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NO. COA12-1402
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

STATE OF NORTH CAROLINA

v.

Randolph County
No. 08 CRS 53483

MANUEL CASTANEDA MORENO

Appeal by defendant from judgment entered 23 March 2012 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 10 April 2013.

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

Russell J. Hollers III, for Defendant.

ERVIN, Judge.

Defendant Manuel Castaneda Moreno appeals from a judgment sentencing him to a term of 240 to 297 months imprisonment for committing a first degree sexual offense against A.V.¹ On appeal, Defendant argues that the trial court erred by allowing certain witnesses to vouch for the credibility of Amy, allowing a social worker to testify that DSS had substantiated Amy's

¹A.V. will be referred to throughout the remainder of this opinion as Amy, a pseudonym used for ease of reading and to protect A.V.'s privacy.

allegations against Defendant, and allowing the State to make grossly improper comments during its closing argument. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

I. Factual Background

A. Substantive Facts

In 2008, eight-year-old Amy and her two brothers lived with their mother and Defendant, who was their mother's boyfriend. The children looked upon Defendant as a father figure given the fact that they had little to no relationship with their biological father. Defendant, who was 31 years of age in 2008, had begun living with the family approximately one year prior to the incident which led to the institution of the present case. Amy slept in a room with her brothers because the room that she had once occupied had been set aside for the baby that her mother had told her that she was expecting.²

Amy's mother was in the kitchen administering medication to Amy's brothers on an evening during spring break in 2008, at which time Amy was lying alone in the bed in the room which she

²Although Amy's mother had told Amy that she was pregnant, this statement was, as Amy's mother admitted during her trial testimony, false.

occupied with her brothers. At that time, Amy was covered by a blanket and wearing her underwear and a pair of pajamas. As Amy lay there, Defendant entered the bedroom, got into the bed with her, put his hand underneath her clothing, and inserted his hand into her vagina. Although Amy told him to stop, Defendant continued touching Amy until he heard her mother coming down the hallway, at which point Defendant retreated to the bathroom.

On 4 April 2008, which was the following Monday, Amy attended the Child Abuse Reduction Effort program, which was intended to build the students' self-esteem and to help students identify and encourage the reporting of inappropriate adult sexual behavior by distinguishing between "good touches" and "bad touches." During the class, Amy realized that Defendant had touched her in an inappropriate manner and decided to report what he had done to Sergeant Traci Williams of the Randolph County Sheriff's Department, who taught the program that Amy was attending. As a result, Amy approached Sergeant Williams after class and nervously told her what Defendant had done.

After finishing the next class that she was responsible for teaching, a process which took about forty-five minutes, Sergeant Williams took Amy to see Kim Bullins Clodfelter, the school guidance counselor, and Sherry Ficquette, the assistant principal. The group talked in Ms. Ficquette's office, at which

time Amy, who appeared to be embarrassed, repeated her account of what Defendant had done to her a few nights earlier. At the conclusion of Amy's description of Defendant's conduct, Ms. Clodfelter contacted Judy Ebanks, the school social worker, and the Randolph County Department of Social Services.

Angie Polito, a social worker with DSS, received Ms. Clodfelter's call concerning the allegations that Amy had made against Defendant. After speaking with Ms. Clodfelter, Ms. Polito contacted Detective Debra McKenzie of the Randolph County Sheriff's Department with a request that she accompany Ms. Polito during her investigation. Ms. Polito and Detective McKenzie arrived at Amy's school a few hours after Ms. Polito received Ms. Clodfelter's call.

As a result of the fact that Amy was not initially comfortable speaking with Ms. Polito and Detective McKenzie, she requested that Ms. Clodfelter, Ms. Ficquette, and Sergeant Williams be present for her conversation with Ms. Polito and Detective McKenzie. During the course of her interview with Amy, Ms. Polito asked Amy about good touches and bad touches, showed Amy a diagram, and asked if she could identify her private parts. In response, Amy properly identified the name and function of many of her body parts, including her vagina, which she referred to as "the private." After answering these

initial questions, Amy told Ms. Polito that Defendant had touched her beneath her underwear and had moved his fingers in the middle of her vaginal area. When Amy expressed concerned about what her mother's reaction would be upon learning that she had made these allegations against Defendant and inquired whether Defendant would go to jail in light of her statements, Detective McKenzie and Ms. Polito reassured Amy that Defendant would not be present at the time that she returned home.

At the conclusion of their interview with Amy, Detective McKenzie and Ms. Polito went to Amy's home, where they told Amy's mother about Amy's allegations against Defendant. Amy's mother was shocked and upset when she received this information. After creating a signal by means of which Amy could tell them whether she was willing to be left alone, Ms. Ficquette, Sergeant Williams, and Ms. Clodfelter took Amy home later that day. Upon Amy's return to her home, her mother hugged Amy and asked Amy why she had not told her about the incident earlier. Amy responded that she had been afraid. Although Amy's mother was very comforting at the time of her arrival, Amy decided to spend the night with her grandmother because she was afraid that her mother would become upset with her.

The following weekend, Amy returned to her mother's home. Although Amy's mother had initially been supportive of Amy, she

was angry at her daughter when she came back to the house and made her "pinky-promise" to refrain from telling anyone about what happened. According to Amy's mother, she did not want Amy to repeat her accusations against Defendant because she was worried about what would happen if Defendant went to prison given that he was the only member of the household with a job. In addition, Amy's mother told Amy that, unless she recanted the accusation that she had made against Defendant, she would abort her pregnancy, take away all of Amy's toys, refuse to allow Amy to eat out, whip Amy, and "blow her [own] brains out."

On the following Monday, Amy came into Ms. Clodfelter's office acting "silly" and "strange." At that point, Amy told Ms. Clodfelter that nothing had happened between her and Defendant. Shortly thereafter, however, Amy broke down crying and told Ms. Clodfelter about the threats that her mother had made in an effort to persuade her to recant her accusations against Defendant.

On 22 April 2008, Amy went to see Kim Madden for a forensic interview. Prior to the interview, Amy's mother told Amy to tell Ms. Madden that Defendant had not done anything to her. In an attempt to compromise between the statement that her mother wanted her to make and what had actually happened, Amy told Ms. Madden that, while Defendant had touched her, he had done so in

November on the exterior of her clothing. When asked if someone had told her to change her story, Amy refused to answer any more questions and lowered her head. Even so, Amy's mother was very upset that Amy had told Ms. Madden that Defendant had touched her.

On 25 April 2008, Sergeant Williams spoke with Amy at Amy's request in light of Amy's fear that she would be placed in foster care. In spite of her concerns about entering foster care, Amy told Sergeant Williams that the accusations against Defendant were true and that her statements to Ms. Madden were false.

As a result of the events which occurred during Amy's interview with Ms. Madden, she was referred by the Child Medical Examiner's Officer to Christopher Sheaffer, an expert in child psychology, for an evaluation that DSS had requested. In addition to meeting with Amy on three separate occasions, Dr. Sheaffer also met with Amy's mother and grandmother. Dr. Sheaffer described Amy as "pleasant and cooperative" and as exhibiting a willingness to talk about her family and her accusations against Defendant. Amy told Dr. Sheaffer that, while Defendant had touched her underneath her clothes and in her private area, he had not put his fingers "inside" her.

Amy stayed with her mother "off and on" after the incident. In the course of the ensuing two years, Amy's mother continued to date Defendant, had a tattoo bearing Defendant's likeness put on her body, and stayed with Defendant for nine months after he moved to Alabama. On the approximate anniversary of the incident in question, Amy attempted to hurt herself by wrapping a seatbelt around her neck while riding in a car. However, after a neighbor who was riding in the front seat of the car told Amy to stop, she complied with that instruction. Subsequently, Amy broke down crying without saying a word. After hearing that she had tried to hurt herself, Ms. Ebanks spoke with Amy on 25 April 2008. Ms. Ebanks attributed Amy's actions to the "whole situation," including the abuse which she had received at Defendant's hands and the threats and other mistreatment that she had received from her mother. Ultimately, however, Amy's mother did turn Defendant in to investigating officers after he avoided arrest by giving them a false name.

B. Procedural History

A warrant for arrest charging Defendant with first degree sexual offense and two counts of taking indecent liberties with a child was issued in June of 2008. On 14 February 2011, the Randolph County grand jury returned bills of indictment charging Defendant with first degree sexual offense and two counts of

taking indecent liberties with a child. The charges against Defendant came on for trial before the trial court and a jury at the 19 March 2012 criminal session of the Randolph County Superior Court. At the conclusion of the State's case, the trial court dismissed one of the two indecent liberties charges. On 23 March 2012, the jury returned verdicts convicting Defendant of first degree sexual offense and one count of taking indecent liberties with a child. At the conclusion of the ensuing sentencing hearing, the trial court entered a judgment sentencing Defendant to a term of 240 to 297 months imprisonment based upon his conviction for first degree sexual offense and arrested judgment with respect to Defendant's conviction for taking indecent liberties with a child. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Testimony Vouching for Amy's Credibility

In the first two arguments advanced in his brief, Defendant contends that the trial court erred by allowing the admission of testimony that improperly vouched for Amy's credibility. More particularly, Defendant argues that the trial court erred by allowing Ms. Polito to testify that DSS had substantiated Amy's claim to have been sexually abused, by allowing Dr. Sheaffer to testify that Amy had recanted her accusations against Defendant

because she had been coached, and by allowing Ms. Ebanks to testify that Amy had attempted to harm herself because of the "whole situation." We do not find Defendant's arguments persuasive.

1. Substantiation of Alleged Abuse

a. Standard of Review

As a general rule, "[i]n 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 . . . [and] obtain a ruling upon the party's request, objection, or motion." N.C.R. App. P. 10(a)(1). However, "[i]n 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." N.C.R. App. P. 10(a)(4). An alleged error rises to the level of plain error when it is "'so basic, so prejudicial, so lacking in its elements that justice cannot have been done.'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), cert. denied, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d. 513

(1982)). A determination that "plain error" has occurred is only appropriate "in the exceptional case" in which the reviewing court determines, "after examination of the entire record, [that] the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation marks and citations omitted). As a result of the fact that Defendant did not object at trial to the admission of the portion of Ms. Polito's testimony at issue in this part of his brief, we will evaluate this aspect of his challenge to the trial court's judgment utilizing a plain error standard of review.

b. Admissibility of Ms. Polito's Testimony

In the first of his two "vouching-based" challenges to the trial court's judgment, Defendant argues that the trial court erroneously allowed Ms. Polito to vouch for Amy's credibility. At trial, Ms. Polito testified on direct examination that:

Q. Okay. And was that the extent of your involvement in -- in the case?

A. We did have a child and family team meeting to discuss the case and what our case decision - kinda where we were going with the case. And we had that child and family team meeting.

Q. What's family -- tell me what the child and family team meeting -- what is that?

A. Those meetings, we -- the State requires that we have those meetings when we know that we're going to substantiate a case. And the purpose of those meetings is to bring in everyone who's working with the child so that everybody that's involved can hear what issues need to be addressed. And -- and we implement a plan to ensure the safety of the child.

According to Defendant, this "'substantiation' testimony unfairly vouched for [Amy]'s credibility [and] the trial court erred in admitting it." We do not, however, believe that Defendant's argument rests on a correct understanding of Ms. Polito's testimony.

Although testimony to the effect that a Department of Social Services has substantiated an allegation of abuse is clearly inadmissible, *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd*, 363 N.C. 826, 689 S.E.2d 858 (2010), the application of this principle of North Carolina evidentiary law is only triggered by testimony establishing that an allegation of sexual abuse has been substantiated by DSS. *E.g. Giddens*, 199 N.C. App. at 118, 681 S.E.2d at 506 (2009) (holding that testimony "that Defendant was substantiated as the perpetrator" had been erroneously admitted); *State v. Martinez*, ___ N.C. App. ___, ___, 711 S.E.2d 787, 789 (2011) (holding that testimony that "[o]ur agency substantiated a case of sex abuse in regards to [the victim]" had been erroneously admitted);

State v. Sprouse, __ N.C. App. __, __, 719 S.E.2d 234, 243 (2011) (holding that testimony that the DSS “decision was the substantiation of sex abuse of [the alleged victim] by [the defendant]” was erroneously admitted) (alterations in the original), *disc. review denied*, 365 N.C. 552, 722 S.E.2d 787 (2012). In this case, however, Ms. Polito testified that child and family team meetings were required by North Carolina law in the event that they were “going to substantiate a case.” Unlike the situation at issue in cases such as *Giddens*, *Martinez*, and *Sprouse*, Ms. Polito never testified that DSS had substantiated Amy’s claim that Defendant had sexually abused her. Admittedly, Ms. Polito did subsequently testify that “[w]e did make a case decision towards the end of May after all the appointments were completed with Dr. Sheaffer.” However, Ms. Polito never described the decision that was made with respect to the allegations that Amy had made against Defendant. As a result, we conclude that the trial court did not commit plain error by allowing the admission of the challenged portion of Ms. Polito’s testimony.

2. Testimony of Ms. Ebanks and Dr. Sheaffer

In addition, Defendant argues that the trial court erred by allowing Dr. Sheaffer and Ms. Ebanks to impermissibly vouch for Amy’s credibility. According to Defendant, the testimony of Dr.

Sheaffer that Amy had recanted her previous accusations against Defendant because she had been coached by her mother and the testimony of Ms. Ebanks that Amy wanted to hurt herself because of the "whole situation" amounted to an impermissible vouching for Amy's credibility. We do not believe that Defendant is entitled to relief from the trial court's judgment on the basis of either of these contentions.

As an initial matter, we must consider the standard of review which must be utilized in evaluating Defendant's second "vouching-based" challenge to the trial court's judgment. Ordinarily, the extent to which a jury was erroneously permitted to hear testimony impermissibly vouching for the credibility of a particular witness is, assuming that a proper objection was lodged against the admission of that testimony at trial, a question of law subject to *de novo* review. *Martinez*, ___ N.C. App. at ___, 711 S.E.2d at 789). Although Defendant asserts that the testimony which he seeks to challenge in this portion of his brief was admitted over objection at trial, our review of the relevant portions of the record indicates that no such objection was, in fact, ever made. For that reason, Defendant has failed to properly preserve these arguments for purposes of appellate review. See N.C.R. App. P. 10(a)(1). Moreover, in order to preserve the right to challenge the admission of the evidence in

question on plain error grounds, Defendant was required to "specifically and distinctly contend[] [the error] to amount to plain error," N.C.R. App. P. 10(a)(4), a step which he has not taken in his brief. As a result, Defendant has failed to adequately preserve his right to challenge the admission of the testimony in question utilizing any otherwise-available standard of review.

Even if Defendant's arguments were properly before us, we would conclude that they had no merit. On cross-examination, Ms. Ebanks testified that she did not know for sure whether Amy attempted to injure herself as the result of Defendant's actions or those of her mother. In response to the prosecutor's questions on redirect examination, Ms. Ebanks testified that Amy had tried to hurt herself based on the "incident and all . . . the whole situation." When the prosecutor asked Ms. Ebanks to explain what she meant by "the whole situation," Defendant's trial counsel stated, "Let her answer that question." After Ms. Ebanks stated that she had answered the question, Defendant's trial counsel said, "[h]e said, what do--." At that point, the trial court reiterated the prosecutor's question, causing Ms. Ebanks to state that Amy's behavior resulted from the "whole situation" of "when [she had been] sexually abused and . . . the problems that she was having with her mom with her asking her to

recant the situation." Although Defendant claims that the explanation that Ms. Ebanks gave in response to the trial court's inquiry amounted to an impermissible vouching for Amy's credibility, the entire episode stemmed from the fact that Defendant's trial counsel had elicited testimony on cross-examination which the prosecutor sought to clarify on redirect examination and the fact that Defendant's trial counsel expressed uncertainty about the answer that Ms. Ebanks had given and appeared to ask for clarification. Aside from the fact that Defendant opened the door on cross-examination to the admission of the explanatory testimony which the prosecutor sought to elicit by establishing that Ms. Ebanks was not certain as to whether Amy's attempt at self-injury resulted from Defendant's misconduct or from her mother's pressure, *State v. Gappins*, 320 N.C. 64, 67, 357 S.E.2d 654, 657 (1987) (stating that "[q]uestions seeking an explanation on redirect examination of matters brought out by the defendant on cross examination are proper"), we believe that Defendant invited the admission of the challenged evidence during cross-examination. "Ordinarily, one who causes (or we think joins in causing) the court to commit error is not in a position to repudiate his action and assign it as ground for a new trial." *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971). As a result of the fact that

Defendant, even if he was not completely responsible for eliciting the allegedly inadmissible testimony, both opened the door to the admission of the challenged evidence and contributed to its presentation before the jury, we conclude that Defendant is not entitled to relief from the trial court's judgment on the basis of this argument.

Similarly, after being asked on direct examination if he had an opinion concerning the extent to which Amy had been coached by anyone, Dr. Sheaffer testified that:

My opinion is that [Amy] was coached and that she was coached by her mother. And there was indication that pressure was also placed on her by her grandmother to recant and to change her statements about having been molested.

Although Defendant argues that this portion of Dr. Sheaffer's testimony was tantamount to "an expert opinion that [Amy] lied to the forensic interviewer on 22 April 2008" and "was telling the truth to Dr. Sheaffer and the jury," his argument requires an inferential leap which we are not inclined to take. Aside from the fact that the Supreme Court has drawn "a distinction between testimony from a witness . . . that a child victim was truthful or untruthful, which is inadmissible, and testimony that the expert discerned no evidence that the child had been 'coached,'" *State v. Baymon*, 336 N.C. 748, 752, 446 S.E.2d 1, 3 (1994) (quoting *State v. Baymon*, 108 N.C. App. 476, 485, 424

S.E.2d 141, 146 (1993) (Walker, J., dissenting), *aff'd on different grounds*, 336 N.C. 748, 446 S.E.2d 1 (1994)), Dr. Sheaffer never testified that Amy's recantation was false or that her trial testimony was truthful. In addition, "[i]t is well settled that no prejudice arises from the erroneous exclusion of evidence when the same or substantially the same testimony is subsequently admitted into evidence." *State v. Burke*, 342 N.C. 113, 120, 463 S.E.2d 212, 217 (1995) (quoting *State v. Hageman*, 307 N.C. 1, 24, 296 S.E.2d 433, 446 (1982)) (internal quotation marks omitted); *see also State v. Trull*, 349 N.C. 428, 456, 509 S.E.2d 178, 197 (1998) (stating that a "[d]efendant can show no prejudice where evidence of a similar import has also been admitted without objection and has not been made the subject of an assignment of error on appeal"), *cert. denied*, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999). In her trial testimony, Amy's mother admitted, without drawing any objection from Defendant, that she had pressured Amy on a number of occasions to deny that her accusations against Defendant were true. As a result, even if Defendant had properly presented either of these arguments for either regular or plain error review, he would not have received an award of appellate relief on the basis of either contention.

B. Improper Closing Argument

Finally, Defendant contends that the trial court erred by failing to intervene to preclude the State from making impermissible comments in its closing argument. More specifically, Defendant argues that the trial court erred by failing to intervene to stop prosecutorial arguments which he contends contained gross improprieties. We do not find Defendant's argument persuasive.

According to well-established North Carolina law, a closing argument must: "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *State v. Jones*, 355 N.C. 117, 135, 558 S.E.2d 97 108 (2002). "The standard of review for assessing alleged[ly] 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*." *Id.* at 133, 558 S.E.2d at 107. As a result, in reviewing a challenge to a prosecutorial jury argument against which no objection was lodged at trial, such as those at issue here, we must "determine whether the argument in question strayed far enough from the parameters of propriety

that the trial court . . . 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." *Id.*

As an initial matter, Defendant argues that the trial court should have intervened to preclude the prosecutor from arguing that:

There's someone else who, as difficult as it was for a kid to come up here and go through that torment, put her hand on the Bible, on that crucible of truth, not knowing what [Defendant's trial counsel] was gonna ask her, and that great big fear of the unknown; and me not knowing if she was gonna shut completely down, she came up here to that crucible of truth, she put her hand on the Bible, and she very bravely told you folks what happened. You've got -- you know, you've got to think about what it's like for a kid coming into this place. That is something you can consider, the courage it takes to get up here and do this. Because it -- if I could give her a medal, I would.

Although Defendant argues that this portion of the State's final argument constituted an impermissible expression of the prosecutor's opinion that Defendant was guilty, we see nothing grossly improper in this part of the State's closing argument. Instead, the prosecutor simply argued that Amy's testimony should be deemed credible because of the courage that it took for her to take the witness stand and subject herself to the trial process. Although the prosecutor would have probably been

better advised to refrain from making any reference to striking a medal for Amy, we do not believe that this argument, read in context, exceeded the bounds of proper argument to such an extent as to necessitate intervention from the trial court in the absence of an objection at trial.

Secondly, Defendant argues that the trial court should have intervened to stop the prosecutor's comment that the State had not played the tape recording of Amy's interview with Ms. Madden because the prosecutor "[does not] present false evidence" or "evidence that's been coached." Assuming, without in any way deciding, that this portion of the State's final argument constituted an impermissible expression of the prosecutor's opinion, we do not believe that this statement was sufficiently extreme to have required the trial court to intervene without objection given that the record contained ample evidence tending to show that the statements that Amy made during her interview with Ms. Madden were, in fact, false and that Amy's mother had attempted to coach her into recanting her accusations against Defendant.

Thirdly, the prosecutor stated that he had "rolled the dice" in calling Amy's mother to testify and that the "ugly, ugly, ugly truth came out" when he did so. The appellate courts in this jurisdiction have repeatedly held that personal attacks

upon the character of the defendant exceed the bounds of permissible argument. See, e.g., *State v. Matthews*, 358 N.C. 102, 111-12, 591 S.E.2d 535, 542 (2004) (disapproving a prosecutorial argument to the effect that any positive characterization of the defendant was "bull crap"); *Jones*, 355 N.C. at 132-34, 558 S.E.2d at 107-08 (disapproving a prosecutorial argument describing the defendant as a "quitter," a "loser," and "mean" and comparing the facts of the case in question to those surrounding the Oklahoma City bombing and Columbine school shooting); *State v. Millsaps*, 169 N.C. App. 340, 348, 610 S.E.2d 437, 442 (2005) (disapproving prosecutorial arguments that, if the defendant were to be found not guilty by reason of mental insanity, he would soon be released to the public and that Defendant's conduct was comparable to the conduct engaged in by the perpetrators of the 11 September 2001 terrorist attacks). However, even if the prosecutor's description of the evidence in the present record as "ugly" can be construed as an attack upon Defendant's character, we do not believe that such an isolated comment rises to the level of invective held to be sufficient to justify an award of appellate relief despite the absence of a trial objection in cases such as those listed above.

Finally, Defendant challenges the prosecutor's statement to

the jury that "I have proven this case beyond a reasonable doubt." As a result of the fact that members of the Bar are prohibited from expressing their personal opinions to the effect that a defendant is either guilty or innocent, *Jones*, 355 N.C.. at 135, 558 S.E.2d at 108; see also N.C. Gen. Stat. § 15A-1230(a) (stating that "an attorney may not . . . express his [or her] personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant" during a closing argument), and our belief that this argument cannot be understood as anything other than an expression of prosecutorial confidence in Defendant's guilt, we believe that this particular prosecutorial assertion exceeded the bounds of permissible argument. However, we do not believe that this comment, although impermissible, rises to the level of gross impropriety needed to warrant awarding Defendant a new trial. Simply put, in view of the fact that the record contains substantial evidence tending to show Defendant's guilt, the fact that the challenged comment was relatively brief and unaccompanied by significant other improprieties and the fact that the members of the jury would have had little hesitancy about concluding that the prosecutor thought that the Defendant should be convicted, we are unable to see how this comment, despite its impermissible nature, constituted a gross impropriety of the type needed to

justify a decision to award Defendant a new trial. As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of any of his challenges to the prosecutor's final argument to the jury.

III. Conclusion

Thus, for the reasons stated above, we conclude that Defendant is not entitled to relief from the trial court's judgment on the basis of any of the arguments asserted in his brief. As a result, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Judges CALABRIA and DILLON concur.

Report per Rule 30(e).