NO. COA13-245
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v. Edgecombe County
No. 11 CRS 52664

KEON DERRELL GREENE

Appeal by defendant from judgments entered 25 July 2012 by Judge W. Russell Duke, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 11 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Daphne D. Edwards, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for defendant-appellant.

STEELMAN, Judge.

Where defendant did not show that the evidence of co-defendants' guilty pleas had a probable impact upon the jury's guilty verdict, there was no plain error. Where the prosecutor's remarks in a closing argument referring to the guilty pleas of co-defendants were brief and within the context of a proper argument, the trial court did not err by failing to intervene *ex*

mero motu. Where defendant failed to state the grounds for his objection at trial, that issue was not properly preserved for appellate review. The trial court did not err by questioning a witness for the State where the trial court was merely seeking to clarify the witness' prior answer, and the questions did not imply an opinion regarding the testimony or the credibility of the witness. Where there was some evidence in the record to support the award of $500 in restitution, that award will not be disturbed on appeal.

I. Factual and Procedural Background

On 13 August 2011, eighty-year-old Joe Padgett (Padgett) was sitting on his front porch when five men appeared. One of the men hit Padgett on the head with a gun and forced him into the house. He tied Padgett's hands behind his back, put a gun to Padgett's head, and ordered him to open a safe. The five men ransacked Padgett's house, and took, according to Padgett's testimony at trial: a metal detector, a wallet with $200 cash, an unknown number of $2 bills, a .22 revolver, a .44 magnum gun, his cell phone, and $10,000 in cash. On 24 August 2011, the Edgecombe County Sherriff's Office received a report from an E-Z Mart store clerk that he had received $2 bills as payment from a customer and that the same customer, later identified as

Demetrius Burgess (Burgess), had tried to sell him a gun. Upon questioning, Burgess told police that he had robbed Padgett, along with Keon Greene (defendant), Dayton Staton (Staton), Delvin Wilkins (Wilkins), Craig Williams (Williams), and Jody.

Defendant was indicted for felonious breaking and entering, kidnapping, and robbery with a dangerous weapon. Burgess and Wilkins gave written statements to police and pled guilty to conspiracy to commit robbery and conspiracy to commit breaking and entering. The charges against Staton and defendant were joined for trial, and were tried at the 23 July 2012 session of Criminal Superior Court for Edgecombe County. At trial, Burgess and Wilkins testified for the State detailing their own participation in the crimes, as well as defendant's participation.

On 24 July 2012, the jury found defendant guilty of all charges. Defendant stipulated to and the trial court found two aggravating factors. The trial court sentenced defendant, as a Level III offender, to three consecutive active terms of imprisonment: 12 to 15 months for the breaking and entering, 41 to 59 months for second-degree kidnapping, and 105 to 135 months for the robbery with a dangerous weapon. The trial court also ordered $500 in restitution.

Defendant appeals.

II. Co-Defendants' Guilty Pleas

In his first argument, defendant contends that the trial court committed plain error when it allowed the State to introduce evidence of the guilty pleas of Burgess, Wilkins, and Williams on direct examination. We disagree.

A. Standard of Review

Because defendant did not object at trial when the State elicited the evidence of the guilty pleas of co-defendants, we review for plain error:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, 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) (citation omitted).

B. Analysis

"The clear rule is that neither a conviction, nor a guilty plea, nor a plea of *nolo contendere* by one defendant is competent as evidence of the guilt of a codefendant on the same charges." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 230 (1979). In *State v. Rothwell*, 308 N.C. 782, 303 S.E.2d 798

(1983), our Supreme Court held that "that if evidence of a *testifying* co-defendant's guilty plea is introduced for a *legitimate* purpose, it is proper to admit it." *Id.* at 786, 303 S.E.2d at 801. Relying upon *State v. Potter*, 295 N.C. 126, 244 S.E.2d 397 (1978), the Supreme Court went on to hold that it was proper to elicit the fact of the guilty plea on re-direct examination, in order to "bolster the witness' credibility." *Rothwell*, 308 N.C. at 786, 303 S.E.2d at 801. In *Rothwell*, as in the instant case, the fact of the witness' guilty plea was elicited upon direct examination, and not upon re-direct examination. *Id.* at 787, 303 S.E.2d at 801. *Rothwell* held that this testimony was "erroneously admitted into evidence," over the objection of the defendant, but that its admission was not prejudicial to the defendant. *Id.* at 787, 303 S.E.2d at 801-802.

In the instant case, during the State's direct examination of Wilkins and Burgess, both witnesses admitted to pleading guilty to conspiracy to commit robbery and conspiracy to commit breaking and entering. Under the rationale of *Rothwell*, this error does not rise to the level of prejudicial error, let alone plain error. *See Id.* at 788, 303 S.E.2d at 802. Defendant had ample opportunity to cross-examine both Burgess and Wilkins, and each witness testified to his own participation in the crime,

such that the jury was already fully aware of the testifying witness' guilt.

The evidence of Williams' plea is more problematic. The State elicited this evidence from Linda Smith (Smith), an employee of the Edgecombe County Clerk of Court's office. Smith testified that Williams pled guilty to "conspiracy, robbery with a dangerous [sic] and conspired [sic] to commit felony breaking and entering" on 28 March 2012 and that Williams received 29 to 44 months active imprisonment.

Defendant did not object to this testimony. Defendant did not have an opportunity to cross-examine Williams, and Williams did not testify to his own participation in the crime. The prosecutor later referred to Williams' guilty plea in his closing argument, noting that Williams "didn't have anybody pointing a finger at him. And, yet, he manned up and came in and pled guilty."

In *State v. Kerley*, 246 N.C. 157, 97 S.E.2d 876 (1957), our Supreme Court held that where a co-defendant does not testify and the "prosecuting attorney urges such other conviction as justification for the jury to find the accused guilty or urges or implies that it is evidence of the accused's guilt, real prejudice results. . . ." *Id.* at 161, 97 S.E.2d at 880 (citation

omitted). The Court noted that such reference by the State requires "not only prompt but forceful action by the trial court to eliminate the harmful effect; under some circumstances, even curative instructions to the jury will not eradicate the prejudice to the accused." *Id.* (citation omitted). We hold that the instant case is distinguishable from *Kerley*. Here, the prosecutor referred to Williams' guilty plea in arguing the credibility of Burgess and Wilkins to the jury and not in arguing a basis for the jury to find defendant guilty. Further, unlike the defendant in *Kerley*, defendant did not object at any point to the admission of the evidence of Williams' guilty plea, nor did defendant object during closing arguments, thus we review for plain error, not harmless error. *Id.* Defendant bears a heavier burden than did the defendant in *Kerley*, and must show that the error "had a probable impact on the jury's finding that . . . defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation omitted). Both Burgess and Wilkins testified that defendant participated in the crimes, and both witnesses had previously given written statements to police stating that defendant participated in the crimes. Because we apply plain error "cautiously and only in the exceptional case," *id.* (citation omitted), defendant has not met the high burden of

proving that the evidence of Williams' guilty plea had a probable effect on the jury's finding that he was guilty. We hold that while the admission of the guilty pleas of Burgess, Wilkins, and Williams was error, because of the plenary evidence of defendant's guilt, it does not rise to the level of plain error in this case.

This argument is without merit.

III. Closing Argument

In his second argument, defendant contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. We disagree.

A. Standard of Review

> 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).

B. Analysis

"A prosecutor must be allowed wide latitude in the argument of hotly contested cases and may argue all the facts in evidence and any reasonable inferences that can be drawn therefrom." *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995). Prosecutorial arguments are not viewed in isolation, but rather are considered within the context and overall factual circumstances in which they are made. *State v. Davis*, 349 N.C. 1, 22-23, 506 S.E.2d 455, 467 (1998). To establish that the prosecutor's remarks were so grossly improper, "defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.*

In the instant case, defendant argues that the prosecutor's closing arguments "invited, even urged, the jury to hold against [defendant] his invocation of his constitutional right to plead not guilty and stand trial before an impartial jury." Specifically, defendant cites the following statements as grossly improper:

> You didn't have anybody pointing a finger at [Williams]. And, yet, he manned up and came

> in and plead guilty, according to the court record. And [defendant and Staton] are in this court, saying, I'm not guilty. And you all know everything that these guys did because [Burgess and Wilkins] came in and testified. And this jury is not being asked to decide what appropriate sentencing is. That's up to a judge.

Even if improper, defendant has not shown that these remarks infected the trial with unfairness rendering defendant's conviction fundamentally unfair. The remarks were brief when compared to the closing argument as a whole, and the prosecutor made the comments in the context of a proper argument, highlighting the credibility of two State witnesses, Burgess and Wilkins. *See State v. Fletcher*, 354 N.C. 455, 484-85, 555 S.E.2d 534, 552 (2001) (reasoning that when "[t]he 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 . . . argument[,]" it was not grossly improper).

Based upon the brevity of the statements and their context within a proper argument, we cannot say that the trial court committed reversible error by failing to intervene *ex mero motu*.

This argument is without merit.

IV. Balancing Test under Rule 403

In his third argument, defendant contends that the trial court erred when it failed to perform a Rule of Evidence 403 balancing test in admitting Wilkins' testimony that he had been robbed at gunpoint by defendant. We disagree.

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C.R. App. P. 10(a)(1). While defendant objected to Wilkins' testimony at trial, he did not state the grounds of his objection. The contention that the introduction of the evidence was more prejudicial than probative and violated Rule 403 of the North Carolina Rules of Evidence is raised the first time on appeal.

We note that defendant has filed a reply brief pursuant to N.C.R. App. P. 28(h)(3), which permits an appellant to file a reply brief "limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief." Defendant's reply brief merely expands upon the alleged error raised in his principal brief

and, for the first time, asserts plain error. A reply brief does not serve as a way to correct deficiencies in the principal brief. *See Beckles-Palomares v. Logan*, 202 N.C. App. 235, 246, 688 S.E.2d 758, 765 (2010) (holding that when a party fails to advance an issue in its principal brief, the party has abandoned that assignment of error); *see also* N.C.R. App. P. 28(b)(6).

Defendant has failed to preserve this issue for appellate review. This argument is dismissed.

V. Impartial Tribunal

In his fourth argument, defendant contends that the trial court deprived defendant of his constitutional right to a trial before an impartial tribunal when the trial judge questioned a witness. We disagree.

A. Standard of Review

"[T]he question for this Court is whether the challenged remarks constituted expression on any question of fact to be decided by the jury or, more narrowly, expression of opinion as to the weight or credibility of any competent evidence presented before the jury." *State v. Taylor*, 106 N.C. App. 534, 537, 417 S.E.2d 833, 836 (1992). We review "all facts and attendant circumstances as shown by the record" and we view the remarks within the context in which they are made. *Id.*

B. Analysis

The trial judge "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2011). "However, the mere asking of a question by the court is not in itself erroneous." *State v. Ramey*, 318 N.C. 457, 464, 349 S.E.2d 566, 571 (1986). Rule 614 of the North Carolina Rules of Evidence permits a judge to "interrogate witnesses, whether called by itself or by a party," N.C. Gen. Stat. § 8C-1, Rule 614(b) (2011), and our Supreme Court has held that such questioning is proper "in order to clarify confusing or contradictory testimony[.]" *Ramey*, 318 N.C. at 464, 349 S.E.2d at 571.

In the instant case, the following exchange occurred at trial:

> [THE STATE:] Is there anything as you read your statement today that you would either change or kind of elaborate on?
>
> [WILKINS:] Well, I was like, well, [defendant] wasn't doing much of nothing. I ain't really want to say what he really did, you know, because, you know, he was my neighbor at the time.
>
> He was kind of cool and I ain't really – didn't really know what I was going to get myself into, you know. And then the people

> affiliated with, you know. I didn't want to get into all that.
>
> THE COURT: What was the last part of your answer? What was that last thing you said?
>
> [WILKINS:] I said and then the people that he be affiliated with I didn't want to get into all of that. So I didn't really put down what really happened, you know. I just put that as a replacement by saying he wasn't doing much of nothing.

It is evident from the transcript that the purpose behind the trial court's questions was to clarify the witness' prior answer. Neither question implied the judge's opinion regarding Wilkins' credibility, defendant's guilt, or any factual controversy to be resolved by the jury. We hold that the questioning of the witness by the trial judge was proper.

This argument is without merit.

VI. Restitution

In his fifth argument, defendant contends that the trial court erred by ordering restitution in the amount of $500 when there was insufficient evidence to support the amount. We disagree.

A. Standard of Review

"On appeal, we consider *de novo* whether the restitution order was 'supported by evidence adduced at trial or at sentencing.'" *State v. McNeil*, 209 N.C. App. 654, 667, 707

S.E.2d 674, 684 (2011) (quoting *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004)).

B. Analysis

At sentencing the State introduced a worksheet listing $500 in restitution, including $300 cash and $200 for the .22 revolver. A restitution worksheet, by itself, is insufficient to support an award of restitution. *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010). "When . . . there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986). We have previously upheld a restitution order of $180 when the victim testified that the money stolen from her pocketbook was between $120 and $150 in cash, and another witness involved in the robbery testified that the pocketbook contained $240. *State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 10 (2005).

In the instant case, while there was no specific testimony as to the value of the .22 revolver that was stolen, there was some evidence to support the $500 award. Padgett testified that his assailants took a metal detector, a wallet with $200 cash, an unknown number of $2 bills, two guns, his cell phone, and $10,000 cash. Burgess testified that they took a .44 magnum gun,

a .22 revolver, and some $2 bills. He testified that they each received sixty to eighty dollars. There was testimony about Burgess' sale of other guns, including that he sold the .44 magnum gun for $150 and sold a .38 gun for $100. Wilkins testified that the five co-defendants each received sixty dollars from the cash taken from Padgett, which would total $300. As in *Davis*, when there was conflicting evidence as to the value of the property stolen, we review only to see if there is some evidence to support the trial court's award. Upon review of the record, we hold there was sufficient evidence in the record to support the award of $500 in restitution and therefore the award will not be disturbed on appeal.

NO ERROR IN PART; DISMISSED IN PART.

Judges HUNTER, ROBERT. C, and BYRANT concur.

Report per Rule 30(e).