NO. COA14-988
NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2015

STATE OF NORTH CAROLINA

v. Johnston County
Nos. 12 CRS 57334, 13 CRS 476

DANNY LAMONT AVERY

Appeal by Defendant from judgment entered 2 April 2014 by Judge Richard T. Brown in Johnston County Superior Court. Heard in the Court of Appeals 23 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Jason Christopher Yoder, for Defendant.

STEPHENS, Judge.

Defendant Danny Lamont Avery appeals from a judgment entered upon a jury verdict finding him guilty of felony possession of cocaine. Defendant argues that the trial court committed reversible error by failing to intervene *ex mero motu* during the State's closing argument. We find no error.

The State's evidence tended to show that, at approximately 8:00 p.m. on 29 November 2012, officers from the Johnston County Sheriff's Office responded to a report of shots fired in the area of Big Pine Road and Folden Drive. Lieutenant Gary Bridges, investigating on foot, came upon a vehicle parked in a yard. Defendant was crouched in a fetal position on the front passenger seat floorboard.

Lieutenant Bridges asked Defendant to get out of the car, and then requested consent to frisk Defendant for weapons. Defendant replied that he did not have any weapons and began to pat his pockets. Defendant pulled a pack of cigarettes from his pants pocket and showed them to the officer. Lieutenant Bridges illuminated the pack with his flashlight and noticed an "off white rock-looking substance" in the bottom corner of the cellophane wrap. The officer believed the substance to be cocaine.

Upon being advised that he was under arrest, Defendant pushed Lieutenant Bridges and grabbed the cigarette pack from the top of the car. Lieutenant Bridges called to other officers across the street as he struggled with Defendant. Defendant spun around, came out of his coat, and started running. Lieutenant Bridges, who injured his finger during the struggle, pursued Defendant. When another deputy joined in the pursuit, Lieutenant Bridges

returned to the car to locate the cigarette pack which "had been tossed to the ground." The substance in the cigarette pack was later determined to be less than one-tenth of a gram of cocaine.

A jury found Defendant guilty of possession of cocaine and not guilty of assault inflicting serious injury on a law enforcement officer. Defendant subsequently pled guilty to attaining habitual felon status. The trial court sentenced Defendant to 35 to 54 months of imprisonment. Defendant appeals.

Defendant contends the trial court reversibly erred by failing to intervene *ex mero motu* to address improper remarks by the prosecutor during closing arguments. We disagree.

Because Defendant failed to object to any of the prosecutor's statements, our review is limited to determining "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). This standard requires Defendant to show 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) (citation omitted), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

Defendant challenges the italicized portions of the

prosecutor's closing argument as inaccurate:

> [] *Defendant himself started removing items from his pockets, and he actually threw this. He threw this with the crack rock. He threw the pack.* So, it appears that, and I believe it was even stated in opening argument, that [] Defendant did not intentionally cause the injury of Lieutenant Bridges, that somehow it wasn't deliberate, and I'm telling you that it was. And how do you know that? Because if it wasn't intentional, if it wasn't an intentional injury, he would have cooperated. He wouldn't have resisted. He wouldn't have struggled to the point that he was removing himself from his coat. He wouldn't have pushed, pulled, jerked away, thrown evidence, evidence of drugs, to distance himself from this. He wouldn't have done that if he had good intentions. He is going to do, and *he did, whatever he needed to do to throw this away or get the officer not to notice it*, or get it off his person to get out of the situation. That's what the struggle was about.

Defendant points out that Lieutenant Bridges actually testified that Defendant did not toss the cigarette pack onto the ground until after the officer's flashlight illuminated what appeared to be cocaine inside the pack, and that Defendant therefore cannot have been trying "to get the officer not to notice it[.]" Defendant further argues that the true sequence of events would not support an inference that Defendant knew the cigarette pack contained cocaine and, thus, that the prosecutor's "mischaracterization of the testimony unfairly bolstered the

State's case that [Defendant] knew what was inside the cigarette [pack]." We are not persuaded.

The first portion of the challenged remarks accurately summarizes Lieutenant Bridges' testimony about the sequence of events. As for the comment that Defendant threw the pack on the ground "to get the officer not to notice it," we believe that the most reasonable inference to be made therefrom is that the prosecutor was suggesting that Defendant attempted to get rid of incriminating evidence. By throwing the pack on the ground before running away, Defendant may have hoped that the officers would not be able to locate the pack and the cocaine inside it. In any event, we perceive nothing unfair or improper in the remark, regardless of the prosecutor's intended meaning. Further, even if the prosecutor's account of the incident could be construed as containing a minor inaccuracy, it was cured by the court's instruction that the jury must rely on its own recollection of the evidence when deliberating. *See State v. Barbour*, __ N.C. App. __, __, 748 S.E.2d 59, 64 (2013) ("Even assuming *arguendo* that the State's remarks were improper, [the] instruction reminding the jury to rely on its own recollection, instead of that of the State, cured any defect."), *cert. denied*, __ N.C. __, __ S.E.2d __ (2014).

Defendant also challenges the italicized portion of the

following remarks by the prosecutor:

> We have an officer [who] was injured after he arrested [] Defendant who was already hiding from him, and if you want to know whether or not [] Defendant intended on hurting this officer, I'm going to tell you right now, and you're going to get an instruction on it. Ladies and Gentlemen, ***innocent people don't run, and innocent people don't fight law enforcement, and innocent people don't resist; guilty people do. And that's what you have in this case.***

Defendant asserts that the prosecutor's promise that the jury would receive an instruction that "innocent people don't run, [] guilty people do" was an improper expression of the prosecutor's personal opinion that Defendant was guilty and a misstatement of the law.

"During a closing argument to the jury[,] an attorney may not . . . express his personal belief . . . as to the guilt or innocence of the defendant . . . . An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C. Gen. Stat. § 15A-1230(a) (2013); ***see also State v. Erlewine***, 328 N.C. 626, 633, 403 S.E.2d 280, 284 (1991) (holding that a prosecutor may "ask[] the jury to find facts and draw permissible inferences based upon substantial competent evidence"). Here, the prosecutor's statement "that's what we have here" is not clearly an expression of his personal belief in Defendant's guilt, but rather appears to be an assertion

that Defendant's decision to resist arrest and flee from Lieutenant Bridges was evidence of his guilt. Arguing such a position based on competent evidence before the jury is explicitly permitted by section 15A-1230(a).

Regarding the promise of a jury instruction, the prosecutor was apparently referring to the flight instruction which the trial court did later give, to wit, that the jury *could* consider evidence of Defendant's flight in determining his guilt. To the extent that the prosecutor's inartful summary of the relevant law was inaccurate, "a trial court cures any prejudice resulting from a prosecutor's misstatements of law by giving a proper instruction to the jury." *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citation omitted), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Accordingly, Defendant cannot show reversible error by the trial court in its failure to intervene *ex mero motu*. *Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

NO ERROR.

Chief Judge MCGEE and Judge HUNTER, JR. concur.

Report per Rule 30(e).