

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-363

Filed: 19 December 2017

Mecklenburg County, No. 14CRS246125

STATE OF NORTH CAROLINA

v.

CESAR DAVID CLEMEN FIGUEROA

Appeal by Defendant from judgment entered 3 November 2016 by Judge Charles Malcom Viser in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Rory Agan, for the State.

Jarvis John Edgerton, IV, for the Defendant.

DILLON, Judge.

Cesar David Clemen Figueroa (“Defendant”) appeals from judgment entered upon a jury verdict finding him guilty of driving while impaired. We hold the trial court did not err by failing to intervene *ex mero motu* during the prosecutor’s closing argument, because the statements challenged by Defendant on appeal were not so grossly improper as to require intervention by the trial court.

Defendant was found guilty by a jury for driving while impaired. Defendant gave notice of appeal in open court.

I. Analysis

Defendant's sole argument on appeal is that the trial court erred when it failed to correct, *ex mero motu*, the prosecutor's closing argument to the jury wherein he stated the role of defense counsel includes misrepresenting the burden of proof and confusing and distracting the jury. We disagree.

This Court reviews alleged improper closing arguments to which opposing counsel did object at trial to determine:

whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). "Under this standard, [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. Waring*, 364 N.C. 443, 499, 701 S.E.2d 615, 650 (2010) (internal marks and citation omitted). "[I]mproper remarks

include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others.” *Jones*, 355 N.C. at 131, 558 S.E.2d at 106.

Here, Defendant specifically challenges the following portion of the prosecutor’s closing arguments:

Next I want to talk to you a little bit about what [defense counsel’s] job is. Defense counsel has a number of roles in a trial. *One of their roles is to try to confuse and make light of the facts in the case. Another one of those roles is to elevate that burden that we just discussed and make it seem unreachable. If that burden was so unreachable, we wouldn’t be here today. Those instructions will come from His Honor.*

One of the other major roles of defense counsel in the case is to distract you from the facts that really matter. . . .

Defendant argues that the above emphasized assertions constitute an improper *ad hominem* attack on the motivations and integrity of his trial counsel, a theme that infected the prosecutor’s closing argument.

Although we agree with Defendant that the challenged statements are improper attacks on an officer of the court, we do not agree that they were so grossly improper as to require direct intervention from the trial court. The challenged statements were made less than two minutes into the prosecutor’s closing argument and comprise less than one minute of the nineteen-minute closing argument. The prosecutor never again implied that Defendant’s counsel would attempt to confuse

STATE V. FIGUEROA

Opinion of the Court

the jury and the remainder of the closing arguments focused on the facts and evidence before the jury. The prosecutor preemptively addressed arguments it believed defense counsel would present to the jury in an attempt to refute and minimize those arguments but did not do so in a manner that further disparaged defendant's trial counsel. The vast majority of the prosecutor's closing arguments focused on presenting the State's case to the jury based on the facts in evidence and attempting to convince the jury that the State had met its burden of proof. This is the proper role of closing arguments. *See State v. Gaines*, 345 N.C. 647, 675, 483 S.E.2d 396, 413 (1997) ("The prosecutor is entitled to argue any reasonable inference to be drawn from the evidence and to rebut defense counsel's argument).

Accordingly, we hold the challenged comments were not so grossly improper as to require intervention by the trial court. *Compare Jones*, 355 N.C. at 132-34, 558 S.E.2d at 106-08 (holding the State's closing arguments were grossly improper when the prosecutor made repeated degradations of defendant's character, including calling him "lower than the dirt on a snake's belly"), *with Gaines*, 345 N.C. at 674-75, 483 S.E.2d at 412-13 (holding the State did not make grossly improper closing arguments, where the prosecutor argued in part "You know why [the defendant's counsel] did that? To confuse you. That's why. To confuse you. That's what they're doing. That's what they're up to.). Defendant has not otherwise challenged the

STATE V. FIGUEROA

Opinion of the Court

judgment entered upon the jury's verdict finding him guilty of driving while impaired, and we find no prejudicial error in the judgment or sentence.

NO ERROR.

Chief Judge McGEE and Judge STROUD concur.

Report per Rule 30(e).