IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-253

Filed: 4 October 2016

Edgecombe County, Nos. 14 CRS 53112-13, 16

STATE OF NORTH CAROLINA

v.

JERMUIS ERELL ANDREWS, Defendant.

Appeal by defendant from judgments entered 12 August 2015 by Judge Milton F. Fitch in Superior Court, Edgecombe County. Heard in the Court of Appeals 19 September 2016.

Attorney General Roy A. Cooper III, by Assistant Attorney General Jason R. Rosser, for the State.

William D. Spence for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgments entered upon his conviction for felony possession of marijuana and felony possession of cocaine. We find no error.

The evidence at trial establishes the following factual background. On 8 October 2014, law enforcement officers were patrolling a neighborhood in Tarboro in response to complaints of drug activity. The officers noticed Jamal McGuire and another individual standing in the road next to a vehicle with several individuals

inside. The vehicle was parked in front of McGuire's home. The officers got out of their car and smelled marijuana in the air. They asked McGuire for consent to search his person, McGuire agreed, and the officers found a marijuana cigar in his pants pocket.

McGuire, however, refused consent to search his home. The officers found marijuana paraphernalia in a trash can and decided to obtain a search warrant. They conducted a protective sweep of the house to identify any persons inside and found defendant sitting on a couch in the living room. They escorted defendant outside, and several officers went to obtain a warrant. After obtaining a warrant, the officers searched McGuire's home and found illegal drugs in one of the bedrooms. They found cocaine powder and a shotgun in the closet, as well as clear plastic bags with marijuana seeds inside a book bag. The officers opened up a vacuum cleaner bag and found additional bags of marijuana and cocaine. Lastly, an officer found a digital scale under some clothes in a laundry basket. The scale contained traces of cocaine and marijuana. State Bureau of Investigation ("SBI") laboratory testing later confirmed that the substances found were marijuana and cocaine.

An officer showed the marijuana and cocaine to defendant, and defendant admitted that the drugs were his. However, he denied ownership of the shotgun. On the following day, the officer wrote a report summarizing defendant's admission.

Defendant was charged by bills of indictment with possession with intent to sell and deliver ("PWISD") marijuana, manufacture of marijuana, felony possession of marijuana, PWISD cocaine, manufacture of cocaine, felony possession of cocaine, and attaining habitual felon status. The State dismissed the two manufacturing charges. At the close of the State's evidence, defendant moved to dismiss the charges, and the court denied his motion. The court also denied defendant's renewed motion at the close of all evidence.

On 10 October 2013, a jury found defendant guilty of felony possession of marijuana and felony possession of cocaine. The jury, however, found defendant not guilty of the two PWISD charges. Defendant entered a plea of guilty to attaining habitual felon status. The trial court sentenced defendant to two consecutive terms of imprisonment for 29 to 47 months. Defendant appeals.

I.

Defendant first argues that the trial court erred in denying his motion to dismiss. " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a

reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

Defendant claims that there was insufficient evidence under the *corpus delicti* rule to submit the charges to the jury. Our Supreme Court has "long held that 'an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime.' " *State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013) (quoting *State v. Parker*, 315 N.C. 222, 229, 337 S.E.2d 487, 491 (1985)). Therefore, when the State uses an extrajudicial confession, we apply the *corpus delicti* rule " 'to guard against the possibility that a defendant will be convicted of a crime that has not been committed.' " *Id.* at 151, 749 S.E.2d at 275 (quoting *Parker*, 315 N.C. at 235, 337 S.E.2d at 494). Our Supreme Court explained the *corpus delicti* rule as follows:

> Traditionally, our *corpus delicti* rule has required the State to present corroborative evidence, independent of the defendant's confession, tending to show that (a) the injury or harm constituting the crime occurred and (b) this injury or harm was done in a criminal manner. This traditional approach requires that the independent evidence touch or

> concern the *corpus delicti*—literally, the body of the crime, such as the dead body in a murder case.

Id. (citations, quotation marks, and alterations omitted).

Defendant argues that the circumstances surrounding his confession are insufficient to corroborate the facts of the underlying confession and therefore do not satisfy the *corpus delicti* rule. Defendant claims that he was never in actual possession of the drugs, did not live in McGuire's home, and did not have exclusive possession of the home. Consequently, he argues, the evidence tends to show that he was not the possessor of the drugs. We are not persuaded.

Defendant appears to overlook a key principle of the *corpus delicti* rule. Our Supreme Court explained:

> When applying the *corpus delicti* rule, it is fundamental that *the corroborative evidence need not in any manner tend to show that the defendant was the guilty party*. Instead, the rule requires the State to present evidence tending to show that the crime in question occurred. The rule does not require the State to logically exclude every possibility that the defendant did not commit the crime. Thus, if the State presents evidence tending to establish that the injury or harm constituting the crime occurred and was caused by criminal activity, then the *corpus delicti* rule is satisfied and the State may use the defendant's confession to prove his identity as the perpetrator.

Id. at 152, 749 S.E.2d at 275 (citations, quotation marks, and alterations omitted) (emphasis added). Here, the criminal act at issue was the illegal possession of marijuana and cocaine—the "body" of the crime was illegal drug possession. We are

satisfied that the State produced sufficient evidence to corroborate illegal drug possession at the time of defendant's confession. The drugs were discovered in the home pursuant to a search warrant, and officers showed them to defendant, which prompted his confession. SBI testing confirmed that the drugs were marijuana and cocaine. Given that the *corpus delicti* rule was satisfied, the State properly used defendant's confession to prove his identity as the individual in possession of the drugs. *See id.* We therefore find no error in the trial court's denial of defendant's motion to dismiss.

II.

Next, defendant challenges a portion of the prosecutor's closing argument. During closing, the prosecutor made the following statement:

> This jury has to decide if we're going to let Mr. Andrews slide with all this marijuana and this cocaine and this scale. If this jury wants him back out there able to sell, distribute this cocaine, this marijuana, then you can find him not guilty.
>
> *If this jury wants him to stop and start turning off the value [sic] the drugs going into this community, find him guilty***.** Put a stop to it. Thank you.

(Emphasis added). Defendant did not object to the prosecutor's closing argument at trial, but contends that the prosecutor's comment regarding "turning off the [valve of] the drugs going into this community" was so improper that the trial court should have intervened *ex mero motu*.

"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*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citations omitted). "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[.]" *Id.* "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Grooms*, 353 N.C. 50, 81, 540 S.E.2d 713, 732 (2000) (quoting *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 469 (1998)). We disagree that the prosecutor's comment rose to the level of extreme impropriety such that it rendered defendant's conviction fundamentally unfair.

In support of his argument, defendant cites to *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985). The charges in *Scott* arose from a fatal impaired driving accident, and during closing, the prosecutor stated the following:

> Now, we often hear, we often read in the paper or hear on television or anything else, something that happens, there's a lot of public sentiment at this point against driving and drinking, causing accidents on the highway. And, you know, you read these things and you hear these things and you think to yourself, "My God, they

> ought to do something about that." . . .
>
> . . . .
>
> Well, ladies and gentlemen, the buck stops here. You twelve judges in Cumberland County have become the "they".

Id. at 311, 333 S.E.2d at 297. Our Supreme Court held that the prosecutor's comment regarding public sentiment was "improper because it went outside the record and appealed to the jury to convict the defendant because impaired drivers had caused other accidents." *Id.* at 312, 333 S.E.2d at 298. Our Supreme Court, however, found the prosecutor's comments that " 'the buck stops here' " and that the jury had become the " 'they' " to be proper. *Id.* at 311, 333 S.E.2d at 297. The Court explained that those statements "correctly informed the jury that for purposes of the defendant's trial, the jury had become the representatives of the community." *Id.*

Given the context of the comment, we find the instant case distinguishable from *Scott*. In the instant case, unlike *Scott*, the prosecutor did not make any comments regarding news stories related to illegal drugs or ask the jury to convict defendant based on other drug crimes. We do not find the prosecutor's brief and vague reference to "this community" in the instant case to be analogous to the prosecutor's explicit appeal to "public sentiment" in *Scott*.

Furthermore, our Supreme Court has explained that "[i]n determining whether argument was grossly improper, [our appellate courts] consider[ ] the context

in which the remarks were made, as well as their brevity relative to the closing argument as a whole." *State v. Taylor*, 362 N.C. 514, 536, 669 S.E.2d 239, 259 (2008) (citations and quotation marks omitted).

Here, the comment at issue was brief in comparison to the State's closing argument. The prosecutor made the comment only one time during his closing argument, which covered over thirteen pages of the trial transcript. Additionally, the comment was made in the context of the State's attempt to bolster the credibility of a witness. The prosecutor anticipated that defense counsel would attack the credibility of the officer who testified as to defendant's confession—to cast doubt as to whether the confession actually occurred. Therefore, the prosecutor reminded the jury that there was no evidence to rebut the officer's testimony that defendant admitted the drugs belonged to him. The prosecutor then informed the jury that it was neither the duty of himself nor law enforcement officers to decide whether defendant did something wrong—that decision is the function of the jury. Therefore, the prosecutor asked the jury to hold defendant responsible for the drugs. It was only in this context that the prosecutor made the comment at issue. Based on the foregoing, we find no error in the trial court's failure to intervene *ex mero motu*.

NO ERROR.

Judges TYSON and INMAN concur.

Report per Rule 30(e).