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NO. COA08-1050

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

STATE OF NORTH CAROLINA,

v.

New Hanover County

No. 06CRS010370

06CRS010371

JAMES ANDRE ROSE,  
Defendant.

Appeal by defendant from judgment entered on or about 22 February 2008 by Judge John E. Nobles in Superior Court, New Hanover County. Heard in the Court of Appeals 26 February 2009.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General C. Norman Young, Jr., for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.*

STROUD, Judge.

After a jury trial, defendant was convicted of first degree murder, robbery with a dangerous weapon, and possession of a firearm by a felon. Defendant appeals, arguing the trial court erred when it (1) did not allow defendant to present evidence of a witness's prior convictions, (2) allowed testimony that the victim "was a hothead who wo[u]ld have fought back if somebody was trying to rob him and that's probably what got him killed[,]'" (original in all caps), and (3) failed to strike the State's improper argument. For the following reasons, we find no error.

## I. Background

On or about 3 July 2006, defendant was indicted for first degree murder, robbery with a dangerous weapon, and first degree kidnapping; defendant was also indicted for possession of a firearm by a felon. On 7 January 2008, defendant was indicted for possession of a firearm by a felon in a superseding indictment. On 18 February 2008, defendant notified the State that he "intend[ed] to introduce evidence of the criminal convictions of the witness, James Lamb, that occurred more than ten years ago."

During defendant's trial, James Robert Lamb, Jr. ("Mr. Lamb") testified for the State. Mr. Lamb testified that he knew the victim as he was a regular customer at the victim's place of work, a video poker establishment. On 29 May 2006, Mr. Lamb was playing poker and the victim was at work. At one point, the victim began emptying money out of the poker machines and "then [the victim] picked up the money and handed it to . . . [defendant] and [Mr. Lamb] said, 'What's going on?'" Defendant took out a gun and held it to Mr. Lamb's neck. Defendant robbed Mr. Lamb and then also "grabbed another wad of money" from a couch on the premises. The victim opened the door and ran; defendant also went outside. Mr. Lamb waited a few minutes and then went to his car. Mr. Lamb found the victim, who had been shot, on the ground. Later, Mr. Lamb identified defendant from a set of photos.

On or about 22 February 2008, the trial court dismissed the first degree kidnapping charge. Defendant was convicted of first

degree murder, robbery with a dangerous weapon, and possession of a firearm by a felon. The trial court arrested judgment on the robbery with a dangerous weapon conviction and sentenced defendant to life imprisonment without parole on the first degree murder and possession of a firearm by a felon convictions. Defendant argues that the trial court erred when it (1) did not allow defendant to present evidence of Mr. Lamb's prior convictions, (2) allowed testimony that the victim "was a hothead who wo[u]ld have fought back if somebody was trying to rob him and that's probably what got him killed[,]" (original in all caps), and (3) failed to strike the State's improper argument. For the following reasons, we find no error.

## II. Prior Convictions

The trial court admitted evidence that Mr. Lamb had been convicted of eight counts of misrepresentation, but did not allow evidence of fourteen other counts of misrepresentation which were over ten years old. Defendant first argues,

James Lamb was the State's only eyewitness to alleged robberies occurring inside the video establishment. His extensive history of prior convictions indicated dishonesty extending back at least sixteen years. . . . Defendant moved that he be allowed to introduce evidence that . . . Lamb . . . had . . . fourteen . . . convictions, more than ten years old . . . Specifically, the evidence would have shown that Lamb was a habitual liar who, for more than fifteen years, frequently dispensed with the truth, i.e., misrepresented or lied, when it was to his financial benefit to do so. Accordingly, the trial court's denial of defendant's motion to introduce evidence of the convictions constituted prejudicial error entitling [defendant] to a new trial.

Both defendant and the State engage in lengthy arguments regarding N.C. Gen. Stat. § 8C-1, Rule 609, regarding the admissibility of convictions which are more than ten years old; however, we do not deem this analysis to be necessary and instead turn to N.C. Gen. Stat. § 8C-1, Rule 403.

"[T]he proper standard of review for reviewing a trial court's decision to admit or exclude evidence is abuse of discretion." *State v. Early*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 670 S.E.2d 594, 599 (2009) (citation omitted). North Carolina Rule of Evidence 403 allows the trial court to exclude relevant evidence if it is a "needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403.

During defendant's trial, with the jury out of the courtroom, the following dialogue took place:

MR. LEWIS [State's attorney]: Your Honor, if I may, our next witness is named James Lamb. He is going to testify as to what he remembers happening inside the business that day. Ms. Lucas filed a motion yesterday giving us notice that she was planning on using convictions older than 10 years with Mr. Lamb. We would object; it wasn't served in a timely manner, it being the morning of trial. Also when you do a balancing test, I think it's more prejudicial than probative.

MS. LUCAS [defendant's attorney]: I would argue it's more probative to our case than [sic] prejudicial to the State. Actually, Mr. Lamb, according to the record that we were given by the State, has four convictions of misrepresentation in order to obtain employment security benefits in the year 2004, of the same thing in the year 2006. He has 8 giving false information to the Employment Security Commission in 1992 and 1996, misrepresentation to obtain employment security benefits in 1993. So it's just those

14 charges in '92 and '93 that are more than 10 years. There are 8 similar misdemeanors, more recently 2000, 2006, and it goes to his credibility, Your Honor. If he is going to misrepresent himself to the Employment Security Commission, then I think that that's important and it goes to the credibility of this witness.

THE COURT: I think it's sufficient that you go ahead and just stick with the ones within the last 10 years. They are the same charge. I may have addressed it a little bit differently otherwise, but I think that's appropriate.

Even if we were to assume *arguendo* that the 14 convictions which were more than 10 years old were admissible under Rule 609, the trial court made it clear that it was denying defendant's request to allow in the other convictions because "[t]hey are the same charge[;]" thus, the charges were cumulative in nature. The trial court even went on to state that were the charges different "I may have addressed it a little bit differently[,]" indicating that his decision turned on the cumulative nature of the charges defendant wished to admit. We conclude that the trial court did not abuse its discretion in denying defendant's motion to present evidence of Mr. Lamb's other convictions for misrepresentation when the jury was allowed to consider eight such convictions. This argument is overruled.

### III. Testimony Regarding Victim's Temper

During defendant's trial the State presented evidence that Detective Odham had interviewed defendant. Defendant's attorney cross-examined Detective Odham and the following dialogue took place:

Q. Now, Detective Tully said he interviewed all those beer drinking guys at the Stop-&-Go?

A. We did.

Q. How many of those were there?

A. Several.

Q. And you didn't include anything about them in your report, did you?

A. I didn't have one of them's name, ma'am.

Q. So you must not have given them much of an interview; is that correct?

A. Spoke to them, refused to give us their names, phone numbers, et cetera. Therefore the information they give us we cannot bring to court because we don't know who they are.

Q. So it wasn't what you really call an interview?

A. It was a street interview, ma'am.

Q. How many people were there in the interview?

A. Several.

Q. How many is "several"?

A. More than three, less than 10. I don't recall the exact number. I also spoke to the old man that Mr. Kempf indicated in his testimony, the guy with the cane, the old gentleman. He also refused to give me his name and advised that he didn't see anything and didn't know anything. Therefore, I had no further investigative necessity to deal with him.

Q. Now, one of you all told Mr. Rose that you heard Ricky was a hothead?

A. Yes.

Q. Another investigative tool?

A. No, Ricky was a hothead.

Q. Ricky was a hothead?

A. That was what the investigation revealed, that Ricky was the type of person, if someone was trying to rob him, he probably would have fought back, which is probably --

MS. LUCAS: Objection, Your Honor.

THE COURT: Go ahead.

A. It's probably what got Ricky killed. He decided to fight back instead of giving Mr. Rose the money from the truck.

Defendant argues "[t]he trial court's action violated Evidence Rules 404, 602, 701, and 802. Mr. Rose was prejudiced and, accordingly, must be given a new trial." We disagree.

"The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Bodden*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 661 S.E.2d 23, 27 (2008) (citation omitted), *disc. review denied and appeal dismissed*, 363 N.C. 131, 675 S.E.2d 660 (2009).

In *State v. McNeill*, defendant argued

that the trial court erred by refusing to strike statements by Michael McNeill that defendant's evidence was a "circus" and by overruling defendant's objections to the same witness' statement that the "victims of this heinous crime deserve more than what they've been getting." Defendant argues that these statements further compounded the prejudice of his earlier challenge to defendant to testify and that failure by the trial court to control these remarks constituted reversible error.

*State v. McNeill*, 349 N.C. 634, 648, 509 S.E.2d 415, 423 (1998),  
*cert. denied*, 528 U.S. 838, 145 L.Ed. 2d 87 (1999).

The North Carolina Supreme Court disagreed with defendant's contentions concluding that

[t]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Defendant opened the door to the witness' response by impugning his character through his line of cross-examination. We conclude that Michael McNeill's responses were in explanation of or in rebuttal to evidence elicited by defendant.

*Id.* at 649, 509 S.E.2d at 424 (citation and quotation marks omitted).

Here, defendant's attorney began a line of questioning that she presumably thought would lead to evidence regarding Detective Odham's deceptive investigative tactics: "Now, one of you all told [defendant] that you heard Ricky was a hothead?" Mr. Odham responded with a simple "Yes." Defendant's attorney then asked, "Another investigative tool?" to which Detective Odham responded, "No, Ricky was a hothead." At this point, defendant's attorney was free to object to Detective Odham's response on the grounds now argued before this Court, including lack of personal knowledge, improper lay opinion, and hearsay. In fact, Detective Odham had just testified that he was aware that the information he had obtained from the "street interview[s]" would not be admissible in court, when he stated that "the information they give us we cannot bring to court because we don't know who they are." However, instead of objecting, defendant's attorney chose to pursue this



point and asked, "Ricky was a hothead?" which essentially asked Detective Odham to explain why he considered Ricky a hothead. Detective Odham then responded with the statements in issue. Detective Odham's statement that "It's probably what got Ricky killed. He decided to fight back instead of giving Mr. Rose the money from the truck" answered defense counsel's question as to why he considered Ricky a hothead. Thus, even assuming *arguendo* that Detective Odham's statements were not admissible, it was not error for the trial court to allow them as "[t]he law wisely permits evidence not otherwise admissible to be offered to explain . . . evidence elicited by the defendant himself[] [as] [d]efendant opened the door to the witness' response[.]" *Id.* (emphasis added). This argument is overruled.

#### IV. Prosecutor's Closing Argument

During the State's closing argument, the prosecutor argued in pertinent part:

That leads us to, I guess, the ultimate question in this case and that is why should you care? Why would you care about somebody engaged in this video poker business? He knew it was dangerous, it's the risk of a job. Why should I care? Well, if you don't care for considering the nature of the offense and the people involved and the family involved, think about your community. Think about that intersection at 17th and Market. How many times have you been through that? How many times have you come down Market Street, gone past New Hanover High School and come downtown? How many times have you gone up 17th Street?

Bullets don't have eyes, they don't know after they're fired out of a gun, they can't self-guide into a person. People like Christy Williams could have been hit, the pizza driver; Daniel Kempf; maybe you if you were at

that intersection. You can't tolerate that type of behavior as a community. And as a jury, you are here to make the decision as to whether you will tolerate that.

Defendant contends that the prosecution gave an improper closing argument because "it urged the jury to convict Mr. Rose for reasons other than facts shown or inferable from the record, that is, on the off-chance that others, including themselves could have been hit."

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). "The impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998) (citation, quotation marks, and brackets omitted), *cert. denied*, 525 U.S. 1180, 143 L.Ed. 2d 114 (1999).

In *State v. Fletcher*, this Court determined that even though the prosecution's closing argument may have been improper,

we decline to hold that this one brief comment out of thirty-two transcript pages of closing argument was so grossly improper as to warrant intervention *ex mero motu*. The offending comment was not only brief, but its overall significance to the entire closing argument was minimal; and the comment was made in the context of a proper voice and conscience of the community argument.

*State v. Fletcher*, 354 N.C. 455, 484-85, 555 S.E.2d 534, 552 (2001) (citation and quotation marks omitted), *cert. denied*, 537 U.S. 846, 154 L.Ed. 2d 73 (2002). We conclude that *Fletcher* is dispositive of this case.

Here, the prosecutor made an arguably objectionable comment over the course of two paragraphs of a twenty-nine page closing argument. Immediately following the comment in question the prosecutor reminded the jurors, "In jury selection you promised to follow the law . . . ." We too conclude that the "comment was not only brief, but its overall significance to the entire closing argument was minimal; and the comment was made in the context of a proper voice and conscience of the community argument." We therefore do not conclude that the prosecutor's remarks in questions "were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones* at 133, 558 S.E.2d at 107. This argument is overruled.

#### V. Conclusion

We conclude that the trial court properly denied defendant's motion to present evidence regarding Mr. Lamb's other convictions, allowed testimony regarding the victim's temper, and allowed the

State to proceed with its closing argument without intervention.

For the following reasons, we find no error.

NO ERROR.

Judges JACKSON and STEPHENS concur.

Report per Rule 30(e).