C. 281, 297, *cert. denied*, 534 U.S. 965 (2001) (quoting *State v. Guevara*, 349 N.C. 243, 257

(1998)). “[T]he ‘relevant question is whether the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Huey*, 370 N.C. at 180 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *see also id.* at 181 (citing *State v. Sexton*, 336 N.C. 321, 363–64 (1994)) (“When this Court has found the existence of overwhelming evidence against a defendant, we have not found statements that are improper to amount to prejudice and reversible error.”). The burden to show that a prosecutor’s argument was grossly improper, warranting a new trial, is a heavy one. *See Tart*, 372 N.C. at 81; *see also State v. Blakeney*, 352 N.C. 287, 320-21 (2000) (quoting *State v. Fletcher*, 348 N.C. 292, 322 (1998)) (“[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.”); *see, e.g., Meyer*, 353 N.C. at 114 (reasoning a prosecutor’s statement was not so grossly improper as to require the trial court to intervene *ex mero motu* though the statement was “not wholly supported by the record[]”).

In this case, the trial court provided the jury with the following guidance about the parties’ closing arguments:

The lawyers are permitted in their final statements or their arguments to characterize the evidence and to attempt to persuade you to a particular verdict. . . .

The lawyer may . . . on the basis of the lawyer’s analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

In its closing argument, the State noted that it had the burden of proof to show that Defendant “knowingly possessed cocaine” and “[k]nowingly transported the cocaine.” As to the charge of trafficking in cocaine by possession and the specific issue of whether Defendant knowingly possessed cocaine, the State recounted the evidence, reviewing the testimony presented by the law enforcement officers involved in Defendant’s arrest as well as the surveillance video of the drug transaction which had been played for the jury. The State pointed out that Defendant exited his vehicle and spoke with the undercover detective, agreed to show the undercover detective “the work,” handed the undercover detective the box of cocaine, and identified the items in the box as “white girl”—street slang for cocaine. The State noted that Defendant stipulated the amount of cocaine was 2,007 grams—well over the 400 gram threshold required for the offense of trafficking in cocaine under N.C.G.S. § 90-95(h)(3)c. The State contended that the testimony that Defendant called the items in the box “white girl” and knew and directed the other people at the scene shows that Defendant knowingly possessed cocaine.

As to the charge of trafficking in cocaine by transportation and whether Defendant knowingly transported cocaine, the State argued that Defendant directed the vehicles following him where to park to avoid the motel’s surveillance cameras, that Defendant retrieved the box containing two kilograms of cocaine from one of the vehicles, and that he transported the box to the undercover officer. The State

contended that “the amount of cocaine was more than 400 grams. That was stipulated to by the Defendant because he knew.”

Even if we assume that the State’s comment “because he knew” was improper, the comment does not rise to the level of grossly improper in the context of the State’s closing argument and in light of the record evidence. *See Cummings*, 353 N.C. at 297. As Defendant concedes in his brief to this Court, “there was evidence from which the jurors could have inferred that [Defendant] knew the substance was cocaine[.]” The evidence was overwhelming. *See Huey*, 370 N.C. at 181. And, as described above, Defendant’s conduct would have a strong tendency to suggest to a jury his knowing involvement with the cocaine even absent the State’s closing argument. Accordingly, Defendant has not established prejudice.

The State’s closing argument was not grossly improper, and Defendant’s conviction was not absent due process. *See id.* at 180. We do not consider Defendant’s contention that his Fifth Amendment right against self-incrimination was violated as this argument was not raised before the trial court. *See State v. Jones*, 216 N.C. App. 225, 230 (2011), *appeal dismissed*, 365 N.C. 559 (2012) (“[C]onstitutional arguments not raised at trial are not preserved for appellate review[.]”). Accordingly, we hold no error in the trial court’s 26 May 2024 consolidated judgment of conviction.

NO ERROR.

Panel consisting of Judges STROUD, MURPHY, and FLOOD.

Report per Rule 30(e).