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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-473

No. COA20-445

Filed 7 September 2021

New Hanover County, No. 18 CRS 51367

STATE OF NORTH CAROLINA

v.

JEFFERY SCOTT DAVIS, JR., Defendant.

Appeal by Defendant from judgment entered 24 May 2019 by Judge James S. Carmical in New Hanover County Superior Court. Heard in the Court of Appeals 10 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

James R. Glover for Defendant.

GRIFFIN, Judge.

¶ 1

Defendant Jeffery Scott Davis, Jr. (“Defendant”), appeals from a judgment and commitment entered after a jury verdict finding him guilty of (1) statutory sexual offense with a child fifteen years old or younger and (2) taking indecent liberties with a child. Defendant argues that the trial court erred by failing to intervene *ex mero motu* when, in the presence of the jury, the prosecutor made remarks which

improperly disparaged defense counsel's integrity. Defendant has not demonstrated on appeal that these remarks rendered the conviction fundamentally unfair. We discern no error.

I. Factual and Procedural Background

¶ 2 On 9 April 2018, Defendant was indicted for one count of statutory sexual offense with a child fifteen years old or younger, two counts of taking indecent liberties with a child, one count of statutory rape, and one count of incest. Defendant's trial was held from 20 to 24 May 2019 in New Hanover County Criminal Superior Court.

¶ 3 On the fourth day of trial, the following exchange occurred during the cross-examination of Defendant's wife, Leah Davis:

[PROSECUTOR]: Let's talk a little bit about Adderall. Did you know that Adderall is used recreationally as an aphrodisiac?

[LEAH DAVIS]: No.

[PROSECUTOR]: You didn't know that?

[LEAH DAVIS]: No.

[PROSECUTOR]: Do you know Adderall is an amphetamine?

[LEAH DAVIS]: I don't know what that means, but okay.

[PROSECUTOR]: Do you know that there is absolutely no study whatsoever –

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Opinion of the Court

[DEFENSE COUNSEL]: Objection. He is testifying.

THE COURT: State it as a question.

[PROSECUTOR]: You testified earlier that Adderall makes it difficult for him to maintain an erection?

[LEAH DAVIS]: Yes.

[PROSECUTOR]: Do you know that there is no side effect of Adderall –

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained as to the form of the question.

¶ 4

Later, the following occurred during the redirect examination of Leah Davis:

[DEFENSE COUNSEL:] Are you aware a side effect of Adderall is erectile dysfunction?

[PROSECUTOR]: Judge, that is completely false. And I would like to know where you get that information from. As an officer of the court, that is a complete mischaracterization.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Your Honor I have –

THE COURT: Sustained.

[DEFENSE COUNSEL]: Nothing further.

¶ 5

Defendant did not object to these remarks of the prosecutor.

¶ 6

Later that day, after lunch recess and before the jury returned, defense counsel

said the following to Judge Carmical:

[DEFENSE COUNSEL]: Can I address something? Where I indicated that Adderall has a side effect of erectile dysfunction. [Prosecutor] questioned me and said I was being untruthful to the Court and also said as an officer of the Court I was out of line. I take great pride in my honesty. The whole time during the trial I tried to follow everything.

...

Your Honor, I kept it honest the entire time and I was kind of somewhat offended that [Prosecutor] questioned my honesty when I've never had any problems with [Prosecutor].

THE COURT: I think he impugned it.

[PROSECUTOR]: Judge, in any event, I apologize on the record to [Defense Counsel]. I did a lot of research myself and I did not see anything on erectile dysfunction.

¶ 7

Judge Carmical explained to defense counsel his reasons for sustaining the prosecutor's objections as follows:

THE COURT: I felt like you were asking questions that you had just objected to. [Prosecutor] asked [sic] was trying to do the same thing and I sustained your objection.

¶ 8

Defendant's voluntary written statement to the New Hanover County Sheriff's office admitted that his stepdaughter ("H.B.") had "put [Defendant's] penis in her mouth" and that he had "allow[ed] it to happen." Two nurses, who had examined H.B., testified that H.B. had told each of them that Defendant had sexually assaulted her while she and Defendant were on the back porch. Although H.B. testified at trial

that “nothing else happened” on the porch besides talking alone with Defendant, licensed clinical social worker Julie Ozier (who had conducted a forensic interview of H.B.) testified that twenty percent of children known to be abused “[take] back a statement of abuse saying it didn’t happen” and explained some reasons why children retract their statements.

¶ 9 The jury found Defendant guilty of (1) statutory sexual offense with a child fifteen years old or younger, and (2) taking indecent liberties with a child. Defendant gave notice of appeal in open court.

II. Analysis

¶ 10 Defendant argues that the prosecutor’s comments during the redirect examination of Leah Davis disparaged defense counsel’s integrity. Defendant further argues the trial court implicitly sanctioned these comments because the court did not *ex mero motu* condemn the comments and instruct the jury to disregard them. Defendant did not object at trial and has not met his burden to “show that the prosecutor’s comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.” *State v. Ward*, 354 N.C. 231, 250, 555 S.E.2d 251, 264 (2001) (citation and internal quotation marks omitted).

¶ 11 Defendant did not object at trial to the prosecutor’s allegedly inappropriate remarks. Defendant “must demonstrate on appeal that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero*

motu.” *Id.* (citation and internal quotation marks omitted). Establishing such an abuse of discretion requires that Defendant “show that the prosecutor’s comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.” *Id.* (citation and internal quotation marks omitted). “In evaluating counsel’s comments, remarks are to be viewed in the context in which they are made and the overall factual circumstances to which they referred.” *State v. Bowman*, 349 N.C. 459, 473, 509 S.E.2d 428, 437 (1998) (citation and internal quotation marks omitted).

¶ 12 To support his argument, Defendant cites *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33 (1994), where our Supreme Court found that the prosecutor’s misconduct deprived the defendant of a fair hearing. *Id.* at 9-11, 442 S.E.2d at 38-40. In *Sanderson*, “[t]he prosecutor persistently engaged in improper conduct toward opposing counsel[.]” *Id.* at 9, 442 S.E.2d at 38. The prosecutor’s improper actions included constantly interrupting defense counsel, directing “objections” towards defense counsel rather than to the court, and calling defense counsel “cowards.” *Id.* at 9-10, 442 S.E.2d at 38-39. Many of these inappropriate comments were made in the presence of the jury. *Id.* at 11, 442 S.E.2d at 39. The effect of the prosecutor’s misconduct was so severe that one of the defendant’s attorneys said to the court, “I’ve never been through anything like this before and I’m getting exhausted of trial by insult”, and the other defense attorney stated near the end of trial, “I’m . . . nauseated to the pit of my stomach. . . . I’ve lost a tremendous amount of weight during this

trial. I do not sleep, I cannot eat.” *Id.* at 11, 442 S.E.2d at 39-40. The Supreme Court concluded that “[t]hose comments made before the jury may have diminished defendant’s counsel in the eyes of the jury. The prosecutor’s entire course of conduct, including the comments he made out of the presence of the jury, may have undermined the ability of defendant’s counsel to provide effective representation.” *Id.* at 11, 442 S.E.2d at 40.

¶ 13 The present case can be distinguished from *Sanderson*. Here, the prosecutor’s comments were limited to a single instance and did not constitute “a repeated attempt to diminish defense counsel before the jury.” *State v. Bowman*, 349 N.C. 459, 474, 509 S.E.2d 428 (1998) (holding that no deprivation of due process occurred where the prosecutor’s “statement was [] an isolated comment and not a repeated attempt to diminish defense counsel before the jury” (citation and internal quotation marks omitted)). Defendant’s counsel stated that he “was kind of somewhat offended[.]” *See Sanderson*, 336 N.C. at 11, 442 S.E.2d at 39-40 (describing effects on defense counsel). The Record does not suggest that this single incident undermined defense counsel’s ability to provide effective representation. *See id.* at 11, 442 S.E.2d at 40 (concluding that the prosecutor’s persistent misconduct “may have undermined the ability of defendant’s counsel to provide effective representation”).

¶ 14 Defendant also takes issue with the fact that the trial judge interrupted defense counsel by repeating the word “sustained”. Defendant argues this “impliedly

sanctioned” the prosecutor’s comments. Defendant cites *State v. Reid*, 334 N.C. 551, 434 S.E.2d 193 (1993) in support of this argument. However, *Reid* is distinguishable because there the trial court failed to take curative measures after the prosecutor directly commented during closing argument on the defendant’s decision to not testify. *Id.* at 554-56, 434 S.E.2d at 196-97 (“We consistently have held that when the trial court fails to give a curative instruction to the jury concerning the prosecution’s improper comment on a defendant’s failure to testify, the prejudicial effect of such an uncured, improper reference mandates the granting of a new trial.” (citations omitted)).

¶ 15 Here, the trial court did not abuse its discretion by sustaining the prosecutor’s objection. As the trial judge explained, defense counsel had objected to a similar line of questioning and the trial court sustained those similar objections. “[T]he trial court’s singular act of sustaining an objection did not, in any perceptible or even minute way, amount to an improper comment upon the evidence.” *State v. Walls*, 342 N.C. 1, 42, 463 S.E.2d 738, 759 (1995).

¶ 16 The state presented substantial evidence from which the jury could infer Defendant’s guilt and the contested comments were brief. We do not perceive any likelihood that the jury would have reached a different verdict had the trial court intervened. “[W]here there is no reasonable possibility that the [prosecutorial] misconduct affected the outcome of the trial, there is no need for a reversal.” *Id.* at

66, 463 S.E.2d at 773 (citation omitted).

¶ 17 Defendant has not “show[n] that the prosecutor’s comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.” *Ward*, 354 N.C. at 250, 555 S.E.2d at 264 (citation and internal quotation marks omitted). We conclude that the trial court did not abuse its discretion by failing to intervene *ex mero motu* in response to the prosecutor’s comments regarding defense counsel.

III. Conclusion

¶ 18 For the foregoing reasons, we hold Defendant received a trial free from error.

NO ERROR.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).