NO. COA12-457
NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2012

STATE OF NORTH CAROLINA

v. Wake County
No. 10 CRS 229944

MICHAEL EVANS JACKSON

Appeal by defendant from judgment entered 23 August 2011 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 26 November 2012.

Attorney General Roy Cooper, by Assistant Attorney General Terence D. Friedman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant appeals from judgment entered after a jury found him guilty of robbery with a dangerous weapon. He contends the trial court committed reversible error by failing to intervene *ex mero motu* during the State's closing argument when the prosecutor commented upon defendant's failure to testify. For

the following reasons, we hold the court did not commit reversible error.

Corey Merritt ("Merritt") testified that he met defendant in December 2010 in the parking lot of a fast food restaurant in Raleigh for the purpose of selling a Sprint cell phone to defendant. Merritt got into defendant's car and showed defendant the Sprint cell phone. Merritt also brought with him a GPS device he hoped to sell to defendant and two other cell phones. Defendant examined the Sprint cell phone for a few minutes, reached down as if he were getting money out of his pocket, and pointed a semi-automatic .22 pistol at Merritt. Defendant ordered Merritt to get out of the vehicle. Merritt complied with defendant's request, and defendant drove away with Merritt's cell phones and GPS device.

Merritt saw an officer in a police car and told the officer what had happened. Merritt also called defendant and told him that he had reported the incident to the police. Defendant never returned the property to Merritt.

Defendant gave a statement to police in which he indicated he met Merritt for the purpose of buying a cell phone from him. He thought Merritt was going to rob him so he pulled out a BB

gun and ordered Merritt to exit his vehicle. He sold the telephones and threw the BB gun in a pond.

Defendant's mother testified that she searched defendant's car and found a Walmart bag, a container for a BB gun, and a receipt from Walmart dated 15 December 2010.

During closing argument, the prosecutor made two statements which defendant contends constituted an impermissible comment upon his exercise of his right not to testify. The first statement is as follows:

> The defendant to the police -- not to you but to the police -- claimed that Corey somehow scared him, he thought Corey was going to rob him. The reasons he gives for that -- at least to the police -- I want you [to] think about if that makes any sense at all.

Later, the prosecutor stated:

> The defendant does not have to testify, has no obligation whatsoever, and the fact that he hasn't should not enter into your mind at all, but the statement that you have from him is what he gave to the police.

Having failed to object at trial to either of these statements, defendant argues the court should have intervened *ex mero motu* and taken corrective action.

It is settled that "[a] criminal defendant may not be compelled to testify, and any reference by the State regarding

his failure to testify is violative of his constitutional right to remain silent." *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994). However, a comment upon the defendant's failure to testify is not automatically reversible error if it is shown the error was harmless beyond a reasonable doubt. *State v. Reid*, 334 N.C. 551, 557, 434 S.E.2d 193, 198 (1993). "Where a defendant fails to object to the closing arguments at trial, defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *State v. Mitchell,* 353 N.C. 309, 324, 543 S.E.2d 830, 839, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001). This generally requires a showing that "the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

We cannot say the court abused its discretion by failing to intervene under the circumstances at bar. Defendant gave a statement in which he confessed to taking Merritt's property at gunpoint and disposing of it. Defendant's counsel conceded during closing argument that defendant made a "stupid mistake" when he took Merritt's property by displaying a BB gun, and that

he made "further foolish and young mistakes" by selling the telephone as quickly as he could and by throwing the BB gun into a pond. The key factual conflict was whether defendant employed a semi-automatic .22 pistol or a BB gun. Although defendant did not testify, his mother testified on his behalf that she found a receipt and packaging for a BB gun in defendant's vehicle. Defendant, therefore, did present evidence in support of his defense.

Moreover, in its final charge to the jury the court instructed the jury regarding the presumption of innocence and the burden of the State to prove defendant guilty of a charged crime beyond a reasonable doubt. The court also instructed the jury that defendant had the privilege not to testify, that his decision not to testify created no presumption against him, and that his silence was not to influence the jurors in any way. "Jurors are presumed to follow the trial court's instructions." *State v. Gregory,* 340 N.C. 365, 408, 459 S.E.2d 638, 663 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996).

We hold defendant received a fair trial free of prejudicial error.

No error.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).