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NO. COA13-348
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 12 CRS 76503-04
JONATHAN LEE AUTERY 12 CRS 24406

Appeal by defendant from judgment entered 27 November 2012 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 14 October 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Charles G. Whitehead, for the State.

John L. Wait, for defendant-appellant.

CALABRIA, Judge.

Jonathan Lee Autery ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of malicious conduct by a prisoner and habitual misdemeanor assault. We find no error.

On 2 May 2012, Officer Culbreath Mounce ("Officer Mounce") was attempting to escort defendant from his Guilford County Jail cell to the nurse's station. Officer Mounce restrained

defendant with handcuffs, ankle shackles, and a belly chain. After he was secured, defendant began to walk away. Officer Mounce ordered defendant to return, but defendant failed to comply. Officer Mounce then pushed defendant against the wall. Defendant reacted by "cursing, spitting, hollering, stating he was going to F [Officer Mounce] up," and spit directly in Officer Mounce's face. Officer Mounce received assistance from additional officers.

Officer James Blakely ("Officer Blakely") escorted defendant, who continued yelling and cursing, to the elevator. Officer Blakely pushed defendant to the corner of the elevator, where defendant began to struggle. Defendant grabbed Officer Blakely's pinky finger and bent it backward toward the officer's wrist. Officer Blakely instructed defendant to release his finger, and defendant then bit Officer Blakely on the forearm. Officers subsequently transported defendant to a holding cell.

Defendant was indicted for malicious conduct by a prisoner, assault on a government official, and habitual misdemeanor assault. Beginning 14 November 2012, defendant was tried by a jury in Guilford County Superior Court. At trial, defendant testified on his own behalf. Defendant's account of his altercations differed from that of the officers. Defendant

claimed that Officer Mounce did not loosen his shackles when he told him they were too tight; that he complied with the officers' orders; that when Officer Mounce grabbed him, defendant got tangled in his shackles and stumbled; and that Officer Blakely tried to choke him while in the elevator. Defendant denied spitting at Officer Mounce and also denied biting Officer Blakely during their respective altercations. However, defendant admitted that he had been convicted of "[a]bout four or five" prior assault offenses.

On 15 November 2012, the jury returned verdicts finding defendant guilty of all charges. The trial court arrested judgment on the assault on a government official conviction, consolidated the remaining two convictions, and sentenced defendant to a minimum of 25 months to a maximum of 39 months in the North Carolina Division of Adult Correction. Defendant appeals.

Defendant argues that the trial court erred by failing to intervene *ex mero motu* in response to the prosecutor's remarks during closing arguments. Specifically, he claims that the prosecutor: (1) interjected his personal opinion that the State's witnesses were "believable"; (2) asserted his personal opinion by saying defendant was lying; (3) "offered his opinion

that [defendant] was guilty of the crimes alleged"; and (4) referred to defendant as the "king of the assaults." Essentially, defendant contends that the prosecution's closing statement improperly bolstered the State's witnesses while at the same time improperly disparaging defendant. We disagree.

"During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, [or] express his personal belief as to the truth or falsity of the evidence[.]" N.C. Gen. Stat. § 15A-1230(a) (2011). When the defendant fails to object to the prosecutor's argument this Court "must determine whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Augustine*, 359 N.C. 709, 723, 616 S.E.2d 515, 526 (2005) (internal quotations omitted). "[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Mann*, 355 N.C. 294, 307, 560 S.E.2d 776, 785 (2002) (internal quotations and citations omitted). A prosecutor acts with extreme impropriety when "the prosecutor's remarks must have perverted

or contaminated the trial such that they rendered the proceedings fundamentally unfair." *Id.* at 307-08, 560 S.E.2d at 785.

Although the prosecutor may not "express his personal belief as to the truth or falsity of the evidence" under N.C. Gen. Stat. § 15A-1230(a), "prosecutors are allowed to argue that the State's witnesses are credible." *Augustine*, 359 N.C. at 725, 616 S.E.2d at 528. All statements made during closing arguments "must be considered in the context in which the remarks were made and the overall factual circumstances to which they referred." *Id.* at 725-26, 616 S.E.2d at 528 (internal quotations and citation omitted).

In the instant case, the theme of the State's closing argument was that the State's version of events was significantly more believable than defendant's version and thus would support a guilty verdict. Read in this context, the implication of the prosecutor's argument was not that the State's evidence was inherently true, as defendant suggests, but rather that, based on the evidence, the State's witnesses' version of events were more credible. Thus, this portion of the State's argument was proper.

Likewise, the State's argument did not impermissibly disparage defendant or his credibility. Our Supreme Court has stated that "while it is improper for a lawyer to assert his opinion that a witness is lying, a lawyer may argue to the jury that they should not believe a witness." *State v. Davis*, 291 N.C. 1, 12, 229 S.E.2d 285, 293 (1976). As noted above, the theme of the State's argument was that defendant's version of events was highly improbable and that the State's version was much more likely to be true. In this context, the statements highlighted by defendant are properly considered a challenge to the credibility of the defendant as a witness, rather than an impermissible statement that defendant was a liar.

Finally, defendant contends that the prosecutor improperly characterized him as "the king of the assaults." However, the prosecutor was referring to defendant's own testimony in which he admitted that he had been convicted of at least "four or five" assaults, as well as the fact that defendant was charged with two additional assaults in the instant case. Thus, the prosecutor's reference to defendant as "the king of the assaults," which was based upon the evidence at trial, was not improper. Compare *State v. Twitty*, 212 N.C. App. 100, 104, 710 S.E.2d 421, 426 (2011) ("[W]e see no impropriety in the State's

reference to Defendant as a liar and con man, as those terms accurately characterize the offense with which he was charged and the evidence presented at trial."). When taken in its entirety, there was nothing impermissible in the prosecutor's closing argument. Defendant's argument is overruled.

Since the trial court did not err in failing to intervene during the prosecutor's closing argument, defendant received a fair trial, free from error.

No error.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).