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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-970

Filed: 3 May 2016

Wake County, No. 13CRS228746

STATE OF NORTH CAROLINA

v.

KERRI LYNN HICKS, Defendant.

Appeal by Defendant from judgment entered 7 November 2014 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 9 February 2016.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Whitney Hendrix Belich, for the State.*

*Kimberly P. Hoppin for the Defendant.*

DILLON, Judge.

Kerri Lynn Hicks (“Defendant”) appeals from judgment entered upon jury verdict finding her guilty of driving while impaired. We find no error.

I. Background

Evidence at trial tended to show as follows: On a morning in November 2013, Defendant drove her two children to a birthday party at an indoor playground. After Defendant checked her children in, she remained on site. Over the course of the next

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two hours while her children attended the party, Defendant went outside on a number of occasions. After coming back into the building for at least the third time, others inside noticed that Defendant appeared to be impaired. Defendant was uncoordinated in her movements and she was slurring her speech.

A short time after the party ended, Defendant drove her van into the playground's parking lot at a high rate of speed. She pulled into a parking space, hitting the curb and landing on the sidewalk and grass area near the building entrance. Defendant then backed up her van and stopped. Defendant got out of the driver's side and fell onto the sidewalk. Defendant's children became upset.

A few minutes later, an officer arrived on the scene and observed Defendant's children standing next to their mother's van. He also observed Defendant some distance away attempting to use her van key to enter another vehicle which was not hers. As the officer approached Defendant, he noticed a strong odor of alcohol. He noticed that Defendant's speech was slurred and her eyes were bloodshot and watery. As the officer tried to help Defendant and explain to her that she was at the wrong vehicle, Defendant cursed at him.

Another officer was called to transport Defendant to the police station. This officer observed a number of empty wine box containers in Defendant's van. Once at the station, Defendant submitted to a breath alcohol test which showed her blood alcohol content to be .19.

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Defendant was convicted of driving while impaired and sentenced to a term of imprisonment of 13 to 25 months. Defendant timely appealed her conviction.

II. Analysis

Defendant makes a number of arguments on appeal, which we address in turn.

A. State's References to Defendant's Silence During the Incident

At trial, Defendant testified that she suffered from a panic attack on the day in question which caused her to appear disoriented and to slur her speech. Further, she stated that she drank the wine *after* she crashed her van but before the police arrived, an interval of time lasting approximately one minute.

To rebut Defendant's testimony, the State called the host of the birthday party and the officer on the scene, both of whom stated that Defendant never mentioned anything at the scene about having a panic attack. During closing arguments, the State essentially made an argument that Defendant's version of events was not credible because she never told the police that her behavior was the result of a panic attack rather than alcohol consumption.

On appeal, Defendant argues that the trial court erred by allowing the State and its witnesses to reference Defendant's failure to tell the police at the scene about her panic attack in violation of her Fifth Amendment right to remain silent. Defendant concedes that she failed to lodge any objection at trial to much of the "objected to" statements and testimony and that when she did object, she failed to

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state the constitutional grounds for the objection. Therefore, we review this issue for plain error. *See State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 372, 519 (1988), *rev'd on other grounds*, 358 N.C. 122 (2004) (holding that failure to raise constitutional issues at trial results in waiver on appeal); *see also State v. Lemons*, 352 N.C. 87, 92, 530 S.E.2d 542, 545 (2000) (invoking Rule 2 of the North Carolina Rules of Appellate Procedure to review the appellant's arguments under plain error standard of review).

Assuming, *arguendo*, that the references to Defendant's silence at the scene regarding her suffering panic attacks were error, we hold that said error did not rise to the level of plain error. Here, the evidence of Defendant's guilt is overwhelming. Defendant's claim that she consumed alcohol only after crashing her van was refuted by other evidence. For instance, an employee of the playground testified that when the crash occurred, she ran outside to assist Defendant and Defendant's children, that she never lost sight of Defendant once she exited her vehicle after the crash and that she never saw Defendant drink anything after the crash. Also, there was uncontradicted evidence regarding Defendant's impairment prior to the accident. Therefore, we cannot say that there is a reasonable probability that a different result would have occurred had the alleged error not occurred at trial. *See State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012) (finding no plain error where the defendant failed to show that, "absent the error, the jury probably would have returned a different verdict."). Accordingly, this argument is overruled.

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B. State's Closing Arguments

Next, Defendant argues that the trial court committed reversible error by failing to intervene *ex mero motu* and by overruling her objections to portions of the State's closing arguments. Specifically, Defendant argues that the State's argument demeaned Defendant's trial counsel by stating that it was her counsel's job "as her advocate to muddy it up, make it look as messy so you'll try to have some kind of doubt." Defendant also argues that State's counsel impermissibly expressed a personal belief that Defendant was not credible, pointing to a section of the closing where the State argued that Defendant's testimony was "their entire evidence" and that "[i]f there was anybody credible who came in here and [told] you that she has panic attacks diagnosed, you would have heard from them." Finally, Defendant argues that during closing the State mischaracterized a portion of the playground employee's testimony, suggesting that the employee observed Defendant drive away from the playground before returning where the employee actually testified that she did not see Defendant leave with her children but only saw Defendant again when she re-entered the parking lot (when she crashed her van).

Because Defendant failed to object to these remarks at trial with proper specificity, our standard of review is whether the State's closing arguments were "grossly improper." *State v. McNeill*, 360 N.C. 231, 244, 624 S.E.2d 329, 338 (2006). Where a closing is grossly improper, the trial court commits reversible error by failing

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to intervene *ex mero motu*. *State v. Gladden*, 315 N.C. 398, 417, 340, S.E.2d 673, 685 (1986). However, improper remarks only constitute reversible error when they “render the proceeding fundamentally unfair.” *State v. Phillips*, 365 N.C. 103, 144, 711 S.E.2d 122, 150 (2011).

We do not believe that the trial court’s failure to intervene constitutes reversible error. Rather, the trial court instructed the jury that “[y]ou are the sole judge of the believability of each witness” and that if their “recollection differs from that of the attorneys, you are to rely solely upon your recollection.” Further, in light of the overwhelming evidence of Defendant’s guilt and the State’s closing argument as a whole, we do not believe that the challenged statements impeded Defendant’s right to a fair trial. *See State v. Campbell*, 359 N.C. 644, 679, 617 S.E.2d 1, 23 (2005) (stating that even if portions of State’s closing were improper, “the jury instructions informed the jury not to rely on the closing arguments as their guide in evaluating the evidence” and holding that “the prosecutor’s challenged arguments did not so infuse the proceeding with impropriety as to impede defendant’s right to a fair trial”). This argument is overruled.

### C. Defendant’s Right to Present a Defense

Finally, Defendant argues that the trial court erred by limiting her testimony regarding her mental health diagnosis. Specifically, at trial, Defendant began to explain some of her mental health diagnoses in order to show that her panic attacks

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caused her to exhibit certain behaviors which could be distinguished from those exhibited when she was intoxicated. Defendant conceded that she did not intend to call any expert witnesses regarding the subject. The State sought to exclude any testimony by Defendant on the subject, contending that Defendant failed to provide notice of any mental infirmity. The trial court overruled the State's objection, but limited Defendant's testimony to evidence concerning panic attacks "which is something she could identify herself."

This limitation is clearly an acknowledgment by the trial judge of the general rule that "a witness may not testify to a matter unless [she] has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2014). The commentary to this evidentiary rule clarifies that personal knowledge "is not an absolute but may consist of what the witness thinks [she] knows from personal perception." *Id.* We believe this was an appropriate limitation. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (noting that lay opinion testimony is limited to those opinions or inferences "rationally based on the perception of the witness").

Even assuming, *arguendo*, that the trial court abused its discretion by limiting Defendant's ability to present lay testimony regarding her condition, we do not believe that such abuse of discretion prejudiced Defendant, given the overwhelming evidence of Defendant's guilt. Defendant was still allowed to argue to the jury that the behaviors she exhibits during her panic attacks differ from the behaviors she

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exhibits when she is intoxicated. In light of evidence discussed previously, it does not seem reasonably possible that the jury would have returned a different verdict had the trial court not stated the limitation. Accordingly, this argument is overruled.

III. Conclusion

Upon careful consideration of the record, we find no reversible error in Defendant's trial.

NO ERROR.

Judges BRYANT and ZACHARY concur.

Report per Rule 30(e).