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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-326

Filed: 20 December 2016

Edgecombe County, Nos. 13 CRS 52923-25, 14 CRS 1138

STATE OF NORTH CAROLINA

v.

JARVIS MONTRALE BELL

Appeal by Defendant from judgments entered 9 June 2015 by Judge Walter H. Godwin, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 20 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Perry J. Pelaez, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for Defendant.

STEPHENS, Judge.

Defendant Jarvis Montrale Bell appeals from judgments entered on his convictions for possession of a stolen firearm, possession of a firearm by a felon, felony possession of marijuana, and possession with intent to sell or deliver marijuana. Bell argues that the trial court (1) erred by failing to intervene *ex mero motu* when the prosecutor made improper remarks during his closing argument, and (2) plainly erred by allowing testimony regarding video evidence not introduced at trial. Because Bell

was not prejudiced by the State's improper argument or the improper testimony, we find no error in the trial court's failure to intervene in the State's closing argument and no plain error in its allowance of testimony regarding the video.

Factual and Procedural Background

On 29 August 2013, Rocky Mount police officers Wade Butler and Sergeant Feagans met with two confidential informants to set up a drug purchase at 1549 Cherry Street, Rocky Mount, North Carolina. The operation was intended to target Bell. Officer Butler provided forty dollars to one of the informants from the Rocky Mount drug fund for the purchase. He also "equipped one of the confidential informants with [an] audio and video recording device." The officers then sent the informants to 1549 Cherry Street to purchase marijuana from Bell. The officers followed the informants to within a block or two of the house at 1549 Cherry Street, but then stopped and remained approximately two blocks from the house where they could not see the informants enter the location or conduct the transaction. The officers lost sight of the informants for approximately ten minutes. When the informants and the officers returned to their secure meeting location, the informants gave Officer Butler fifteen dollars as change from the purchase and one bag containing approximately five grams of marijuana. The informants also reported that there were several people smoking marijuana and playing cards around a picnic table in the backyard, and that there was more marijuana on the premises.

Officer Butler called Sergeant Whitley, supervisor of the Rocky Mount Police Department gang unit, and told him that there were people at 1549 Cherry Street smoking marijuana, that Bell had just sold marijuana to the confidential informants, and that he had more marijuana on the premises. Specifically, Officer Butler told Sergeant Whitley that Bell was storing and selling marijuana in the barn on the back side of the residence.

While Officer Butler remained with the confidential informants to debrief them and collect evidence, Sergeant Whitley assembled a team of officers. The team included Rocky Mount police officers Curtis Robinson and Tyre Carter. The officers went directly to the backyard at 1549 Cherry Street instead of approaching the front of the house. There were five or six people in the backyard. Sergeant Whitley smelled burnt marijuana immediately upon approaching the yard. He instructed the officers to gather everyone around a picnic table in the backyard. The officers explained to the people in the backyard that they were being detained for an investigation. Bell was not in this group of people.

As everyone was being gathered, a woman claiming to be the owner of the residence approached Sergeant Whitley. Sergeant Whitley explained that his team had information that narcotics were being stored in and sold out of the barn, and asked for permission to search the barn. Sergeant Whitley and Officer Robinson approached the barn. Sergeant Whitley instructed Officer Robinson to search the

barn with the assistance of Officer Carter. Officer Robinson yelled as he went toward the barn that he was a police officer preparing to come inside and told anyone inside the barn to come out with their hands up. A voice from inside the barn said he was coming out. Bell then opened the barn door and came outside with his hands up.

Once Bell exited the barn, Officer Robinson handcuffed and detained him. Sergeant Whitley, Officer Robinson, and Officer Carter conducted a search of the barn. They discovered a bag of marijuana weighing 3.6 grams stuffed on a ledge where the rafters met the edge of the building. The officers also found a stack of money containing two hundred and sixteen dollars, a loaded .40 caliber Glock firearm, and ammunition for the firearm underneath a chain guard on an ATV located in the barn. Additionally, they found a digital scale with marijuana residue and plastic sandwich bags inside a bucket of dog food in the barn. Behind the barn, on the opposite side of a fence outside a broken window in the barn, Officer Robinson found a larger bag of marijuana weighing 56.97 grams. The evidence was conflicting as to whether the fence was less than five feet or ten to fifteen feet from the barn. Officer Robinson photographed all of the evidence, and Officer Carter collected and packaged it.

Tawanda Grimes was one of the people in the backyard on 29 August 2013 when the police arrived. She left after the officers checked her identification. However, Grimes later voluntarily came into the Rocky Mount Police Department

and was interviewed by Sergeant Whitley and Larry Antill, a criminal investigator with the Bureau of Alcohol, Tobacco, Firearms and Explosives. Grimes admitted that she stole the .40 caliber Glock firearm from a room at the Comfort Inn where she worked. There was conflicting evidence regarding how the gun got in the barn. Grimes testified that she placed the gun in the barn "up under the tire or the fender part" of a four wheeler. She further testified that she did not tell Bell about the gun. Officer Antill testified that Grimes told him in the interview that she called Bell after she stole the gun, and brought the gun to Bell at the 1549 Cherry Street residence at his instruction.

Bell was brought in to the police station for an interview. Bell met with Officer Antill. Officer Antill read Bell his *Miranda* warnings prior to beginning the interview. Bell then requested a lawyer. Officer Antill gathered his notebook and prepared to leave the room. As he was leaving, Bell initiated a conversation about Antill's previous assignment with the Rocky Mount Police Department narcotics unit. Bell stated that he "wanted to talk" and "could help [Antill] set up some big drug dealers." Antill responded that that could happen "at a later date." As Antill again prepared to leave the interview room, Bell stated that the marijuana found by the Rocky Mount police officers was his, that he sold marijuana, and that he was able and willing to obtain large quantities of cocaine for Antill.

Bell was arrested on 29 August 2013 for possession of a stolen firearm, possession with intent to sell or deliver marijuana, felony possession of marijuana, possession of a firearm by a felon, and being an habitual felon. Bell had a prior conviction from 7 June 2010 in Edgecombe County for the felony of possession with intent to sell and deliver marijuana. A grand jury returned indictments on all five charges on 3 February 2014. The case came on for trial at the 8 June 2015 session of Edgecombe County Superior Court, the Honorable Walter H. Godwin, Jr., Judge presiding.

At trial, Officer Butler was a witness for the State. In the course of testifying about the marijuana purchase which he set up with the confidential informants, Officer Butler also testified that he reviewed the audio-video recording from the device worn by one of the confidential informants and positively identified Bell and the residence at 1549 Cherry Street. Officer Butler further responded to a question from Bell's attorney about his knowledge of where the informants went by stating, "the audio video recording shows them at 1549 Cherry Street." Bell did not object to the testimony at trial.

During closing arguments, the State argued:

> Well, I guess it's my job to convince the twelve of you that a drug dealer is a drug dealer. That's what Jarvis Bell is. I don't know how hard that should be for me to do. You know he was convicted [in] 2010 of possession with intent to sell and deliver marijuana.

Further, the State argued that although television news was trying to sell cops as bad guys, the jury should consider "[w]ho are the good guys and the bad guys here; the police officer and the drug dealer." The State repeatedly referred to Bell as a drug dealer, and stated that this was "not [his] first rodeo." In contrast, the State said that Officer Antill was "an honorable police officer," and, regarding the officer's testimony, that he didn't "just make this stuff up." In addition, the State linked Bell's solicitation of testimony possibly negatively portraying the police officers to the "political climate." In its conclusion, the State argued that:

> This jury is sitting in front of a known drug dealer in Rocky Mount. And it's this jury's responsibility to not let him go back out this afternoon and get right back up to business. It's time for this drug dealer, Jarvis Bell, to be found guilty because that's what he is.

Bell did not object during the State's closing argument.

On 9 June 2015, the jury convicted Bell of possession of a stolen firearm, possession with intent to sell or deliver marijuana, felony possession of marijuana, and possession of a firearm by a felon. Bell pled guilty to being an habitual felon. Judgment was entered on all charges, and Bell was sentenced as an habitual felon to 80-108 months in prison on the possession of a stolen firearm and possession of a firearm by a felon charges, and 26-44 months in prison on the possession with intent to sell and deliver and felony possession of marijuana charges. Bell gave notice of appeal in open court.

Discussion

On appeal, Bell argues that the trial court (1) erred by failing to intervene in the State's closing argument when the prosecutor vouched for the credibility of the police officers, argued Bell should be convicted because of his prior conviction, and referred to the political climate, and (2) plainly erred by allowing Officer Butler to testify about the contents of the audio-video recording of the marijuana purchase. We conclude that Bell's trial was free of prejudicial error.

1. The State's closing argument

Bell argues that the court erred in failing to intervene *ex mero motu* during the State's closing argument, because the prosecutor's argument was improper and prejudicial to Bell. Specifically, Bell argues that the following remarks were improper: (1) the State's repeated references to Bell as a drug dealer and argument that he should be convicted because he was a "known drug dealer" who had a prior conviction, (2) references to the police officers as "good guys" and vouching for their credibility, and (3) reference to the "political climate" and the television news. We agree that the prosecutor made improper arguments, but hold that they were not prejudicial in light of the evidence presented at trial.

> 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). "[I]n order to constitute reversible error, the prosecutor's remarks must be both improper and prejudicial." *Id.* at 133, 558 S.E.2d at 107-08.

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230 (2015). A lawyer's statement that a witness is or is not credible is an improper expression of his or her personal belief as to the truth or falsity of the evidence. *State v. Phillips*, 365 N.C. 103, 139, 711 S.E.2d 122, 147-48 (2011), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d. 176 (2012).

"[I]t is the duty of the judge to interfere when the remarks of counsel are not warranted by the evidence, and are calculated to mislead or prejudice the jury." *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967). However, "[t]o merit a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair." *Phillips*, 365 N.C. at 136,

711 S.E.2d at 146 (citation and internal quotation marks omitted). In *Miller*, the North Carolina Supreme Court awarded a new trial where the prosecutor disparaged opposing counsel, gave his opinion that a witness lied, and represented the defendants to be "habitual storebreakers" when there was no evidence in the record to support that claim. 271 N.C. at 656-60, 157 S.E.2d at 343-46. Similarly, the Supreme Court awarded a new trial where the prosecutor insinuated that his experience led him to know when to ask for the death penalty, referred to his reputation for not trying innocent men, stated that the defendant was "lower than the bone belly of a cur dog," and expressed his personal belief on multiple occasions that witnesses were lying. *State v. Smith*, 279 N.C. 163, 165, 181 S.E.2d 458, 459 (1971)

Here, the State's arguments that Bell should be convicted because he was known to have a prior conviction and that he was guilty were improper statements of the prosecutor's personal belief as to the truth of the evidence and the guilt of Bell. N.C. Gen. Stat. § 15A-1230. However, Bell also argues that the State improperly used his prior conviction as substantive evidence. In support of this argument, Bell cites *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986), and *State v. Jeffers*, 48 N.C. App. 663, 269 S.E.2d 731 (1980), *disc. review denied*, 301 N.C. 724, 276 S.E.2d 285 (1981). In *Tucker*, the North Carolina Supreme Court held that the prosecutor misused evidence of a prior crime which was admissible only for impeachment

purposes. *Tucker*, 317 N.C. at 544, 346 S.E.2d at 424. In *Jeffers*, this Court found no error when the defendant stipulated to his prior conviction and the jury was given a limiting instruction. *State v. Jeffers*, 48 N.C. App. at 666, 269 S.E.2d at 734. This case is easily distinguishable from both *Tucker* and *Jeffers*. Here, Bell could have stipulated to his prior conviction, but did not do so. As a result, his prior felony conviction for possession with intent to sell or deliver marijuana was admitted as substantive evidence to prove that he was a felon at the time he possessed the firearm. In addition, Bell did not request a limiting instruction from the trial court, and has not argued that the trial court erred in failing to provide one. Therefore, reference to the fact that Bell was a convicted drug dealer in and of itself was not an improper use of evidence admitted for a non-substantive purpose, such as impeachment.

Like the improper expression of the prosecutor's belief that Bell was guilty, the State's argument that the police officers were credible and its reference to the television news and political climate were improper violations of section 15A-1230. The State's argument regarding the credibility of the police officers was an improper statement of the prosecutor's personal belief as to the truth of the evidence. § 15A-1230; s*ee also Phillips*, 365 N.C. at 139, 711 S.E.2d at 147-48. The reference to the news and the political climate were improper arguments on the basis of matters outside the record. § 15A-1230; s*ee also Jones*, 355 N.C. at 132, 558 S.E.2d at 107

(holding that the prosecutor's reference to the Columbine shootings and the Oklahoma City bombing were improper because, among other reasons, "it referred to events and circumstances outside the record").

In order to constitute reversible error, however, the State's remarks must be not only improper, but so prejudicial that they rendered the trial fundamentally unfair. *See Phillips*, 365 N.C. at 136, 711 S.E.2d at 146. The prosecutor's comments, while improper, do not rise to the level of egregiousness that was present in *Miller* or *Smith*. Specifically, the prosecutor was not abusive, he did not assert a personal belief that any witness was lying, and he did not refer to any criminal history not in the record.

In addition, there is unchallenged evidence that the marijuana, drug paraphernalia, and firearm were found in and around the barn where Bell was also found. Further, Officer Antill testified that Bell admitted that the marijuana belonged to him and that he sold marijuana. Officer Robinson testified that the confidential informants stated they bought marijuana from Bell. In light of this evidence, we cannot say that the improper remarks of the prosecutor so "perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair." *Phillips*, 365 N.C. at 136, 711 S.E.2d at 146. This argument is overruled.

2. The audio-video recording

Bell argues that the trial court committed plain error by allowing Officer Butler's testimony that he reviewed the audio-video recording and identified Bell and the residence at 1549 Cherry Street on the recording. Because we are not convinced that the jury would have reached a different result absent this testimony, we find no plain error.

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve . . . rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

The North Carolina Rules of Evidence provide that an original video or audio recording must be admitted to prove the contents of that video or audio recording unless the rules of evidence or general statutes provide otherwise. N.C.R. Evid. 1001(1)-(2), 1002. Secondary evidence of the content of a video recording which is available violates Rule 1002. *See, e.g., State v. York*, 347 N.C. 79, 91, 489 S.E.2d 380, 387 (1997) (holding that the trial court did not err in excluding transcripts of tape recordings, because admission of the transcripts would violate Rule 1002 where the

tape recordings were available and introduced into evidence); *see also State v. Stewart*, No. COA02-214, 2002 N.C. App. LEXIS 2505 (Dec. 31, 2002) (unpublished) (holding that a witness's testimony that she saw the defendant on a surveillance video was error, but not plain error, in light of other evidence of the defendant's guilt).

At trial, Officer Butler testified that he reviewed the audio-video file and positively identified Bell and 1549 Cherry Street. He further testified that the reason he knew the informants went to the 1549 Cherry Street residence was because the residence appeared on the video. This testimony was secondary evidence of the contents of the audio-video recording made by the informants. The rules of evidence required the actual video or recording to be admitted to prove that Bell and 1549 Cherry Street in fact appeared on the video. Therefore, Officer Butler's testimony about his observations of the video was erroneously admitted.

However, the error in the admission of Officer Butler's statement about the video must have prejudiced the outcome of the trial in order to warrant a new trial. *See Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. Officer Butler testified that he sent two confidential informants to buy marijuana from Bell. He further testified that he followed the informants to within two blocks of the residence at 1549 Cherry Street, that they were out of his sight for only ten minutes, that he then followed them back to the secure meeting place, and that they gave him a bag of marijuana and change from the purchase. In addition, Officer Antill testified that Bell admitted that the

marijuana at 1549 Cherry Street was his and that he sold marijuana. Officer Robinson testified that the marijuana, firearm, and drug paraphernalia were found in and around the barn where Bell was found. In light of this evidence, we are not convinced that absent Officer Butler's statements that he identified Bell and 1549 Cherry Street on the audio-video recording, the jury would have found Bell not guilty. Therefore, we find no plain error.

NO PREJUDICIAL ERROR.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).