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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-524

Filed: 6 December 2016

Pitt County, No. 13CRS057177

STATE OF NORTH CAROLINA

v.

DAITRIEYUAON PARKER, Defendant.

Appeal by Defendant from judgment entered 22 May 2015 by Judge J. Carlton Cole in Pitt County Superior Court. Heard in the Court of Appeals 2 November 2016.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General H. Dean Bowman, for the State.

Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender Paul M. Green, for the Defendant.

DILLON, Judge.

Daitrieyuaon Parker (“Defendant”) appeals from a judgment convicting him of first-degree murder. He argues that the trial court committed reversible error by failing to intervene *ex mero motu* during a portion of the State’s closing argument.

We disagree.

I. Background

In August 2013, Ciera Michelle Clark died after sustaining a gunshot wound while riding in a car. The fatal shot was fired from an adjacent car containing

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Defendant, Allysia Parker (“Allysia”), and Timothy Reaves (“Reaves”). All three were subsequently arrested for the shooting.

Defendant was indicted for first-degree murder. During the trial, the State called Allysia and Reaves as witnesses. Their testimonies tended to show the following: On the evening in question, Defendant, Reaves, and some of the victim’s family members engaged in a fight at a local gas station. The victim left in a car with her family members. Defendant, Reaves, and Allysia entered another car and followed the victim’s car out of the gas station parking lot. When the vehicles were side-by-side at a stop light, Defendant rolled down his window and shot into the other car, killing the victim.

The jury found Defendant guilty of first-degree murder. The trial court sentenced Defendant to life in prison without parole. Defendant timely appealed.

II. Analysis

During the opening argument at trial, Defendant’s counsel informed the jury that the evidence would show that Reaves, and not Defendant, fired the fatal shot. Reaves and Allysia unequivocally testified on behalf of the State that Defendant fired the fatal shot. Defendant’s counsel cross-examined the State’s witnesses, but did not present any evidence.

On appeal, Defendant argues that a portion of the State’s closing argument was grossly improper because it impugned Defendant’s counsel and had the effect of

shifting the burden of proof to Defendant. Defendant's counsel did not object to the State's closing at trial; however, on appeal, Defendant argues that the trial court committed reversible error by failing to intervene *ex mero motu*. We disagree.

Where a defendant fails to object to the State's closing argument at trial, our review is limited to whether the State's closing was so grossly improper as to render the proceedings fundamentally unfair. *State v. Phillips*, 365 N.C. 103, 143, 711 S.E.2d 12, 150 (2011); *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998). In making this determination, the challenged statements must be examined "in the context in which [they were] given and in light of the overall factual circumstances to which [they] refer[]." *State v. Higgs*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998).

On appeal, Defendant contends that the following portion of the State's closing argument improperly impugned Defendant's counsel and impermissibly shifted the burden of proof to Defendant:

You've got the two eyewitnesses that were there. There's only four people out there: there was Defendant, there was Timothy Reaves, and Allysia Parker, and there was [the victim].

What they said up here is the truth. Don't fall for the red herrings. Don't get off track. All the other issues that he may bring up, I don't know what he's going to say, they're superfluous, because we know what happened out there. . . .

You know, [Defendant's counsel] made one promise in his opening statement. He said, by the end of this trial, the evidence is going to convince you that Timothy Reaves

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committed this crime. The promise fell flat. There's no evidence of that. No evidence. Red herring. That was the first red herring, before we even got into the trial. His promise didn't come true. And the reason it didn't come true is because the Defendant . . . perpetrated this crime.

We have reviewed this portion of the closing argument in the context of the entire trial, (including both the closings and the jury instructions), and conclude that it was not grossly improper. The challenged portion did not rise to the level of impugning Defendant's counsel. Taken as a whole, the State's closing was mostly focused on discussing and explaining the jury instructions, not on Defendant's counsel. The State used the wide latitude to which counsel is entitled, to argue to the jury all the law and facts in evidence and reasonable inferences that could be drawn therefrom. *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144 (1993). Here, the State – having to go first in closing arguments and, therefore, not knowing what Defendant's counsel would argue – was merely pointing out that there was no evidence presented to show that Reaves, and not Defendant, fired the fatal shot, though Defendant's counsel had suggested that this would be the case during his opening argument. Nowhere in the State's closing argument is defense counsel denigrated, directly or implicitly.

Additionally, the words used by the State in its closing do not warrant a new trial. While Defendant contends that the State's use of the words “red herrings” and “superfluous” implies that the defense was deceitful, our Supreme Court has held

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that similar language may be “rich in hyperbole,” but not grossly improper. *State v. Larrimore*, 340 N.C. 119, 160, 456 S.E.2d 789, 811 (1995) (holding that the closing statement, “*It is a red herring that they want you to chase. They want you not to see the truth. That’s what the fog, the smoke, the dirt, that’s what that was all cast out for, to obscure the truth. . . . The defense wants you chasing rabbits . . .*” is not grossly improper and does not constitute prejudicial error.)

Finally, the State was not advocating for a shift in the burden of proof regarding whether Reaves fired the shot. Rather, when looking at the context of the entire closing argument, this passage merely suggests that there was no evidence supporting Defendant’s theory of the case, that Reaves fired the shot. After reviewing the entirety of the closing arguments and the jury instructions, we conclude that it was clear to the jury that the State bore the burden to prove that Defendant fired the fatal shot and that the jury had to determine whether they believed the State’s evidence beyond a reasonable doubt.

In conclusion, we hold that the State’s closing did not rise to the level of gross impropriety as to require the trial court to intervene *ex mero motu*.

NO ERROR.

Judges ELMORE and HUNTER, JR., concur.

Report per Rule 30(e).