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ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-22-583

ALBERT B. MITCHELL APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered December 13, 2023 APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. 26CR-20-748] HONORABLE MARCIA R. HEARNSBERGER, JUDGE AFFIRMED

BART F. VIRDEN, Judge

Appellant Albert B. Mitchell pleaded guilty to first-degree battery in the stabbing of Shonna Yilmaz,[1] and a Garland County jury sentenced him as a habitual offender to forty years' imprisonment. He argues on appeal that this case should be reversed and remanded for a new sentencing hearing because the prosecutor made an improper statement during his rebuttal closing argument regarding how much prison time Mitchell "needs to get." We affirm.[2]

[1]Generally, there is no right to appeal following a guilty plea, except for a conditional plea pursuant to Ark. R. Crim. P. 24.3. Ark. R. App. P.–Crim. 1. A recognized exception to this general rule is for the review of nonjurisdictional issues that arise during the sentencing phase of a trial subsequent to the entry of a guilty plea. *See Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994).

[2]This case began as an appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967) and Ark. Sup. Ct. R. 4-3(b); however, we denied counsel's motion to withdraw and ordered

I. *Standard of Review*

In the absence of manifest abuse of discretion, the reviewing court will not reverse a trial court's action in matters pertaining to its control, supervision, and determination of the propriety of arguments of counsel. *Gill v. State*, 2010 Ark. App. 524, 376 S.W.3d 529. Closing remarks that require reversal are rare and require an appeal to the jurors' passions. *Id.* Although it is not good practice for counsel to inject their personal beliefs into the closing arguments, mere expressions of opinion by counsel in closing argument are not reversible error so long as they do not purposely arouse passion and prejudice. *Neff v. State*, 287 Ark. 88, 696 S.W.2d 736 (1985). The trial court is in the best position to evaluate the potential for prejudice based on the prosecutor's remarks. *Gill*, *supra.*

II. *Discussion*

Arkansas Code Annotated section 5-13-201(a)(1) (Supp. 2019) provides that a person commits battery in the first degree if, with the purpose of causing serious physical injury to another person, the person causes serious physical injury to any person by means of a deadly weapon. First-degree battery under these circumstances is a Class B felony. Ark. Code Ann. § 5-13-201(c)(1). As a habitual offender with four or more prior felonies, Mitchell was subject to receiving an extended term of imprisonment of not less than five years nor more than forty years. Ark. Code Ann. § 5-4-501(b)(2)(C) (Supp. 2019). A defendant convicted of a

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rebriefing. *Mitchell v. State*, 2023 Ark. App. 322. We also ordered that the record be settled and supplemented because Mitchell failed to present us with the *entire* record as required in no-merit appeals. The case is back with a merit brief arguing a single point—the denial of an objection that appears in the supplemental record.

Class B felony may also be ordered to pay a fine not exceeding $15,000. Ark. Code Ann. § 5-4-201(a)(1) (Repl. 2013).

In his closing argument at the sentencing hearing, the prosecutor spoke about parole eligibility and good behavior and explained that Mitchell could be out of prison after having served ten years even if the jury sentenced him to forty years' imprisonment. Defense counsel said the following in his closing argument:

> And you get to decide how long [Mitchell] should stay in jail. If you gave him a fine, he's already served eighteen months in jail. If you gave him the max, he might get out when he's seventy. We don't know that for certain. But that's the range that you guys get to go back there and decide.

In the prosecutor's rebuttal closing argument, the following exchange occurred:

[THE PROSECUTOR]: This is at the top end of a B felony. [Mitchell] almost cut [Yilmaz's] arm off. He needs to get forty years. I think a fine is—

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Come on up (*discussion at bench*).

[DEFENSE COUNSEL]: [The prosecutor] can't recommend a number to the jury and he just did. He said [Mitchell] needs to get forty years.

THE COURT: He said he thinks that he does.

[DEFENSE COUNSEL]: He can't make a recommendation.

THE COURT: He didn't say he recommended it. He said he thinks he does. I don't think it's the same thing. Overruled.

On appeal, Mitchell argues that the prosecutor's statement was inappropriate, inflammatory, and prejudicial. He contends that the prosecutor sought to appeal to the jury's

passions by stating that he (Mitchell) had "almost cut [Yilmaz's] arm off" immediately prior to the statement that he needs to get forty years. Mitchell states that, at minimum, the prosecutor's comment called for an admonition or cautionary instruction. Mitchell further contends that the prosecutor made a firm, definitive statement that he (Mitchell) needed to get forty years' imprisonment—it was not presented as argument but rather was a mandate or an instruction to the jury. He argues that the prosecutor made this statement from a position of power and authority and that "all indications point to the jury taking this statement as a clear instruction" given that the jury subsequently sentenced him to forty years in prison. Mitchell insists that he was prejudiced because the jury sentenced him to the maximum punishment.

The jury was instructed on the range of possible punishment—five to forty years' imprisonment and/or up to a $15,000 fine. The trial court also instructed the jury that remarks made during closing arguments are not evidence. In *Holloway v. State*, 268 Ark. 24, 594 S.W.2d 2 (1980), the appellant argued that the prosecutor's closing remarks were so prejudicial that they mandated a mistrial. The prosecutor said the following to the jury:

> And, I couldn't be more serious or sincere when I tell you that this is a case where I honestly do not see how you can consider anything other than the maximum punishment given you in the instructions for each and every offense listed. I think that justice demands it. I think that it will be a travesty if we get anything less.

Id. at 29, 594 S.W.2d at 5. Our supreme court held that the trial court did not abuse its discretion in denying the mistrial motion. It also noted that the appellant had been charged with, and convicted of, serious crimes and that the State was warranted in asking for the

maximum punishment. The supreme court further recognized, "The State may argue for the maximum punishment in sensible language just as a defendant may argue for the minimum punishment." *Id.* at 30, 594 S.W.2d at 5.

In *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007), the prosecutor said the following in closing argument:

> So, I ask you, how many crimes does this Defendant have to commit before he is sent off for the maximum amount of time allowed by law? Is eleven not enough in this case? I urge you to give this Defendant the maximum amount of time on each charge that you've convicted him of and I also urge you to recommend that his sentences be run consecutive.

Id. at 40, 263 S.W.3d at 487. Defense counsel objected. The trial court overruled the objection and denied defense counsel's motion for a mistrial due to the remark. The supreme court held that the trial court did not abuse its discretion in denying the motion because it is not improper for the State's attorney to argue for the maximum punishment.

In both *Holloway* and *Tryon*, the supreme court pointed out that the jury had been instructed that closing arguments are not evidence. Here, the trial court had similarly instructed the jury at Mitchell's sentencing hearing. Given that the jury had already received such an instruction, a separate admonition was not necessary. We cannot say that the trial court abused its discretion in overruling defense counsel's objection because the prosecutor was permitted to ask for the maximum punishment available and could also seek to impress upon the jury the seriousness of Yilmaz's injury.

Affirmed.

GRUBER and BROWN, JJ., agree.

Grace Casteel, for appellant.

Tim Griffin, Att'y Gen., by: *Christopher R. Warthen*, Ass't Att'y Gen., for appellee.