IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-348

Filed: 15 November 2016

Union County, Nos. 14 CRS 56132, 56133

STATE OF NORTH CAROLINA

v.

BASIL BRANDON BLAKE and JANET WARD NANCE, Defendants.

Appeal by defendants from judgments entered 23 July 2016 by Judge Jeffrey P. Hunt in Union County Superior Court. Heard in the Court of Appeals 21 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Laura H. McHenry, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant Basil Brandon Blake.

Sean P. Vitrano for defendant Janet Ward Nance.

ZACHARY, Judge.

Defendant Basil Brandon Blake (Blake) and Defendant Janet Ward Nance (Nance) (collectively, "defendants") appeal judgments entered upon jury verdicts finding them both guilty of offenses related to the robbery and assault of victim Jason Hanley ("Hanley"). On appeal, defendants raise three joint issues as to whether: (1)

the testimony of a law enforcement officer contained an impermissible expert or lay opinion; (2) the trial court plainly erred in admitting testimony regarding Hanley's childhood struggles; and (3) the prosecutor's closing remarks were so grossly improper that the trial court erred in failing to intervene *ex mero motu*. Blake also raises a claim of ineffective assistance of counsel based on the damaging effects of testimony that defense counsel elicited from him. We find no error in defendants' convictions, and we dismiss Blake's ineffective assistance of counsel claim without prejudice to his right to file a motion for appropriate relief in the trial court.

I. Background

In March 2015, the Union County Grand Jury indicted Blake for conspiracy to commit armed robbery, armed robbery, and assault with a deadly weapon inflicting serious injury. The Grand Jury indicted Nance for conspiracy to commit armed robbery and armed robbery. Both defendants consented to joinder of their charges, and they were tried together. Defendants' jury trial began on 20 July 2015 in Union County Superior Court. Blake testified in his own defense, and Nance offered no evidence. At trial, the State's evidence established the following facts.

A. State's Evidence

Between 6:00 and 7:00 p.m. on 20 December 2014, Hanley finished working his shift as a prep cook at Russell's Pub in Charlotte. The bar was packed with people, and Hanley decided to hang around and have a few drinks. While Hanley was at the

bar, his boss handed him a Christmas card that contained a $100 cash bonus. As Hanley made his rounds in the bar area, he ran into Blake and Nance, who invited Hanley to accompany them to see their friend, Irene, in the town of Indian Trail. Hanley—who had known Nance for nearly ten years, but who knew Blake only on a casual basis—was attracted to Irene, and he agreed to go for the ride.

At some point during the trip, Nance stopped at a gas station so that Hanley and Blake could use the restroom. Once the three continued on their way, Hanley remarked that Nance was not taking the correct route to Indian Trial; however, Nance assured Hanley that she knew a different way to Irene's house. Nance eventually pulled over near the entrance of the Crismark subdivision in Indian Trial. Blake pulled a pistol and pointed it at Hanley, who tried to grab the gun. Somewhat puzzled, Blake replied, "[H]ey, hey, do you know what this is[?]" Blake demanded money from Hanley, but Hanley refused to comply and threatened to call 911. At some point, Blake struck Hanley's face with the gun four or five times, dragged him from the car, and threw him on the ground. After Nance yelled, "Get the wallet," Blake grabbed Hanley's wallet from his pocket and returned to the car. Blake and Nance drove away as Hanley lay on the ground.

Shortly thereafter, pedestrians discovered a disoriented Hanley and called 911. Union County Sheriff's Deputy J.W. Weatherman responded to the call, and observed that Hanley's head injuries were consistent with his statement that Blake had struck

him with a gun. Hanley was transported to the hospital, where he received stitches in his face and ear.

At trial, it was revealed that Hanley is autistic and lives with his mother (Ms. Hanley) and sister. Ms. Hanley testified that she adopted Hanley from Columbia when he was a severely malnourished infant. She also detailed the challenges Hanley faced from childhood to his adult years, including his speech impediment, his "gullible" nature, and his difficulty establishing relationships with others.

B. Defendant Blake's Evidence

Blake's version of events was markedly different than the account given by Hanley, and it told the story of a drug deal gone bad. According to Blake, he and Nance spent much of 20 December 2014 wrapping Christmas presents before they decided to grab some appetizers and drinks at the pub. While there, Blake and Nance saw Hanley, who sat down at their table and asked for help acquiring some cocaine. Blake responded by arranging for Hanley to purchase the drugs from a friend in Indian Trail. After Hanley stated that he could not drive, Blake agreed that he and Nance would take Hanley to get the cocaine.

Defendants and Hanley departed for Indian Trail, but they soon circled back to the pub because Hanley had forgotten his cell phone at the bar. Once the trip resumed, Hanley insisted that Nance was headed the wrong way, but Nance assured him that she was taking an alternate route to Indian Trail. Nance eventually stopped

at a gas station so that Blake and Hanley could use the restroom. Once the three reached their destination, Blake exited the car and used $180.00 that Hanley had given him to purchase 3.5 grams of cocaine from his friend, who lived in the Crismark neighborhood of Indian Trail. Blake kept one gram of cocaine for himself, returned to the car, and gave the remainder to Hanley, who became "irate" and insisted that he had been "shorted" on the drug deal. Acknowledging Hanley's accusation, Blake stated that he had "take[n] out a gram [of cocaine]," because Hanley had not offered any gas money for the road trip.

When Hanley remained "adamant" that he had been cheated, Blake ordered Nance to stop the car. Hanley and Blake, who was wearing rings on his right hand, jumped out of the car and the altercation became physical. Hanley tossed the cocaine in Blake's face and "rushed" him, which prompted Blake to punch Hanley's face multiple times with his right hand. Once Hanley fell to the ground, Blake kicked him twice in the head. Blake returned to the car after Nance admonished him to quit beating Hanley. Defendants left Hanley on the ground and drove away.

C. Jury Verdicts and Sentencing

On 23 July 2015, defendants were found guilty of all indicted offenses. The trial court sentenced Blake to the following consecutive terms of imprisonment: (1) 80 to 108 months' for armed robbery; (2) 31 to 50 months' for conspiracy to commit armed robbery; and (3) 31 to 50 months' for assault with a deadly weapon inflicting

serious injury. Nance received consecutive sentences of 66 to 92 months' for armed robbery and 26 to 44 months' for conspiracy to commit armed robbery. Defendants appeal.

II. Ms. Hanley's Testimony Regarding Hanley's Background

Defendants first challenge Ms. Hanley's testimony concerning Hanley's infancy. On direct examination, Ms. Hanley testified that Hanley, who was adopted from Columbia, was "very ill and severely malnourished" as a young child because he had survived solely on sugar water as an infant. According to Ms. Hanley, Hanley weighed only six pounds at four months of age, whereas the average child in the United States weighs that much at birth. Ms. Hanley also testified that Hanley "had basically on some level given up" when he was placed in adoptive care.

Defendants contend that this testimony was irrelevant and that it aroused the jury's sympathies in Hanley's favor. We disagree.

A. Standard of Review

Because neither defendant objected to the challenged testimony, their arguments are entitled only to plain error review. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because

> plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

Id. (citations and internal quotation marks omitted).

> Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by [N.C. Gen. Stat.] § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

State v. Walker, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citations omitted).

B. Analysis

The relevance of evidence is tested by determining whether it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2015). "Evidence which is not relevant is not admissible." *Id.* § 8C-1, Rule 402 (2015).

Our Supreme Court has recognized that "[i]t is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties and necessary to be known to properly

understand their conduct or motives, or to weigh the reasonableness of their contentions." *State v. Mayhand*, 298 N.C. 418, 428, 259 S.E.2d 231, 238 (1979) (citations omitted). In addition, a trial court need not exclude relevant evidence "simply because it may tend to prejudice the accused or excite sympathy for the cause of the party who offers it. On the other hand, if the only effect of the evidence is to excite prejudice or sympathy, its admission may be ground for a new trial." *Id.* (citations omitted). "The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission." *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987).

In the instant case, the challenged testimony was given in response to questions regarding the circumstances surrounding Ms. Hanley's adoption of Hanley and what "difficulties or challenges [Hanley] faces on an everyday basis." The State's theory of the case was that Blake and Nance took advantage of Hanley's disability in order to rob him. As such, the State notified defendants and the trial court that it intended to prove aggravating factors at trial, including the fact that Hanley was "mentally infirm" and "handicapped." Ms. Hanley's testimony was relevant for those purposes when it was admitted. Furthermore, although the State withdrew the aggravating factors during the charge conference, Ms. Hanley's testimony was still relevant to the State's overall theory of the case. There is no indication that this evidence served to unfairly "excite sympathy" for Hanley. His condition as an infant

was neither repeated nor referenced after Ms. Hanley's testimony, and the trial court made no reference to aggravating factors in its jury instructions. Finally, even if the evidence were erroneously admitted, defendant cannot establish that the error was so "fundamental" that it "had a probable impact on the jury's finding that the defendant[s] w[ere] guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, this argument is without merit.

III. Lay Testimony

Defendants next argue that the trial court erred in allowing Deputy Weatherman to testify that, in his experience, Hanley's wounds were consistent with injuries inflicted by an object as opposed to a hand because Deputy Weatherman was not qualified as a medical expert under Rule 702 of the North Carolina Rules of Evidence. More specifically, defendants contend that Deputy Weatherman's testimony "regarding physical aspects of . . . Hanley's injuries" exceeded the scope of a permissible lay opinion. According to Nance, "the average layman, lacking medical training and experience, could not reasonably have determined" the cause of Hanley's injuries. **[Nance Br p 7]** The essence of defendants' arguments is that the challenged testimony impermissibly lent credibility to Hanley's version of events and tipped the scales in favor of the State.

A. Standard of Review

Although Nance made a timely objection to Deputy Weatherman's testimony, Blake made no objection at all. Blake failed, therefore, to preserve the evidentiary issue, as it relates to him, for appellate review. N.C.R. App. P. 10(a)(1) (2015). However, because Blake specifically and distinctly argues plain error on appeal, we will review his argument under that standard. N.C.R. App. P. 10(a)(4) (2015).

As to Nance's arguments, which are substantially similar to those of Blake, we review the trial court's ruling to determine " 'whether [the evidence] was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence.' " *State v. Blackwell*, 207 N.C. App. 255, 257, 699 S.E.2d 474, 475 (2010) (citation omitted); *State v. Williams*, 363 N.C. 689, 701-02, 686 S.E.2d 493, 501 (2009) (reviewing the trial court's ruling on the admission of lay witness testimony to determine whether the evidence was admissible under Rule 701 and whether the trial court abused its discretion in admitting the evidence). An abuse of discretion occurs when the trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Analysis

Defendants challenge the following portion of Deputy Weatherman's direct testimony:

> [Prosecutor]: . . . Deputy Weatherman, when you made your initial observations of the victim's face, you described

> to the jury the injuries you saw, right?
>
> [Deputy Weatherman]: I did.
>
> [Prosecutor]: And you talked to the victim, correct?
>
> [Deputy Weatherman]: I did.
>
> [Prosecutor]: Were the injuries that you saw on his face consistent with his story?
> . . .
>
> [Deputy Weatherman]: In my experience, you're not going to experience swelling like that from just a hand punch. This was extreme swelling, extreme bleeding. And it was consistent that he was hit with an object as opposed to a hand.

[T 2 pp 464-65] During cross-examination, Deputy Weatherman stated that he had "investigated several hand-to-hand combat assaults," that he had also investigated assaults involving weapons, and that he "saw the same mechanism of injury in this one as the ones with weapons involved."

North Carolina Rule of Evidence 701 provides that

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. 8C-1, Rule 701 (2015). Rule 701 allows witnesses to state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety

of facts presented to the senses at one and the same time." *State v. Roache*, 358 N.C. 243, 294, 595 S.E.2d 381, 414 (2004) (citations and internal quotation marks omitted). Our Supreme Court has explained that "[a]lthough a lay witness is usually restricted to facts within his knowledge, if by reason of opportunities for observation he is in a position to judge . . . the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion." *State v. Lindley*, 286 N.C. 255, 257-58, 210 S.E.2d 207, 209 (1974) (internal citation and quotation marks omitted). Consequently, "a lay witness may still testify to his opinions, which are rationally based on his perceptions and helpful to a clear understanding of his testimony of the determination of a fact in controversy." *State v. Friend*, 164 N.C. App. 430, 437, 596 S.E.2d 275, 281 (2004) (citing Rule 701).

Here, the State was not required to tender Deputy Weatherman as an expert witness in this case, because his testimony falls within the bounds marked by Rule 701. Deputy Weatherman's testimony revealed an "instantaneous conclusion[] of the mind," and it was rationally based on his observations of Hanley's injuries and his experience as a police officer investigating assaults. This testimony was also helpful to a clear understanding of a fact in issue, as Blake was charged with assault with a deadly weapon inflicting serious injury. In that Blake's testimony that he hit Hanley only with his hand conflicted with Hanley's testimony that Blake used a gun in the

assault, Deputy Weatherman's lay witness testimony based on his past experience and his observations of Hanley after the assault occurred was admissible under Rule 701. Accordingly, the trial court neither abused its discretion nor committed plain error by admitting Deputy Weatherman's lay opinion regarding the cause of Hanley's injuries, and the court properly overruled Nance's objection to the testimony.

IV. The State's Closing Argument

Defendants next make a series of arguments to support their assertion that the trial court erred in failing to intervene *ex mero motu* during the State's closing argument. We disagree.

A. Standard of Review

Initially, we note that defendants did not object to the State's closing argument 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*. Under this standard, only 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. Defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Jones, 231 N.C. App. 433, 437, 752 S.E.2d 212, 215 (2013) (citations, quotation marks, and brackets omitted), *disc. review denied*, 367 N.C. 322, 755 S.E.2d 616 (2014).

B. Analysis

Our Criminal Procedure Act imposes several limitations on the scope of closing argument. Pursuant to N.C. Gen. Stat. § 15A-1230(a) (2015), "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 . . . ." However, an attorney may, "on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." *Id.*

Furthermore, it is well established that "[s]tatements made during closing arguments to the jury are to be viewed in the context in which the remarks are made and the overall factual circumstances to which they make reference." *State v. Harris*, __ N.C. App. __, __, 763 S.E.2d 302, 311 (2014) (citation omitted). "As a general proposition, counsel are allowed wide latitude in closing arguments, so that a prosecutor is entitled to argue all reasonable inferences drawn from the facts contained in the record." *Id.* (citations omitted). Absent an objection from the defendant, "the trial court is not required to interfere *ex mero motu* unless the arguments stray so far from the bounds of propriety as to impede the defendant's

right to a fair trial." *State v. Small*, 328 N.C. 175, 185, 400 S.E.2d 413, 418 (1991) (quotation marks and citations omitted).

1. *Remarks on Defense Counsel*

Defendants first assert that the prosecutor's closing argument suggested that defendants had misrepresented the law in an attempt to distract the jury. The challenged portions of the prosecutor's closing include the following statements: "[Defense counsel] didn't tell you the entirety of the instruction on acting in concert"; "It's not fair to give you only sections of the law . . . without giving you the whole law"; "[W]hat do people do behind the goal [when a basketball player is shooting a free throw] . . . ? They [wave] their arms and try to distract them. . . . That's what [defense counsel is] about to do. They're going to try to distract you from the case at hand"; "They're trying to muddy the water. . . . Do not be manipulated by these attorneys"; and "Now there's an old saying, . . . [if] neither [the facts nor the law are] on your side, scream up and down and yell." According to defendants, the language contained in these statements was "abusive, vituperative, and opprobrious[.]" *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994) (citation omitted).

We conclude that defendants' argument is much ado about nothing. The prosecutor's basketball analogy, legal aphorism, and references to defendants' allegedly incomplete preview of jury instructions reflect nothing more than

"shorthand commentary on the arguments [and issues] presented by defense counsel[.]" *Roache*, 358 N.C. at 300-01, 595 S.E.2d at 418 (holding that the trial court was not required to intervene *ex mero motu* when the prosecutor stated "[you better look out] when somebody stand[s] up here . . . before you [and] plays fast and loose with that kind of evidence," and suggested that defense counsel were "doing nothing more than trying to hide [the defendant] behind [a witness's] skirts"). As such, the remarks were not improper.

2. *"Unsworn Testimony" and Personal Opinions About Credibility*

Second, defendants maintain that "the prosecutor [improperly] recast Blake's testimony in the form of a first-person narrative that included facts not in evidence." The challenged portion of the State's closing reads as follows:

> [Prosecutor]: On December 20th five days before Christmas we were wrapping presents. And then we went to the bar after we spent time with our family. And what we did at the bar is I ordered . . . garlic parmesan wings. I ordered a Crown and Coke and a Miller Lite. And my fiancé ordered a [W]hite [R]ussian. [Hanley] came up and I said, hey, [Hanley] --
>
> [Defense counsel]: Your Honor, objection.
>
> The Court: Come down from the witness stand, counsel.
>
> [Prosecutor]: [Hanley] came up and said, hey, how are you doing. He was a friend. So he said, "I'm doing great. How are you doing, [Hanley]? Well, [Hanley], you used to work at Harris Teeter. Why did you leave Harris Teeter? Oh, I was fired because I was stealing meat. I told [Hanley] you shouldn't get into the bad stuff. I have been down that

> road before and it wasn't a good road to take. I'm a recovering drug addict. He later whispers in my ear "can you get me some cocaine[?]" And I called my connection and I said, "sure, I can get you some cocaine, [Hanley]." [Hanley] couldn't drive because [Hanley] doesn't have a car. He doesn't have a license so he asked us to go get it and take him to get some cocaine. . . . [W]e stopped at the gas station.
>
> Then I went to my friend's house and bought some cocaine. He gave me $180. I gave the guy $180. I was supposed to get 3.5 grams of cocaine. [Hanley] was upset. [Hanley] was mad because I shorted him. I stole from him. I stole cocaine. I'm a recovering drug addict but I stole the cocaine from him. Then he was so upset about it, he kept complaining you shorted me, you shorted me, you shorted me. He got so mad I drug him out of the car. And I threw the open container of cocaine, he threw it in my face. It came in my eyes. He was mad I shorted him cocaine, so he threw the rest of the cocaine in my face. So he had no cocaine left.
>
> Then while the cocaine was in my eyes, I started punching him repeatedly and kicked him in the face. That makes no sense. Oh, we bought cocaine. He was mad that the cocaine was short so he threw out the rest of the cocaine. That doesn't make any sense.

Defendants first argue that the "prosecutor's inhabiting the role of [Blake] was intended to provoke the jury's disdain and disbelief of Blake's testimony[,]" and that this "was a blatant attempt to substitute his own narrative for the testimony itself." However, defendants neglect to mention that the initial portion of Blake's direct testimony was, in fact, given in narrative form. Indeed, after defense counsel asked Blake to explain what happened on 20 December 2014, Blake delivered an extensive,

uninterrupted account (two and a half transcript pages) concerning his version of events. The prosecutor eventually objected, and the trial court ordered defense counsel to proceed "on the basis of . . . specific questions and answers." We need say little more than that the prosecutor's attempt to emulate this narrative was a permissible attack on the form of Blake's testimony. As such, this argument lacks merit.

Defendants' principal argument regarding the prosecutor's narrative is that it implied that "Blake was lying because his statements 'made no sense.' " Building on this argument, defendants also assert that the prosecutor improperly vouched for Hanley's version of events while outright attacking the truthfulness of Blake's testimony.

Although attorneys may not express their personal opinions "as to the truth or falsity of the evidence," N.C. Gen. Stat. § 15A-1230(a), the State is permitted to argue that its witnesses are credible. *See, e.g.*, *State v. Wiley*, 355 N.C. 592, 621-22, 565 S.E.2d 22, 43-44 (2002) (noting the difference between improperly vouching for the State's witness and giving the jury reasons to believe the State's evidence), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Likewise, a lawyer " 'can argue to the jury that they should not believe a witness.' " *State v. Golphin*, 352 N.C. 364, 455, 533 S.E.2d 168, 227 (2000) (citations omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Applying these principles to the present case, we conclude that the prosecutor's argument leveled a permissible attack on Blake's credibility. When examined in context, the State's closing urged the jury to determine that Blake had been untruthful because his testimony was internally inconsistent. For example, the prosecutor noted that although Blake claimed the rings on his hand caused Hanley's injuries, no indentations or similar markings were found on Hanley's face. The prosecutor also found it curious that Blake could remember the type of chicken wings he ordered at the pub, but could not remember the last name, address, or phone number of his friend, the drug dealer. Significantly, the challenged statements were part of the State's rebuttal closing argument and they responded to defense counsel's closing arguments to the jury. The attorneys for Blake and Nance argued that Hanley's testimony was inconsistent and lacked credibility. Given the competing theories of the case—Hanley's account of a calculated armed robbery as opposed to Blake's story of a roadside fistfight over cocaine—the prosecutor's narrative constituted a permissible argument that Blake's version of events should not be believed. *See State v. Gladden*, 315 N.C. 398, 426, 340 S.E.2d 673, 690 (1986) (prosecutor's jury argument that " '[t]he only logical inference is that this man is not telling you the truth today, and I submit if I was in his shoes, I probably wouldn't either' . . . was not so grossly improper as to require the trial judge to intervene *ex*

mero motu"). The prosecutor may have exceeded his dramatic license by reciting Blake's testimony at length, but his rhetorical flourishes were not legally improper.

3. *Appeals to Passion*

Finally, Nance argues that the following portion of the prosecutor's rebuttal argument invoked "righteous indignation" toward her and Blake while it garnered "sympathy for Hanley":

> That's why you convict Ms. Nance. That's why you convict her. Because everybody said there are consequences for your actions. That's been said multiple times. Yes, there are. There are consequences for your actions. You chose to do this with Mr. Blake and there are consequences for those actions. . . .
>
> You do not send people away to prison. I do not send people away to prison. People that make choices send themselves away to prison.
>
> People that pick an autistic person out and manipulate him, isolate him, and intimidate him and hit him with a gun, send themselves to prison. That should enrage every single one of you. They picked that boy out. They manipulated him. They hit him. And they didn't just hit him with their fist. He hit him with a gun. That's what they did to him. And they took his wallet. That should make you mad. There's only one thing that you can go and do right now. You can go back there and you can find both of them guilty beyond any doubt. That's what the State would ask you to do.

Here, the prosecutor's references to the "consequences" of Nance and Blake's "manipulation" and "intimidation" of an autistic Hanley may have had an emotional impact on jurors, but this does not make the statements impermissible. We conclude that the remarks were nothing more than an appeal for the jury to seek justice. Our Supreme Court "has consistently held that a prosecutor may argue that a jury is 'the voice and conscience' of the community." *State v. Barden*, 356 N.C. 316, 367, 572 S.E.2d 108, 140 (2002) (citations omitted). "A prosecutor may also ask the jury to 'send a message' to the community regarding justice." *Id.* (citation omitted). Not only were the challenged remarks consistent with the State's theory and grounded in the trial testimony of Hanley and Ms. Hanley, they also fell within the boundaries recognized in *Barden*. Accordingly, for the reasons stated above, the State's closing argument was in no way improper, and the trial court did not err by failing to intervene *ex mero motu*.

V. Ineffective Assistance of Counsel

Finally, Blake argues that he received ineffective assistance when his trial counsel elicited damaging testimony from him.

After Blake testified that he had never shot or owned a gun, Blake's trial counsel asked if he had ever been charged with a gun crime. Blake responded that he had previously been charged with larceny of a firearm (the firearm charge) and stated that he had not been convicted on that charge because "it wasn't true, man."

Next, Blake's counsel inquired into Blake's prior convictions for misdemeanor larceny, uttering and forgery of a check, and obtaining property by false pretenses. Blake confirmed that he had pleaded guilty to those charges, and he acknowledged "responsibility" for them.

When Nance's trial counsel requested that the State be prohibited from questioning Blake on the firearm charge, the trial court found that the door had been "opened" by Blake's attorney. As a result, the State cross-examined Blake on the firearm charge and later referenced the charge during closing arguments. The trial court gave two limiting instructions on Blake's testimony regarding the firearm charge, once during Blake's cross-examination and the other during the final jury charge. The jury charge included instructions that evidence of the firearm charge could not be considered against Nance and that it could "only be considered, if at all," for the impeachment of Blake's testimony or for corroboration purposes.

> To prevail on a claim of ineffective assistance of counsel, a defendant *must first show* that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (emphasis added; citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

On appeal, Blake asserts that his trial counsel's performance fell below an objective standard of reasonableness. Blake also contends that he was prejudiced when his trial counsel opened the door to the admission of the firearm charge and then failed to object to the trial court's jury instructions regarding the charge's permissible uses. According to Blake, defense counsel exposed him to the admission of otherwise inadmissible evidence, which likely led the jury to credit Hanley's testimony that Blake robbed and assaulted him with a gun and to discredit Blake's testimony that he had never owned or possessed a gun.

"When raising claims of ineffective assistance of counsel, the 'accepted practice' is to bring these claims in post-conviction proceedings, rather than on direct appeal. . . . To best resolve [the issue of premature ineffective assistance of counsel claims that have been asserted directly on appeal], an evidentiary hearing available through a motion for appropriate relief is our suggested mechanism." *State v. Dinan*, 233 N.C. App. 694, 700, 757 S.E.2d 481, 486-87 (quoting *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985)), *disc. review denied*, 367 N.C. 522, 762 S.E.2d 203 (2014).

> The preference for the assertion of ineffective assistance of counsel claims in postconviction proceedings rather than on direct appeal inherent in numerous decisions by this Court and the Supreme Court stems from the fact that

> evidence concerning the nature and extent of the information available to the defendant's trial counsel at the time that certain decisions were made and the fact that information concerning any discussions that took place between the defendant and his or her trial counsel, while needed in evaluating the validity of the ineffective assistance of counsel claim under consideration, are generally not contained in the record presented to a reviewing court on direct appeal.

State v. Pemberton, 228 N.C. App. 234, 242, 743 S.E.2d 719, 725 (2013). To that end, our Supreme Court has held: "[S]hould the reviewing court determine that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (citation omitted).

Although Blake may have a colorable claim of ineffective assistance of counsel, this claim is best resolved in the first instance at the trial level. The reasons that Blake's counsel elicited testimony regarding the firearm charge should be further investigated at an evidentiary hearing, where defense counsel may submit a supporting affidavit. As the State points out, defense counsel's strategy may have been to highlight and contrast "Blake's willingness to take responsibility for his bad acts with his 'not guilty' plea in this case." This may have or may not have been an appropriate strategy, or may not have been defense counsel's strategy at all. In any event, based on the record before us, we can only speculate as to whether defense

counsel's decision to introduce Blake's firearm charge fell below an objective standard of reasonableness. Accordingly, we dismiss this issue without prejudice to Blake's right to assert his claim in a motion for appropriate relief in the trial court.

VI. Conclusion

For the reasons discussed above, we conclude that Deputy Weatherman's testimony regarding Hanley's injuries constituted a permissible lay opinion. In addition, the trial court did not err in admitting the challenged portions of Ms. Hanley's testimony. Because the prosecutor's closing remarks were neither improper nor grossly improper, the trial court was not required to intervene *ex mero motu*. Finally, we dismiss Blake's claim of ineffective assistance of counsel without prejudice to his right to file a motion for appropriate relief in the trial court.

NO ERROR; DISMISSED WITHOUT PREJUDICE IN PART.

Judges ELMORE and ENOCHS concur.

Report per Rule 30(e).