NO. COA11-194
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v. Robeson County
No. 05 CRS 56801

WILLIAM ROBERT LOCKLEAR

Appeal by Defendant from final judgment and sentence entered 23 November 2009 by the Honorable Richard T. Brown in Robeson County Superior Court. Heard in the Court of Appeals 30 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

William Robert Locklear ("Defendant") appeals from a jury verdict finding him guilty of second-degree murder. Defendant argues the trial court committed plain and reversible error in its failure to intervene *ex mero motu* to strike certain

statements made by the prosecutor during closing arguments. For the following reasons, we disagree.

I. Factual & Procedural Background

A Robeson County Grand Jury indicted Defendant for first-degree murder in violation of N.C. Gen. Stat. § 14-17. Defendant pleaded not guilty, claiming that he shot the victim in self-defense. The case was tried at the 16 November 2009 Criminal Session of Robeson County Superior Court before the Honorable Richard T. Brown.

At trial, the State's evidence tended to show the following. At the time of the incident in question, witness James Earl Locklear resided across from Defendant's mother, Sylvia Locklear, on John L. Road in Maxton. On 8 October 2008, James Earl saw Defendant in front of Sylvia's house pacing along the street carrying a rifle between 11:00 a.m. and noon. Between 3:00 and 4:00 p.m., James Earl went to the house of his acquaintance, James Cleveland Brooks. At approximately 4:30 P.M., James Earl and Mr. Brooks drove to the nearby residence of a mutual acquaintance, Phil Jones. At or around 5:00 P.M., James Earl joined Mr. Brooks in Mr. Brooks's truck as they prepared to leave Phil's house. While in Mr. Brooks's truck,

James Earl saw Christopher Jones drive by on his four-wheeler, motioning to them as he passed. Mr. Brooks then pulled onto John L. Road approximately 100 to 150 feet behind Christopher.

After Christopher was approximately 150 to 200 feet past Sylvia's house, Defendant ran onto the road from Sylvia's yard and fired approximately ten to fifteen shots from his rifle at Christopher. Christopher fell from the four-wheeler while the four-wheeler continued down the street, eventually careening into a ditch. James Earl testified that he has never seen Christopher carry a gun and saw nothing in Christopher's hands when he was on the four-wheeler. James Earl did not see Sylvia anywhere near the shooting when it occurred.

Jody Scott, Christopher's cousin, also lived near Sylvia on John L. Road. Mr. Scott saw the shooting and ran to Christopher's side after Defendant finished firing. He did not see Christopher carrying a gun. Carol Locklear, another one of Christopher's cousins, also lived on John L. Road. Carol was notified by her sister, Karen Revels, that Christopher had been shot. Carol immediately drove to the scene, where she found Christopher shot twice but still breathing. She began administering CPR when she felt he had no pulse. She did not see a gun at the scene and did not see anyone remove anything

from his person while she was there. Carol testified that she has never seen Christopher with a gun. Another witness, Tammy McMillian, arrived shortly after Carol and assisted her in administering CPR. Ms. McMillian also did not see a gun on or near Christopher and testified she took nothing from the scene. Christopher's brother, Carvie Nicholas Jones, also arrived at the scene after the shooting and did not see a gun or anyone take anything from the scene.

Robeson County Sheriff's Detective Bruce Meares arrived at the scene between 6:45 and 7:15 P.M. The road and area surrounding Sylvia's house had been roped off and secured with crime scene tape. Detective Meares observed a mailbox laying in the yard that had been broken from its post across the street. He also observed blood and bloodied clothes near the house.

From Sylvia's yard and driveway, investigators collected fourteen shell casings, which were fired from a semi-automatic weapon with the same external characteristics as a rifle. Chief Medical Examiner John Butts conducted an autopsy on Christopher's body and concluded that he had been shot in the back twice, with both bullets exiting the front of his body. Examiner Butts testified that either wound would have been fatal within minutes.

The Defendant's evidence at trial tended to show the following. Defendant grew up with Christopher and saw him on a regular basis. He knew of Christopher's history of violent behavior, including incidences when he shot at people and one case when he cut someone's throat. Defendant slept at the residence of his mother, Sylvia, the morning of 8 October 2008, having spent the entire night out in the nearby area. Sylvia lived approximately one and a half miles from Christopher. Defendant awoke in the evening to a loud noise. He looked out the window and saw Christopher and his brother, Carvie, driving around Sylvia's front yard with four-wheelers, causing substantial damage to the yard. Defendant called Sylvia and advised her to call the police. Sylvia called the sheriff. When the sheriff arrived, Sylvia claimed that Christopher and his brother had caused the damage based on what Defendant told her had happened.

Later that afternoon, while standing in Sylvia's front yard, Defendant saw Christopher driving toward Sylvia's house again. He immediately ran to the house to get his rifle because he was afraid of Christopher. He then returned to the street with his rifle and engaged in a heated verbal exchange with Christopher. Defendant testified that they cursed at each

other, and that Christopher threatened to kill him. Christopher then reached for a gun he had tucked into his pants. Defendant testified that when Christopher reached for the gun, Defendant shot a warning shot across the back of Christopher's head into the woods. After Defendant shot the warning shot, Christopher leaned to the side, threw the gun over his back and sped away. Defendant then testified he shot at Christopher to protect himself from great bodily harm or death. Defendant also testified that his mother, sister, and a number of nieces and nephews were in the yard during the shooting and that he shot at Christopher to protect them from harm as well. Defendant testified that he saw Mr. Scott run to the scene and remove a gun and other items from Christopher's person immediately after the shooting.

Two days later, Defendant turned himself in to the State Bureau of Investigation. He did not turn in the rifle he used for the shooting. Defendant had prior convictions for conspiracy to commit breaking and entering, communicating threats, and injury to real property. He pled guilty to an offense in March 2006, but was unsure of the specific offense to which he pled guilty.

The jury found Defendant guilty of second-degree murder. Judge Brown sentenced Defendant to a presumptive term of 189 to 236 months in prison. Defendant entered a timely notice of appeal on 24 November 2009.

II. Jurisdiction & Standard of Review

As Defendant appeals from the final judgment of a superior court, an appeal lies of right with this court pursuant to N.C. Gen. Stat. §7A-27(b) (2009).

When a defendant does not object at trial to the portions of a prosecutor's closing argument he now claims are improper, the defendant must show on appeal that the argument was so grossly improper that the trial court abused its discretion by not intervening *ex mero motu*. *State v. McNeill*, 360 N.C. 231, 244, 624 S.E.2d 329, 338, *cert. denied*, 549 U.S. 960, 166 L. Ed. 2d 281 (2006). The defendant must show that the prosecutor's argument was so grossly improper as to infect the trial with a level of unfairness that renders his conviction fundamentally unfair. *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). "[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) (citations and quotation marks omitted), *cert. denied*, 537 U.S. 1005, 154 L.Ed.2d 403 (2002).

III. Analysis

Defendant argues that the prosecutor made several improper statements during closing argument. Specifically, Defendant argues that the prosecutor (1) told the jury that Defendant's prior conviction for communicating threats was substantive evidence of his guilt; (2) suggested that Defendant's response to her questioning on cross-examination showed that he would have brought a gun into the courtroom and used it against her if he had not been searched; (3) argued facts not in evidence; and (4) expressed her personal opinion concerning a defense witness's credibility by calling him a "liar" and demeaned Defendant's character by calling him a "coward."[1] Defendant did not object to any of these remarks at trial, but now contends

[1] Defendant's brief also alleges the prosecutor misstated the law concerning elements of second-degree murder and manslaughter. Defendant, however, failed to elaborate on these allegations in his brief and has therefore abandoned their review. *See* N.C. R. App. P. 28(a).

the trial court should have intervened *ex mero motu*. We disagree.

State law provides the following limitations on arguments to the jury in criminal trials:

> During a closing argument to the jury 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 except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2009). With these guidelines in mind, we address Defendant's contentions.

On issue one, Defendant contends the prosecutor during closing argument told the jury that Defendant's prior conviction for communicating threats was substantive evidence of his guilt. To determine if a closing argument was grossly improper, the court must examine it in the context in which it was given and in light of the overall factual circumstances. *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998). While the State may not use evidence of a defendant's prior convictions as evidence that he acted in conformity therewith in the matter at bar, N.C. Gen. Stat. § 8C-1, Rule 404 (2009), a defendant's

prior convictions may be used to impeach the credibility of a witness if elicited from the witness or established during cross-examination. N.C. Gen. Stat. § 8C-1, Rule 609(a) (2009). We find it is in this latter context that the prosecutor made the statements in question.

At trial, Defendant argued that he shot the victim in self-defense. Thus, the focus of the trial was whether Defendant or the victim was the initial aggressor and whether the victim was brandishing a weapon at the time of the shooting. To buttress his claim, Defendant testified during trial that the victim had a history of gun use and a reputation for violence. On cross-examination, the prosecutor asked Defendant which crimes he had been convicted of in the last ten years that carried a sentence of sixty days or more, eliciting testimony regarding a prior conviction for communicating threats, among others. The prosecutor reiterated this evidence during closing argument, stating, "[W]ho was the person . . . with the record of communicating threats? More evidence of violence. Chris doesn't have that." We find that the prosecutor made reference to Defendant's prior conviction not as substantive evidence of Defendant's guilt but to diminish the credibility of Defendant's testimony that the victim was violent and was carrying a gun at

the time of the murder as is permitted under Rule 609(a). Furthermore, the prosecutor's statement, even if improper, was not so grossly improper as to render the conviction fundamentally unfair. The prosecutor made a brief statement during a lengthy closing argument regarding the prior convictions, and the jury was properly instructed during jury instructions to disregard Defendant's prior convictions as evidence of his propensity for violence generally.

On the second issue, Defendant argues that it was grossly improper for the prosecutor to make statements during closing argument suggesting the Defendant would bring a gun into the courthouse and use it for violence if he had the opportunity. A prosecutor may properly comment on a defendant's demeanor displayed throughout the trial. *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980). Here, the prosecutor made reference during her closing argument to Defendant's demeanor on cross-examination, noting that he "bowed up and raised up and got that little attitude" during her questioning. The prosecutor went on to say that "[i]t's a good thing we search people in this courthouse for guns to prevent things because then you saw who the defendant was." While this statement may have been improper, we find it was not so grossly improper to

warrant reversal because the thrust of the prosecutor's statement was to comment on Defendant's demeanor during trial.

On issue three, Defendant contends that it was grossly improper for the prosecutor to refer to facts Defendant claims were not in evidence. While an attorney may not make arguments based on facts outside the record during closing argument in a criminal trial, N.C. Gen. Stat. § 15A-1230(a) (2009), counsel may argue to the jury all reasonable inferences from the law and the facts in evidence. *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709-10 (1995). Further, "[c]ounsel must be allowed wide latitude in the argument of hotly contested cases." *State v. Lynch*, 300 N.C. 534, 551, 268 S.E.2d 161, 171 (1980).

Here, the prosecutor stated in closing argument that the victim had no record of communicating threats when this fact had not been introduced into evidence. However, we find the prosecutor simply communicated the reasonable inference that, if there had been charges brought against the victim for communicating threats, the defense would have introduced those charges into evidence given the paramount importance of such evidence to material issues in the case. The defense presented a wealth of testimony regarding the victim's allegedly violent nature, including charges brought against him for cutting a

man's throat, but did not introduce any evidence of charges for communicating threats. Therefore, we hold the prosecutor's statement to be a reasonable inference from the evidence and not grossly improper.

The prosecutor also stated during her closing argument that charges brought against the victim for cutting a man's throat had been dismissed due to a lack of evidence. While these charges were part of the record, the reason for their dismissal was not. However, we find the prosecutor reasonably based this argument on the testimony of the victim's mother, Vickie Jacobs, who stated that the judge dismissed the charges when her son "didn't show up for court." The prosecutor made the reasonable inference from Ms. Jacobs's testimony that her son, the victim of the alleged crime, failed to provide evidence necessary to support the charge, resulting in the dismissal of the case against him. Therefore, we find that this statement was not grossly improper.

Lastly, Defendant argues the prosecutor improperly expressed her opinion of a defense witness by calling him a "liar" and her opinion of Defendant by calling him a "coward." We disagree. Defendant cites to ***State v. Locklear***, in which our Supreme Court states, "'[An attorney] can argue to the jury that

they should not believe a witness, but he should not call him a liar.'" 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978) (citation omitted). However, even in cases where an attorney makes such comments, these comments only constitute plain error if grossly inappropriate. *State v. Lawson*, 159 N.C. App. 534, 542, 583 S.E.2d 354, 359 (2003). Further, it is not improper for the State to refer to a defendant in terms that reflect the offense that has been charged or the evidence presented at trial. *State v. Harris*, 338 N.C. 211, 229-30, 449 S.E.2d 462, 472 (1994); *see, e.g.*, *State v. Twitty* ____ N.C. App. ____, ____, 710 S.E.2d 421, 425-26 (2011) (holding it was not improper for a prosecutor to refer to a defendant who lied to a church congregation for pecuniary gain as a "con man," "liar," and "parasite" during closing argument) and *State v. Warren*, 348 N.C. 80, 125-26, 499 S.E.2d 431, 456-57 (1998) (holding that a prosecutor describing the defendant as a "coward" based on the fact that he preyed on those weaker than himself was connected to the evidence and was not improper).

Here, the prosecutor's contentions that a witness for the defense, James A. Locklear, was a "liar" and that Defendant was a "coward" were founded in evidence on the record. During cross-examination, the witness claimed that he had never been

convicted of anything other than shoplifting. Upon further cross-examination, he admitted to being convicted of a litany of additional offenses including possession of cocaine and larceny. Though we do not encourage the use of terms like "liar" by attorneys in describing witnesses, we do not find this use to be grossly inappropriate as it was founded in the evidence. The prosecutor's characterization of Defendant as a "coward" also was not grossly improper because it was based on the fact that Defendant admitted to shooting the victim twice in the back.

IV. Conclusion

Because we hold that none of the prosecutor's statements during closing argument were grossly improper, we find

No error.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).