IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1053

Filed: 3 September 2019

Alleghany County, No. 17 CRS 50046

STATE OF NORTH CAROLINA,

v.

LARRY MCCANN, Defendant.

Appeal by defendant from judgment entered on 25 April 2018 by Judge Michael D. Duncan in Alleghany County Superior Court. Heard in the Court of Appeals 23 April 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.*

*Tin Fulton Walker & Owen, PLLC, by Matthew G. Pruden, for defendant-appellant.*

BERGER, Judge.

Larry McCann ("Defendant") appeals his conviction of second degree murder, arguing that the trial court erred by (1) admitting evidence of phone records that were not properly authenticated; (2) denying Defendant's motion to dismiss for insufficient

evidence; (3) failing to instruct on the defense of accident; and (4) failing to intervene *ex mero motu* during closing arguments. We disagree.

## Factual and Procedural Background

At trial, Defendant testified that, prior to January 21, 2017, he had seen John Stephen Bishop ("Bishop") at a local park in Sparta, North Carolina on several occasions, but that he had only had two previous interactions with Bishop. According to Defendant, Bishop had acted aggressively both times—once "knock[ing Defendant] off the track with his shoulder."

Defendant testified that on the morning of January 21, he was at the park and walked in the direction of Bishop. According to Defendant, Bishop "puffed up" as he approached, and as he drew closer, he saw Bishop open a knife. According to Defendant, the knife had a serrated blade, and when he pulled out his pistol, Bishop slid the knife back into his pocket.

The two men had a heated verbal exchange, after which Bishop purportedly took a step forward and Defendant shot Bishop two times, killing him. Defendant testified that he only intended to fire one shot, but "[t]he gun went off two times just real fast. I don't know if that was fear, adrenaline, his continued body movement. I can't explain why. . . . I tried to stop it, but it was too late."

When asked how many shots he heard, the first witness on the scene, Tommy Poindexter ("Poindexter"), testified that he had heard two shots and that the shots

were "within seconds of each other." He then clarified that the shots were "at least two seconds [apart] . . . pretty much back to back." Josh William Jenkins, Defendant's concealed carry instructor, testified that he teaches his students to aim for "center mass" and "double tap" to make sure the target goes down.

Autopsy results indicated that Bishop was shot once in the arm and once in the middle of his back. Defendant called 911, and stated that Bishop "pulled a knife on me" and "I had to put him down." Poindexter testified that Defendant made similar statements to him. A non-serrated knife was found clipped into Bishop's right pants pocket.

Defendant testified that he had only spoken to Bishop one time during their earlier encounters in the park. However, on cross-examination, the State elicited testimony from Defendant through Bishop's phone records showing several calls made between Defendant's phone and Bishop's phone. Defendant did not object to the testimony, but did object to publishing the records to the jury. Defense counsel argued that it was "not the State's turn to introduce evidence. And we feel that showing it to them is tantamount to introducing it." The trial court overruled the objection.

The State called Special Agent Joshua Hawks of the North Carolina State Bureau of Investigation on rebuttal. He testified about the State's procedure for subpoenaing phone records and his request for Bishop's cell records. The records did

not include the subscriber name. However, they did indicate that the number had only been assigned to one subscriber since 2011 and that the account was still active at the time of the shooting. Further, Bishop's brother and his sister-in-law testified that the number on the records was Bishop's and had been for at least six years. The State edited Bishop's call records and only sought to introduce the portions showing calls between Bishop's phone and Defendant's phone. Defense counsel objected to the introduction of the edited phone records, requesting instead that the entirety of the records be admitted. The trial court overruled the objection.

At the conclusion of the State's case and again at the close of all evidence, Defendant made a motion to dismiss, arguing that the State had introduced exculpatory statements made by Defendant in its case in chief, but presented no evidence to rebut Defendant's testimony that he had acted in self-defense. The trial court denied both motions.

During the charge conference, Defendant asked the court to instruct on the defense of accident pursuant to North Carolina Pattern Jury Instruction 307.10. The trial court noted that an intentional act of self-defense and an unintentional act contemplated by accident tend to be mutually exclusive defenses, and declined to give the accident instruction.

During closing arguments, the State referred to "heated" phone conversations between Defendant and Bishop, which Defendant denied making. Later in reference

to the same phone calls, the State asked, "[w]hat is it that they talked about? Well, we don't know because [Defendant] isn't willing to tell us even though he is up there under oath . . . ." After playing the tape of Defendant's 911 call, the State remarked, "[t]he first statement that [Defendant] made about the shooting to the dispatcher was untruthful. At a minimum, it was misleading because you know that Steve Bishop had not pulled a knife on [Defendant]." The State also asked jurors what their "good old Alleghany County common sense" told them they would do if they were unarmed and someone was pointing a gun at them. Defendant made no objections during the State's closing argument.

The jury found Defendant guilty of one count of second degree murder and the trial court sentenced Defendant to 216 to 272 months in prison. Defendant appeals.

## Analysis

### I. Authentication

Defendant first argues that the trial court erred in admitting Bishop's phone records into evidence. Defendant contends that the phone records between his phone and Bishop's phone were not properly authenticated, and he asserts that this issue was preserved by objection but seeks plain error review in the alternative. We decline to reach this argument because it was not properly preserved and Defendant is not entitled to plain error review.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. Rule 10(a)(1). "Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal . . . ." N.C. Gen. Stat. § 15A-1446(b) (2017). Where a party timely objects to the admission of evidence, but then fails to later object to admission of the same evidence, "the benefit of the objection is lost." *State v. Williams,* 1 N.C. App. 127, 131, 160 S.E.2d 121, 124 (1968).

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error. The Supreme Court of North Carolina has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence.
>
> Plain error arises when the error is so basic, so prejudicial, so lacking in its elements that justice cannot have been done. Under the plain error rule, [D]efendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.

*State v. Bice,* ___ N.C. App. ___, ___, 821 S.E.2d 259, 263-64 (2018) (citations and quotation marks omitted), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2019).

In *State v. Bice*, the trial court admitted an officer's handwritten statement into evidence through the following exchange:

> THE COURT: All right. Any objection to State's Exhibit No. 7?
> [Defense Counsel:] No, sir, Judge.
> THE COURT: All right. Then State's Exhibit No. 7 is hereby admitted into evidence.

*Id.* at ___, 821 S.E.2d at 264. In that case, the defendant conceded that "he had failed to object to the admission of the statement, and thus, did not preserve [the] issue for review." *Id.* at ___, 821 S.E.2d at 263. Instead, the defendant requested that this Court review the admission of the statement for plain error. *Id.*

Because that defendant had not only failed to object, but expressly consented to the admission of the statement, this Court held that the defendant had "failed to demonstrate that any 'judicial action' by the trial court amounted to plain error." *Id.* at ___, 821 S.E.2d at 264. This Court could not "conclude [that] the trial court erred by permitting the admission of [the] evidence per both parties' agreement." *Id.*

In the case *sub judice*, Defendant contends that he preserved error by timely objecting to the admission of the challenged phone records "on several grounds, including lack of authentication . . . ." In support of this contention, Defendant points to the following exchange regarding the State's request to publish the phone records (State's exhibits 55 and 56) to the jury:

> [DEFENSE COUNSEL]: Your Honor, we would object to the publication of this because it's not the State's turn to

introduce evidence. And we feel that showing it to them is tantamount to introducing it.

[COURT]: Do you wish to be heard, Mr. Bollinger?

[STATE]: Judge, he's already testified as to what's on the document. I'm just asking that the jury be allowed to see it. I'm not introducing it. I'm on cross-examination.

THE COURT: Objection is overruled.

. . . .

[STATE]: So, Mr. McCann, do you agree that your cell phone number does, in fact, appear on this call log as 336-572-2571?

. . . .

[STATE:] All right. Let me show you what's marked as State's Exhibit Number 56. Again, a call log showing your cell phone number of 336-572-2571. Do you see that?

[DEFENDANT:] I can't see it, but I'll take your word for it.

[STATE:] All right. And it shows that on September 15th, 2016, at about 10:49 in the morning that you had a call between your cell phone and Steve Bishop's cell phone that lasted for 515 seconds. Do you remember speaking to him on September 15th, 2016?

[DEFENDANT:] Never spoke to him at all that I know of.

[STATE:] All right, sir.

[DEFENDANT:] And where did that call -- who originated that call?

[STATE:] That call originated from Steve Bishop calling you. All right. And then at 11:37, about an hour later, you

> and Mr. Bishop spoke for 95 seconds, and this log shows that 336-572-2571, which is your cell phone, called his cell phone number.
>
> [DEFENDANT:] Was that his cell phone number at this time and point?
>
> [STATE:] Yes, sir.
>
> [DEFENSE COUNSEL]: Well, objection, Your Honor. That's not in evidence. There has been no evidence that that was [his] cell phone at that time.
>
> THE COURT: Ladies and gentlemen of the jury, I need you to step to the jury room for just a minute. I don't believe it will take long. Remember the same instruction I give you each and every time.
>
> . . . .
>
> THE COURT: All right. Outside the presence of all the jurors, Mr. Reeves, do you wish to be heard?
>
> [DEFENSE COUNSEL]: Your Honor, there has been no testimony as to what dates that he owned this phone or this phone number. There was testimony that -- my recollection was there was testimony from Detective West that he retrieved the phone and got the records for it. But there's no evidence at all that that was -- that these were actually Steve Bishop's phone number on that date. That's just simply not in evidence. It's -- I think the jury is hearing a lot of stuff that's not properly being authenticated. I think this is just getting a little bit out of hand, quite frankly.

Later, during the State's direct examination of Special Agent Joshua Neal Hawks, the State sought to admit the challenged phone records into evidence, without objection from Defendant, as follows:

> [STATE]: Your Honor, I move to introduce State's exhibits 57, also 55 and 56 that we used on cross-examination as cell phone records for this cell phone.
>
> THE COURT: Any objection?
>
> [DEFENSE COUNSEL]: No objection.
>
> THE COURT: The Court will allow it.

Whether or not Defendant's objection would have been sufficient to preserve for appeal Defendant's challenge to the trial court's admission of the phone records, because Defendant later failed to object, and, in fact, expressly consented to the admission of the same phone records, Defendant lost any benefit he may have gained from his earlier objection. *Williams,* 1 N.C. App. at 131, 160 S.E.2d at 124.

Defendant's challenge to the trial court's admission of the phone records cannot be saved through plain error review. "[B]ecause Defendant not only failed to object but also expressly consented to the admission of [the phone records], we cannot conclude the trial court erred by permitting the admission of such evidence per both parties' agreement." *Bice*, ___ N.C. App. at ___, 821 S.E.2d at 264.

As in *Bice*, the Defendant not only failed to object to the entry of the evidence, he "expressly consented to [its] admission . . . ." *Id.* Defense counsel's consent to the entry of the phone records into evidence, "may have been the result of strategic decisions made by Defendant and trial counsel, or [the phone records] may have been admitted because of questionable performance by counsel. Whatever the reason, a trial court is not required to second guess every decision, action, or inaction by defense

counsel." *Id.* Thus, we hold that Defendant waived his right to appellate review and is not entitled to plain error review.

II. Motion to Dismiss

Defendant next argues that the trial court erred in denying his motion to dismiss at the close of all evidence because Defendant's uncontradicted testimony constituted a complete defense to the murder charge. We disagree.

> The standard of review for a trial court's denial of a motion to dismiss for insufficient evidence is well-settled:
>
> Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.
>
> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility. Evidence is not substantial if it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, and the motion to dismiss should be allowed even though the suspicion so aroused by the evidence is strong. This Court reviews the denial of a motion to dismiss for insufficient evidence de novo.
>
> If substantial evidence, whether direct, circumstantial, or both, supports a finding that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be denied and the case goes to the jury.

*State v. Bettis*, 206 N.C. App. 721, 728-29, 698 S.E.2d 507, 512 (2010) (citation omitted). In murder cases where no one is available to directly contradict the Defendant's version of events, the State may seek to do so through circumstantial evidence. *See State v. Madonna*, ___ N.C. App. ___, ___, 806 S.E.2d 356, 359 (2017), *rev. denied*, 370 N.C. 696, 811 S.E.2d 161 (2018).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

*State v. Peters*, ___ N.C. App. ___, ___, 804 S.E.2d 811, 815 (2017) (citation omitted).

"Second-degree murder is defined as the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Rick*, 342 N.C. 91, 98, 463 S.E.2d 182, 186 (1995) (citation omitted). "To prove malice, the State need only show that defendant had the intent to perform the act . . . in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind." *State v. Page*, 169 N.C. App. 127, 136, 609 S.E.2d 432, 438 (2005) (alteration in original) (citation and quotation marks omitted).

Defendant cites two cases to support his contention that uncontradicted exculpatory statements may establish a complete defense to murder: *State v.*

*Johnson*, 261 N.C. 727, 136 S.E.2d 84 (1964) and *State v. Carter*, 254 N.C. 475, 119 S.E.2d 461 (1961). These decisions are readily distinguishable.

In both cases, our Supreme Court reversed murder convictions where the State introduced exculpatory statements made by defendants after the murders. In *Carter*, the defendant admitted to killing the victim, but her reason for doing so was to protect her mother, who the deceased was chasing with a broken bottle. *State v. Carter,* 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961). The Court said "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or *shown to be false by any other facts or circumstances* in evidence, the State is bound by these statements." *Id.* (emphasis added). Since the defendant's uncontradicted statement established perfect self-defense, and "[t]he exculpatory statements of the defendant [were] not contradicted or shown to be false by *any other fact or circumstance in evidence*[,]" *Id.* (emphasis added), her conviction was reversed.

Similarly in *Johnson*, the "State relie[d] *entirely* upon a statement made by defendant to a police officer shortly after the occurrence[.]" *State v. Johnson*, 261 N.C. 727, 728, 136 S.E.2d 84, 85 (1964) (emphasis added). The Court referenced the same passage of *Carter* quoted above before reversing because her uncontradicted, corroborated statement established that she had lawfully stood her ground. *Johnson*, 261 N.C. at 730, 136 S.E.2d at 86.

Here, unlike *Carter* and *Johnson*, the State's evidence was not exculpatory. Rather, the State introduced extensive evidence that tended to contradict Defendant's testimony, including, but not limited to, the following: (1) Bishop was shot in the back, but Defendant claimed that Bishop had stepped towards him; (2) the discrepancy between Poindexter's testimony that the shots were seconds apart and Defendant's testimony that the shots were "like . . . a double tap"; (3) Defendant claimed Bishop's knife was serrated when it was not; and (4) the discrepancy between Defendant's testimony that he had only spoken to Bishop once before and the phone records that indicated there were several calls between Bishop's cell phone and Defendant's phone.

Thus, when viewed in the light most favorable to the State, there was substantial evidence that Defendant committed second degree murder when he shot and killed Bishop. The contradictory evidence provided by the State and Defendant was appropriately left for the jury to decide, and Defendant's motion to dismiss was properly denied.

III. Accident Instruction

Defendant next argues that the trial court erred in failing to instruct the jury on the defense of accident. We agree, but conclude that Defendant failed to show prejudicial error.

"Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo,* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "It is the duty of the trial court to instruct the jury on the law applicable to the substantive features of the case arising on the evidence[.]" *State v. Robbins,* 309 N.C. 771, 776, 309 S.E.2d 188, 191 (1983). "All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988) (citations omitted).

"The defense of accident is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another." *State v. Riddick*, 340 N.C. 338, 342, 457 S.E.2d 728, 731 (1995) (citation and internal quotation marks omitted). "A killing will be excused as an accident when it is unintentional and when the perpetrator, in doing the homicidal act, did so without wrongful purpose or criminal negligence while engaged in a lawful enterprise." *Id.* "[Accident] is not an affirmative defense, but acts to negate the *mens rea* element of homicide." *State v. Yarborough*, 198 N.C. App. 22, 33-34, 679 S.E.2d 397, 407 (2009) (citation omitted). A defendant is not precluded from an instruction on the defense of accident merely because he also asserts self-defense. *State v. Wagoner*, 249 N.C. 637, 639, 107 S.E.2d 83, 85 (1959) ("[D]efendant's plea of not guilty

entitled him to present evidence that he acted in self-defense, that the shooting was accidental, or both. *Election is not required*." (emphasis added)).

A defendant must demonstrate that the omission of an accident instruction was prejudicial to justify a new trial. *State v. Moss*, 139 N.C. App. 106, 113, 532 S.E.2d 588, 594 (2000). "In cases where a trial court instructs a jury that the State must prove beyond a reasonable doubt that a defendant intentionally committed the charged act, our Court has . . . held that that such instruction is 'the functional equivalent' of an accident instruction." *State v. Early,* 202 N.C. App. 373, 690 S.E.2d 769 (2010) (unpublished); *see also State v. Cox*, 166 N.C. App. 517, 603 S.E.2d 584 (2004) (unpublished). Where "the trial court instruct[s] the jury that it must find that Defendant acted 'intentionally and without justification or excuse[,]' and the jury [finds] Defendant guilty, the jury 'necessarily[ ] rejected the possibility that the [criminal act] was unintentional.' " *Early*, 202 N.C. App. 373, 690 S.E.2d 769 (quoting *Riddick,* 340 N.C. at 344, 457 S.E.2d at 732); *see also Cox*, 166 N.C. App. 517, 603 S.E.2d 584.

The trial court's failure to give the requested instruction in this case constitutes error. Defendant correctly asserts that accident was a substantive feature of the case. Viewed in the light most favorable to Defendant, his testimony tended to show that he intentionally fired the first shot in self-defense. However, Defendant denied that the second shot was intentional, stating "[t]he gun went off two times just

real fast" and "I don't know how that happened." Thus, there was some evidence from which the jury could have found that the first shot was an intentional yet lawful act of self-defense which did not preclude his right to assert accident on the second shot. Accordingly, the trial court's failure to provide the requested instruction as to the second shot was error.

Nevertheless, the error is harmless. *See Moss*, 139 N.C. App. at 113, 532 S.E.2d at 594. Although *Early* and *Cox* are unpublished, and thus not controlling, they are persuasive on this issue. Here, the trial court provided the following instruction on second degree murder:

> For you to find the Defendant guilty of second-degree murder, the State must prove four things beyond a reasonable doubt:
>
> First, that the Defendant wounded the victim with a deadly weapon. Again, a firearm is a deadly weapon.
>
> Second, that the Defendant acted *intentionally* and with malice.
>
> Intent is a mental attitude which is seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.
>
> . . . .
>
> If the State proves beyond a reasonable doubt, that the Defendant *intentionally* killed the victim with a deadly weapon or *intentionally* wounded the victim with a deadly

> weapon that proximately caused the victim's death, you may infer first, that the killing was unlawful, and second, that it was done with malice, but you're not compelled to do so. . . . If the killing was unlawful and was done with malice, and not in self-defense, the Defendant would be guilty of second-degree murder.

(Emphasis added). The jury found defendant guilty of second degree murder.

"Because the trial court instructed the jury that it must find that the [d]efendant acted 'intentionally and [with malice][,]' and the jury found [d]efendant guilty [of second degree murder] the jury 'necessarily[ ] rejected the possibility that the killing was unintentional.' " *Early*, 202 N.C. App. 373, 690 S.E.2d 769 (quoting *Riddick*, 340 N.C. at 344, 457 S.E.2d at 732.) Thus, there was no prejudicial error from the trial court's failure to provide the instruction on accident. To hold otherwise would require that the jury find the Defendant acted intentionally in killing Bishop, and then make a separate finding that Defendant acted unintentionally based on the same conduct.

IV. Closing Argument

Defendant next argues that the trial court erred in failing to intervene *ex mero motu* during the State's closing argument. We disagree.

> 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*. 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).

> [W]hen defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of 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, 804 S.E.2d 464, 469 (2017). Only where this Court "finds both an improper argument *and* prejudice will this Court conclude that the error merits appropriate relief." *Id.* (emphasis added) (citation omitted). "When this Court is asked to determine the impropriety of a prosecutor's argument, such that it may violate defendant's right to a fair trial, fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred." *State v. Schricker*, ___ N.C. App. ___, 824 S.E.2d 927 (2019) (unpublished) (*purgandum*).

"[G]enerally, 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 quotation marks omitted). "Under this standard, 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. Waring*, 364 N.C. 443, 499, 701 S.E.2d 615, 650 (2010) (*purgandum*). An argument is not improper "when it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *Madonna*, ___ N.C. App. at ___, 806 S.E.2d at 362 (citation omitted), *review denied*, 370 N.C. 696, 811 S.E.2d 161.

A. Argument of Facts Not in Evidence

Defendant contends the trial court should have intervened based on the State's characterization of phone calls between Bishop's phone and Defendant's phone. Specifically, Defendant challenges the prosecutor's statement that "[Bishop]'s also not here to tell you what he was talking to [Defendant] about back in August and September 2016 when they were speaking on the phone heatedly . . . ." The State counters that this statement was a mere "reasonable inference" in light of the phone records establishing multiple calls between the two phones. We disagree.

Defendant's reliance on *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33 (1994) is misplaced. In *Sanderson*, our Supreme Court remanded for a new sentencing proceeding because a prosecutor insinuated that the defendant had previously been suspected of another killing where no such evidence existed. *Id.* at 18, 21, 442 S.E.2d at 43, 45. Our Supreme Court determined that even a prompt instruction from the

trial court was insufficient to cure the prejudicial effect of this type of comment. *Id.* at 21, 442 S.E.2d at 45.

Here, while the evidence allowed for an inference that Defendant and Bishop spoke with each other on several occasions, the prosecutor's remark about the tenor of those conversations was speculative. Moreover, unlike *Sanderson*, the record does contain direct and circumstantial evidence establishing that Defendant and Bishop were not on the good terms, and "heated" exchanges on the phone were at least possible. In light of the context in which this single word was uttered, and the overall factual circumstances to which they referred, we cannot say that one improper utterance deprived Defendant of his right to a fair trial.

B. Expression that Defendant was Untruthful

Defendant next contends the trial court should have intervened after the prosecutor stated that Defendant was untruthful. We disagree.

While "[i]t is improper for the district attorney, and defense counsel as well, to assert in his argument that a witness is lying[,] [h]e can argue to the jury that they should not believe a witness, but he should not call him a liar." *State v. Sexton*, 336 N.C. 321, 363, 444 S.E.2d 879, 903 (1994) (citation and quotation marks omitted).

Defendant takes issue with the statement by the prosecutor that "[Defendant] isn't willing to tell us even though he is up there under oath, he even denies making those phone calls." Defendant also claims prejudicial error when the prosecutor said,

"The first statement that [Defendant] made about the shooting to the dispatcher was untruthful. At a minimum, it was misleading because you know that Steve Bishop had not pulled a knife on [Defendant]."

Defendant's argument concerning the phone calls with Bishop is without merit. Bishop's phone records were admitted into evidence without objection. These phone records, along with other evidence introduced by the State, tended to show that several calls were exchanged between Defendant and Bishop in the months leading up to the shooting. The prosecutor here never stated that Defendant was lying, or that he was a liar. Rather the prosecutor merely pointed out that Defendant testified that the two had not spoken over the phone, and, when there was some evidence to the contrary, Defendant declined to admit he had spoken with Bishop by phone. The prosecutor pointed out that Defendant denied making the phone calls. This was a permissible argument based on the evidence.

The prosecutor's statement about Defendant's 911 call was also not improper. When considered in the context of his entire statement, it is clear that the prosecutor was arguing that Defendant's claim that he had shot Bishop because Bishop pulled a knife on him was not supported by the evidence. Immediately following the challenged statement, the prosecutor continued:

> Is he being honest with the dispatcher when he tells Mr. Finney, "he pulled a knife on me and I shot him"? What do you expect the physical evidence is going to show when you

> hear that statement? That [Bishop] is going to have a knife in his hand or beside him on the ground[.]"

The only evidence supporting Defendant's version of events was his own self-serving testimony that Bishop had pulled the knife. In contradiction to his own claim that he "put [Bishop] down," *because* Bishop had pulled the knife, Defendant testified that, upon seeing his gun, Bishop returned the knife to his pocket. The evidence tended to show that the Bishop's knife was still in his pocket when officers arrived on the scene. Furthermore Defendant incorrectly described the knife that was purportedly pulled on him by Bishop.

It was permissible for the prosecutor to argue that Defendant was not to be believed on this point, and to advance a theory that Bishop had never taken his knife out of his pocket. The prosecutor said Defendant's statements were untruthful and misleading based upon the conflict in the evidence. The prosecutor's argument was consistent with the record and based upon reasonable inferences that could be drawn from the evidence. We find no error.

C. Placing the Jury in the Victim's Shoes

Lastly, Defendant contends that the prosecutor inappropriately requested that the jurors put themselves in the shoes of the victim, and points to the following statement by the prosecutor during closing:

> What [does] your good old Alleghany County common sense tell you you do when you don't have a weapon in your hands and you got a man standing there with a semiautomatic pistol pointed at you? What do you do? You back up. That

> is what I'm going to do, that's what you're gonna do. That's what common sense tells you you are gonna do and even though you don't have a weapon in your hand, that's a natural reaction when a person is pointing a gun at you is to hold that hand up and that's how you get that bullet wound when you bend your arm like that in a defensive position as you are backing up and that bullet comes in your forearm, travels up and out your elbow.

Our courts "will not condone an argument asking jurors to put themselves in place of the victims." *State v. Warren*, 348 N.C. 80, 109, 499 S.E.2d 431, 447 (1998). Furthermore, matters of common sense are best left to the jury. *State v. Zuniga*, 320 N.C. 233, 251, 357 S.E.2d 898, 910 (1987).

Defendant only points to a portion of the prosecutor's overall argument on this point. The prosecutor here was arguing that Bishop was moving away from Defendant when he was shot in the arm and back. In attempting to explain this to the jury, the prosecutor was arguing that the direction of Bishop's head and feet were contrary to Defendant's statements that Bishop was moving towards him. The prosecutor made the following argument:

> So at the time he was confronted that -- [Defendant] was confronting Steve Bishop, there was this much distance, there was nine feet distance between the two of them and Steve Bishop had the knife in his pocket and this man had a .45 caliber weapon in his hand and he says that Steve Bishop took a step forward and that he shot him in the arm. He's 160 pounds; he's five foot two with a low center of gravity. Yes, that bullet may spin him, but it gonna change his direction. He's coming forward and he gets shot even if he spins, his head is gonna be closest to that track. Not his feet. Not his feet. His head.

> It's physics. It's Newton's laws, the three laws of motion. It's 10th grade physics. He is not falling with his feet towards the track.
>
> So how does he fall with his feet towards the track? What is your good old Alleghany County common sense tell you you do when you don't have a weapon in your hands and you got a man standing there with a semiautomatic pistol pointed at you? What do you do? You back up. That is what I'm going to do, that's what you're gonna do. That's what common sense tells you you are gonna do and even though you don't have a weapon in your hand, that's a natural reaction when a person is pointing a gun at you is to hold that hand up and that's how you get that bullet wound when you bend your arm like that in a defensive position as you are backing up and that bullet comes in your forearm, travels up and out your elbow. That's uncontroverted evidence. That was the track of the wound and he is backing up, he gets shot there and it spins him, and he falls in this direction with his feet towards the track.
>
> Doesn't that make sense about what you know about the real world about how people react when faced with a handgun? Doesn't that make sense in light of the uncontroverted evidence that his feet are towards the track and his head is away from the track? He's backing up, his momentum -- the law of physics says that when he gets shot, he's going in the direction -- you are going to continue in the direction that he was traveling at 160 pounds and a low center of gravity.

When examined in context, the prosecutor was making an argument concerning the evidence. He was asking the jury to analyze the evidence concerning how Bishop fell and compare that evidence to Defendant's version of events using their common sense. As the trial court instructed, the prosecutor is permitted "to assist [the jury] in evaluating the evidence. . . . and to attempt to persuade [the jury]

to a particular verdict." The prosecutor here was asking the jury to make a common sense evaluation of the evidence based upon what a similarly situated reasonable person would do under the circumstances.

Thus, in light of the overall context of the challenged statement, the trial court did not err in not intervening *ex mero motu* during the prosecutor's closing argument.

Conclusion

Based on the foregoing, we conclude that Defendant received a fair trial free of prejudicial error.

NO PREJUDICIAL ERROR.

Chief Judge MCGEE and Judge TYSON concur.

Report per Rule 30(e).