NO. COA11-40
NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2011

STATE OF NORTH CAROLINA

v. Forsyth County
No. 09 CRS 57481
09 CRS 9616

ANTONIO LAROD BELL

Appeal by defendant from judgments and order entered 13 August 2010 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 12 May 2011.

Roy Cooper, Attorney General, by Lauren M. Clemmons, Assistant Attorney General, for the State.

Michael E. Casterline for defendant.

THIGPEN, Judge.

Defendant Antonio Bell appeals from a conviction of two counts of statutory sexual offense for sexual acts with another person who is 13, 14, or 15 years old and the defendant is more than four but less than six years older than the person. We must decide whether the trial court erred by (I) allowing the prosecutor to make three improper statements during closing

argument and (II) ordering Defendant to enroll in lifetime satellite-based monitoring. We find no error in relation to the prosecutor's closing argument, but vacate the trial court's order imposing lifetime satellite-based monitoring because Defendant was not convicted of a reportable conviction.

The State's evidence tended to show that in November 2008, J.S., the minor victim, met Defendant while she and her friend were walking to another friend's house. J.S. was 14 years old at that time, and Defendant was 19 years old. Over the next few weeks, J.S. visited Defendant at his house on three occasions. During the visits, Defendant touched J.S.'s breasts and her vagina with his fingers; Defendant performed cunnilingus on J.S.; J.S. performed fellatio on Defendant; and the two engaged in intercourse.

On 26 October 2009, Defendant was indicted on one count of statutory rape and three counts of statutory sex offense of a person who is 13, 14, or 15 years old and the defendant is more than four but less than six years older than the person. At trial, the jury found Defendant guilty of one count of statutory sex offense for cunnilingus and one count of statutory sex offense for fellatio. The jury found Defendant not guilty of statutory rape and not guilty of one count of statutory sexual

offense for digital penetration. The trial court sentenced Defendant to two consecutive sentences of 100 to 129 months imprisonment and ordered him to enroll in lifetime satellite-based monitoring upon his release from prison. Defendant appeals.

On appeal, Defendant argues the trial court erred by (I) allowing the prosecutor to make three improper statements during closing argument and (II) ordering Defendant to enroll in lifetime satellite-based monitoring.

I. Improper Statements in Prosecutor's Closing Argument

In his first argument on appeal, Defendant contends the trial court erred by allowing the prosecutor to make three improper statements during closing argument. Specifically, Defendant argues the prosecutor made an improper comment (1) about Defendant's failure to testify; (2) stereotyping Defendant based on his age and gender; and (3) about Defendant's knowledge of J.S.'s age, a fact outside the record. We will review each of the challenged statements in turn.

At trial, Defendant objected only to the statement about Defendant's knowledge of J.S.'s age. "The standard of review for alleged errors in closing arguments depends on whether there was a timely objection made or overruled, or whether no

objection was made and defendant contends that the trial court should have intervened *ex mero motu*." *State v. Chappelle*, 193 N.C. App. 313, 325, 667 S.E.2d 327, 334 (2008) (citation and quotation marks omitted). "Where an objection was overruled, the trial court's ruling is reviewed for an abuse of discretion only where improper remarks were of a magnitude that their inclusion prejudiced defendant." *Id.* (citations omitted). "Where no objection was made, this Court reviews the remarks for gross impropriety." *Id.* (citations omitted). "[B]efore considering whether defendant was prejudiced or whether the trial court abused its discretion, we must first determine whether the prosecutor's remarks were improper." *Id.* at 326, 667 S.E.2d at 335 (citation omitted).

Defendant first argues the trial court should have intervened when the prosecutor made a statement referring to Defendant's failure to testify in violation of Defendant's constitutional right to remain silent. We disagree.

"Criminal defendants have a constitutional right not to testify and it is improper for prosecutors to comment on a defendant's exercise of this right." *State v. Prevatte*, 356 N.C. 178, 248, 570 S.E.2d 440, 479 (2002) (citation omitted), *cert. denied*, 538 U.S. 986, 123 S. Ct. 1800, 155 L.Ed. 2d 681

(2003). "However, if a prosecutor's comment on a defendant's failure to testify was not extended or was a slightly veiled, indirect comment on a defendant's failure to testify, there was no prejudicial violation of the defendant's rights." *Id.* (citations omitted). Furthermore, "[i]t is well settled that the State may properly draw the jury's attention to the failure of the defendant to produce exculpatory evidence to contradict the State's case." *State v. Alston*, 341 N.C. 198, 243, 461 S.E.2d 687, 711-12 (1995), *cert. denied*, 516 U.S. 1148, 116 S. Ct. 1021, 134 L.Ed. 2d 100 (1996).

In this case, Defendant did not object at trial to the prosecutor's statement that "*you have no evidence to the contrary* that . . . the [bedroom] door was slightly closed, there was a little crack in the door, or it was closed." (Emphasis added). Defendant argues the statement implicates his constitutional right not to testify because it suggests Defendant had an obligation to present evidence to the contrary. However, our Supreme Court has "considered and rejected the contention that statements by the prosecutor in closing argument that the evidence was uncontradicted or unrebutted amount to impermissible comments on the defendant's failure to testify." *Id.* at 243, 461 S.E.2d at 711 (citations omitted). Accordingly,

the prosecutor's statement that "you have no evidence to the contrary" was not improper, and the trial court did not err by failing to intervene *ex mero motu*.

Defendant next contends the trial court erred by failing to intervene when the prosecutor made sexist comments in her closing argument that stereotyped Defendant based on the actions and thoughts of a 19-year-old male. We disagree.

"A prosecutor should refrain from making characterizations relating to a defendant which are calculated to cause prejudice before the jury when there is no evidence from which such characterizations may legitimately be inferred." *State v. Thompson*, 118 N.C. App. 33, 43, 454 S.E.2d 271, 277 (citation and quotation marks omitted), *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995). However, "[i]n arguing to the jury, the State may comment on any contradictory evidence as a basis for the jury's disbelief of a witness's testimony." *State v. Anderson*, 322 N.C. 22, 39, 366 S.E.2d 459, 469-70 (citation omitted), *cert. denied*, 488 U.S. 975, 109 S. Ct. 513, 102 L.Ed. 2d 548 (1988). Additionally, "[s]tatements made in closing arguments are not to be considered in isolation or out of context, but must be reviewed in the context in which they were made and the overall factual circumstances to which they

referred." *Chappelle*, 193 N.C. App. at 325, 667 S.E.2d at 334.

In the present case, J.S.'s credibility was questioned at trial and there was contradictory evidence about whether the alleged sexual acts actually took place. In an attempt to restore J.S.'s credibility, the prosecutor made the following statement in her closing argument, to which Defendant did not object:

> Is it not believable that a 19-year-old boy would get any girl he could in the house that would be willing to have sex? Not just [J.S.], but any girl? Is it hard to believe that he would have sex if somebody else was in the house? They're all males. He's 19.

This statement was made in the context of the prosecutor comparing J.S.'s testimony to the contradictory evidence presented at trial and explaining to the jury why J.S.'s testimony was believable. *See id.* Because "the State may comment on any contradictory evidence as a basis for the jury's disbelief of a witness's testimony," *Anderson*, 322 N.C. at 39, 366 S.E.2d at 469-70, the prosecutor's statement regarding the believability of J.S.'s testimony was not improper. Thus, the trial court did not err by failing to intervene *ex mero motu*.

Defendant also contends the trial court erred in allowing the prosecutor to argue that Defendant should have known J.S. was under 18. Defendant argues this statement was an improper

reference to facts outside the record and a misstatement of law. Because Defendant objected to this statement at trial, we review "whether the trial court abused its discretion by failing to sustain the objection." *State v. McCollum*, 177 N.C. App. 681, 686, 629 S.E.2d 859, 862 (quotation omitted) (2006). "When applying the abuse of discretion standard to closing arguments, this Court first determines if the remarks were improper. . . . Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citation omitted).

"[C]ounsel are allowed wide latitude in arguments to the jury in contested cases. They are allowed to argue to the jury the law and facts in evidence and all the reasonable inferences to be drawn therefrom." *State v. Payne*, 312 N.C. 647, 665, 325 S.E.2d 205, 217 (1985) (citations omitted). "However, counsel may not argue to the jury incompetent and prejudicial matters and may not travel outside the record by injecting facts and personal opinions not included in evidence." *Id.* (citation omitted).

Here, the prosecutor made the following statement during closing argument:

> 18-year-olds and 19-year-olds don't have to be back at the house at four or five o'clock in the afternoon, six o'clock in the afternoon. 18-year-olds don't have to come over to your house with their little girlfriends and their little boyfriends on their bikes. Come on. He should have known better. 18-year-old girls would take the time to know the first and last name of the defendant, how old he is. 18-year-old girls don't keep pursuing and calling the boys over and over again.

Defense counsel objected to this statement at trial on the basis of "arguing facts outside the record." The trial court directed the prosecutor to "rephrase that from a statement of fact. Couch it in terms of your contention." The prosecutor then stated, "The maturity level of [J.S.] should have been questioned by the defendant. . . . She told him she was 15. He knew that she was too young for him. Her behavior indicated that."

Assuming *arguendo* that the remarks were improper, Defendant has failed to show prejudice resulting from the prosecutor's comments. Defendant's knowledge of J.S.'s age was not relevant because the charged offenses are strict liability offenses. Furthermore, the State's evidence tended to show J.S. was 14 and turned 15 years old, and Defendant was 19 years old when the two engaged in sexual conduct. Based on this evidence, and considering the trial court's instruction to the prosecutor

following defense counsel's objection, we find there was no prejudicial error.

II. Lifetime Satellite-Based Monitoring

In Defendant's second argument on appeal, he contends the trial court erred in ordering him to enroll in lifetime satellite-based monitoring. The State concedes error because Defendant was not convicted of a reportable conviction pursuant to N.C. Gen. Stat. § 14-208.40A (2009).

In reviewing a satellite-based monitoring order, "we review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (quotation marks and citation omitted). "When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4)," N.C. Gen. Stat. § 14-208.40A(a), and "[i]f the court finds that the offender has been classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in a satellite-based monitoring program for life." N.C. Gen. Stat. §

14-208.40A(c). The definition of reportable conviction includes "[a] final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses[.]" N.C. Gen. Stat. § 14-208.6(4)(a) (2009).

An "offense against a minor" includes: kidnapping, abduction of children, felonious restraint, and "a solicitation or conspiracy to commit any of these offenses [or] aiding and abetting any of these offenses." N.C. Gen. Stat. § 14-208.6(1m) (2009).

"Sexually violent offense" is defined as:

> a violation of G.S. 14-27.2 (first degree rape), G.S. 14-27.2A (rape of a child; adult offender), G.S. 14-27.3 (second degree rape), G.S. 14-27.4 (first degree sexual offense), G.S. 14-27.4A (sex offense with a child; adult offender), G.S. 14-27.5 (second degree sexual offense), G.S. 14-27.5A (sexual battery), G.S. 14-27.6 (attempted rape or sexual offense), G.S. 14-27.7 (intercourse and sexual offense with certain victims), G.S. 14-27.7A(a) (statutory rape or sexual offense of person who is 13-, 14-, or 15-years-old where the defendant is at least six years older), G.S. 14-43.13 (subjecting or maintaining a person for sexual servitude), G.S. 14-178 (incest between near relatives), G.S. 14-190.6 (employing or permitting minor to assist in offenses against public morality and decency), G.S. 14-190.9(a1) (felonious indecent exposure), G.S. 14-190.16 (first degree sexual exploitation of a minor), G.S. 14-190.17 (second degree sexual exploitation of a minor), G.S. 14-190.17A (third degree

> sexual exploitation of a minor), G.S. 14-190.18 (promoting prostitution of a minor), G.S. 14-190.19 (participating in the prostitution of a minor), G.S. 14-202.1 (taking indecent liberties with children), G.S. 14-202.3 (Solicitation of child by computer or certain other electronic devices to commit an unlawful sex act), G.S. 14-202.4(a) (taking indecent liberties with a student), G.S. 14-318.4(a1) (parent or caretaker commit or permit act of prostitution with or by a juvenile), or G.S. 14-318.4(a2) (commission or allowing of sexual act upon a juvenile by parent or guardian). The term also includes the following: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

N.C. Gen. Stat. § 14-208.6(5) (2009).

In this case, Defendant was convicted of two counts of statutory sex offense in violation of N.C. Gen. Stat. 14-27.7A(b) (2009) for sexual acts with another person who is 13, 14, or 15 years old and the defendant is more than four but less than six years older than the person. These offenses are not "reportable convictions" as defined by N.C. Gen. Stat. § 14-208.6(4)(a). Because Defendant was not convicted of a reportable conviction as required by N.C. Gen. Stat. § 14-208.40A, the trial court erred in ordering lifetime satellite-based monitoring. Thus, we vacate the trial court's order imposing lifetime satellite-based monitoring.

VACATED IN PART, NO ERROR IN PART.

Judges CALABRIA and ERVIN concur.

Report per Rule 30(e).