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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-709

Filed: 21 February 2017

Pitt County, No. 14 CRS 060587, 15 CRS 803

STATE OF NORTH CAROLINA

v.

CORTEZ LIKELV PITT, Defendant.

Appeal by defendant from judgments entered 10 December 2015 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 24 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant.

DIETZ, Judge.

Cortez Likely Pitt appeals convictions for carjacking a woman at gunpoint and later fleeing from police in a dangerous, high-speed pursuit that ended after the stolen car careered off the road and crashed. Pitt fled the scene, but his co-defendant identified him as the driver, and a cellphone recovered from the scene had a video recording, made the previous day, of Pitt brandishing a gun and pointing it at the camera. The State introduced a still image from that video at trial.

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On appeal, Pitt challenges the introduction of the still image of him pointing a gun at the camera and the admission of testimony by a law enforcement officer recounting what Pitt's co-defendant told the officer at the scene. He also argues the trial court should have intervened *ex mero motu* to prevent improper remarks by the prosecutor during closing argument.

As explained below, we reject these arguments. The trial court did not abuse its discretion by admitting the still image taken from the recovered cellphone that was used to place Pitt at the scene of the crime. Similarly, the trial court properly admitted the non-testimonial statement of Pitt's co-defendant that identified Pitt as the driver of the stolen car. Finally, the prosecutor's remarks during closing argument were not so grossly improper that it was error for the trial court not to intervene on its own initiative to prevent them. Accordingly, we find no error in the trial court's judgment.

Facts and Procedural History

On the evening of 28 December 2014, D'Andria Jones was sitting in her car at a gas station, waiting to get gas. Another car approached, and two men got out and forced her out of her car at gunpoint. They fled the scene in the stolen car. Jones later identified Defendant Cortez Likely Pitt as one of the men.

Law enforcement officers from several police departments spotted the stolen car shortly after the crime occurred and pursued it but were hampered by fog and

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rain. Ultimately, while Officer James Cappelletti with the Pinetops Police Department pursued the stolen car, it sped into a curve, careered off the roadway, and crashed into trees and a utility pole. The car was severely damaged in the crash.

Officer Cappelletti found Darrin Gorham at the wreck and quickly arrested him. Officer Cappelletti then asked Gorham if anyone else was in the vehicle at the time of the crash. Gorham told the officer that “Cortez” was driving. Officer Cappelletti found no one else at the scene.

Law enforcement searched the stolen car and found an iPhone between the driver’s side door and the seat. After securing a warrant, officers searched the phone and found a video of Pitt brandishing a gun and pointing it in the direction of the camera. Date information associated with the video indicated that it was recorded less than a day before the crime. Officers later found Pitt fleeing on a stolen bicycle and arrested him.

The State indicted Pitt for robbery with a dangerous weapon, assault by pointing a gun, fleeing to elude arrest with a motor vehicle, and conspiracy to commit robbery with a dangerous weapon. On 8 December 2015, a jury found Pitt guilty on all charges, and the trial court sentenced him to four consecutive active terms of 73 to 100 months, 75 days, 8 to 19 months, and 29 to 47 months, respectively. Pitt timely appealed.

Analysis

Pitt raises three arguments on appeal. First, he argues that the trial court erred by allowing the State to show the jury an image of him holding a gun. Second, he argues that the trial court erred by allowing a law enforcement officer to testify that a co-defendant identified Pitt as the driver of the stolen car. Third, he argues that trial court erred by failing to intervene *ex mero motu* during the State's closing argument to prevent improper remarks by the prosecutor. We address each argument in turn.

I. Still Image of Pitt Pointing a Gun at the Camera

Pitt first argues that the trial court erred by allowing the State to show the jury an image of him, extracted from video footage found on a cellphone recovered from the scene of the crime, in which he is pointing a gun directly at the phone's camera. Pitt contends that the image constituted inadmissible character evidence under Rule 404 of the Rules of Evidence and that its admission was unfairly prejudicial under Rule 403 of the Rules of Evidence. As explained below, we disagree.

In general, evidence of a person's character is not admissible if offered to prove that the person acted in conformity with their character. N.C. R. Evid. 404. But "[w]here evidence is relevant for some purpose other than proving character, it is not inadmissible because it incidentally reflects upon character." *State v. Barnett*, 41 N.C. App. 171, 174, 254 S.E.2d 199, 201 (1979).

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Here, the State did not introduce the still image to show Pitt's character. Law enforcement recovered a video of Pitt holding a gun from a phone found in the stolen car. The still image shown to the jury was taken from that video. The State chose that image because it clearly showed Pitt's face. It also showed Pitt brandishing a black gun, which matched the victim's description of the gun used during the crime. The image thus supported the State's assertion that Pitt was involved in the crime.

Moreover, during cross-examination of the State's witnesses, Pitt suggested that the cellphone could have been stolen, thus explaining how it could have been found at the scene without implicating Pitt in the crime. The State used the image, taken from a video recorded the day before the carjacking, to undermine that claim by showing that Pitt possessed the phone shortly before the crime occurred. Thus, the trial court did not abuse its discretion when it determined that the image from the phone was offered for a purpose other than to show Pitt's character under Rule 404.

Pitt also argues that the trial court should have excluded the image under Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice. *See* N.C. R. Evid. 403. The decision to exclude evidence under Rule 403 "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).

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Here, the image on the phone was probative because, as part of his defense, Pitt sought to establish that, although he owned the phone, it was not in his possession at the time the crime occurred. Although the State presented other evidence that Pitt owned the phone, the photo was a key piece of evidence establishing that Pitt was the one who left the phone at the scene.

Moreover, the State presented other evidence that Pitt owned a gun, including testimony from a law enforcement officer that the phone contained images of guns and a description of the video of Pitt brandishing the gun. Thus, any unfair prejudice that might have resulted from the jury viewing an image of Pitt pointing a gun at the camera was lessened by this other testimony concerning his possession of the gun.

In light of these factors, we hold that the trial court's decision to admit the evidence under Rule 403 was not an abuse of discretion. The trial court weighed Pitt's argument concerning the prejudicial effect of the image but concluded that the probative value of the image warranted its admission despite some risk of prejudice. Under Rule 403, that determination is left to the sound discretion of the trial court. *Id.* Accordingly, we find no error in the trial court's admission of the challenged evidence. Because this evidence properly was admitted, the trial court also did not

err by denying Pitt's motion for a mistrial based on the admission of that evidence.¹ See *State v. Dellinger*, 308 N.C. 288, 297, 302 S.E.2d 194, 199 (1983).

II. Co-Defendant's Out-of-Court Statement that Pitt was the Driver

Pitt next argues that the trial court erred by allowing Officer Cappelletti to testify that Gorham, Pitt's co-defendant, told the officer that Pitt was driving the vehicle. Pitt contends that admitting this evidence violated his Sixth Amendment right to confront the witnesses against him.²

Alleged violations of constitutional rights are reviewed *de novo*. *State v. McKiver*, __ N.C. App. __, __. 786 S.E.2d 85, 90 (2016). The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Sixth Amendment prohibits the admission of testimonial evidence unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 68 (2004); *McKiver*, __ N.C. App. at __, 786 S.E.2d at 90.

¹ Pitt also argues that the trial should have given the jury a limiting instruction. Because Pitt did not request a limiting instruction and does not argue plain error in his brief, this argument is waived. See *State v. Allen*, 346 N.C. 731, 740, 488 S.E.2d 188, 193 (1997).

² The State argues that Pitt waived this constitutional argument because he never asserted it below. When the challenged testimony occurred, Pitt objected. We hold that the subject matter of that objection was obvious from its timing, particularly in light of the trial court's "one-word objection rule," which prevented Pitt from further explaining the objection at the time. See *State v. Ross*, 217 N.C. App. 401, 720 S.E.2d 28 (2011).

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Our review thus begins with whether Gorham’s statement to the officer was testimonial. “[S]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency.” *Davis v. Washington*, 547 U.S. 813, 813–14 (2006). “They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* at 814.

We hold that Gorham’s statement was nontestimonial. Officer Cappelletti testified that, when he arrived at the scene, the car had sustained severe damage in the crash. The officer found Gorham at the scene, “injured, confused, [and] walking unsteady [*sic*].” When the officer questioned Gorham, he did not first read Gorham his Miranda rights because he recognized the urgency of the situation. Instead, the officer immediately took Gorham into custody and then asked him if there was anyone else in the vehicle. Officer Cappelletti testified that he asked this question because he needed to determine if there were other potentially armed suspects near the scene or people who would need medical attention in light of the severe nature of the crash.

Gorham’s response to this question falls squarely within the definition of a nontestimonial statement. The primary purpose of the question was not to further a

criminal investigation, but to ensure officer safety and assist with an ongoing emergency resulting from a car crash. *See id.* at 813–14. Accordingly, the trial court did not err in admitting the officer’s testimony concerning Gorham’s statement to him at the scene of the accident.

III. Trial Court’s Failure to Intervene During Closing Argument

Finally, Pitt argues that he is entitled to a new trial because the trial court failed to intervene *ex mero motu* when the prosecutor made allegedly improper statements during closing argument. We disagree.

“Trial counsel is given wide latitude in the argument of hotly contested cases and they are permitted to argue the facts and evidence, all reasonable inferences from those facts, and the relevant law.” *State v. Robinson*, 330 N.C. 1, 31, 409 S.E.2d 288, 305 (1991). When no objection is made by the defendant during closing arguments, “only 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).

Here, Pitt challenges the prosecutor’s argument that the perpetrators could have thrown Jones’ cellphone out the window. Pitt contends the evidence at trial “conclusively showed that the cellphone had not been thrown out the window.” He

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relies on the assumption that, because it was raining the night of the crime, a phone thrown from the car would have been rendered inoperable. But the victim testified that her phone was operable and could receive calls and be located using an app on the phone.

We reject this argument. As an initial matter, Pitt presents no evidence to support his categorical assertion that “[a] cellphone thrown out of a car into the rain would not have been operable.” Many modern electronic devices continue to function even when wet or dropped from considerable heights. More importantly, even if we agreed with Pitt, that would not mean the trial court’s failure to intervene amounted to reversible error. A trial court must intervene only when the prosecutor’s statement is so extremely and grossly improper that failure to intervene would render the conviction fundamentally unfair. *State v. Waring*, 364 N.C. 443, 500, 701 S.E.2d 615, 650 (2010).

Even assuming the prosecutor’s remarks were improper—and we are not convinced that they were—in the context of all the evidence admitted against Pitt, we cannot say that this isolated statement is the sort of grossly improper statement that would compel the trial court to intervene on its own initiative. Accordingly, we find no error during closing arguments.³

³ Pitt also challenges the prosecutor’s statement that Pitt’s co-defendant identified Pitt as the driver of the stolen car. As explained above, the trial court properly admitted that statement into evidence, and thus it was appropriate for the State to refer to it during closing argument.

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Conclusion

For the reasons stated above, we find no error in the trial court's judgment.

NO ERROR.

Judges BRYANT and HUNTER, JR. concur.

Report per Rule 30(e).