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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-242

Filed: 19 November 2019

Mecklenburg County, Nos. 15CRS228616-17, 15CRS228619, 15CRS228625

STATE OF NORTH CAROLINA

v.

DANIEL DEMETRIUS BLAKNEY, Defendant.

Appeal by defendant from judgment entered 23 August 2018 by Judge Daniel Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John F. Oates, Jr., for the State.

Richard Croutharmel for defendant-appellant.

BERGER, Judge.

On August 22, 2018, a Mecklenburg County jury found Daniel Demetrius Blakney ("Defendant") guilty of first-degree murder, first-degree kidnapping, first-degree burglary, and common law robbery. Defendant was sentenced to life in prison without the possibility of parole for his first-degree murder conviction. Defendant was also sentenced to 252 to 336 months in prison for the remaining convictions. On

appeal, Defendant argues that the trial court erred when it failed to intervene *ex mero motu* during the State's opening statement. Specifically, Defendant contends the trial court should have intervened when the State made a purported misrepresentation which resulted in Defendant being convicted in violation of his Due Process rights under the Fourteenth Amendment of the United States Constitution. We disagree.

Factual and Procedural Background

On July 19, 2015, David Doyle ("Doyle") was found dead in his home in Mecklenburg County, North Carolina. Doyle's body was discovered on the floor of his living room with his hands and feet tied up with nylon cord. Medical examiners ultimately determined that Doyle was strangled to death by hand. He also had severe bruising across his body, two broken ribs, a fractured shoulder blade, a stab wound near his temple, and numerous second-degree burns.

Doyle's home looked as if had been ransacked. Officers also discovered a large safe in Doyle's garage that the perpetrators had tried and failed to move using a car jack. Near Doyle's body, law enforcement officers found a long, thin piece of metal. In the kitchen, one of the electric burners of Doyle's stove was turned on to the highest setting. Crime scene investigators collected fingerprints, bloody footprints, and DNA swabs from the scene. Footprint analysis showed that one of the footprints matched a Nike "Foamposite" shoe.

DNA analysis led law enforcement to their first suspect, Peter Gould ("Gould"), which, in turn, led to the discovery of Defendant and his step-brother, Tardra Bouknight ("Bouknight"). During the weekend of the murder, Bouknight borrowed a minivan from his mother, who is also Defendant's step-mother. Surveillance footage showed the minivan leaving Doyle's neighborhood around 11:00 p.m. on the night of the murder.

The State also obtained cell phone records for the phone numbers used by Defendant, Gould, and Bouknight in July 2015. With help from the Federal Bureau of Investigation, law enforcement determined that the three phones were in southeast Charlotte early on the evening of the murder. Then, from 10:07 p.m. to 11:09 p.m., the phones were clustered near Doyle's neighborhood in the southwestern part of Mecklenburg County. By 11:15 p.m., the phones were once again returning towards Charlotte.

During the murder investigation, law enforcement officers were given consent to search Defendant's home. While searching Defendant's home, officers found a pair of bloodstained Nike Foamposite shoes. Crime lab technicians determined that the blood on Defendant's shoes matched a sample from Doyle.

On August 17, 2015, the Mecklenburg County Grand Jury indicted Defendant on charges of first-degree murder, first-degree kidnapping, first-degree burglary, and robbery with a dangerous weapon. Defendant's first trial resulted in a mistrial on

May 8, 2018 when the jury was unable to reach a unanimous verdict. On August 13, 2018, Defendant's trial came on for rehearing.

Defendant was convicted by a Mecklenburg County jury of first-degree murder, first-degree kidnapping, first-degree burglary, and common law robbery. He was sentenced to life in prison without parole for his first-degree murder conviction. Defendant was also sentenced to 252 to 336 months in prison for the remaining convictions. Defendant timely appeals.

Analysis

On appeal, Defendant argues that the trial court erred when it failed to intervene *ex mero motu* after the State made a purported misrepresentation during its opening statement. Defendant further contends that the State's remarks during opening statements resulted in Defendant being convicted based upon false evidence. We disagree.

I. *Ex Mero Motu* Intervention

First, Defendant argues that the trial court erred when it failed to intervene *ex mero motu* during the State's opening statement.

"The purpose of an opening statement is to permit the parties to present to the judge and jury the issues involved in the case and to allow them to give a general forecast of what the evidence will be." *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685 (1986). Opening statements are not evidence and may not be used or

considered as evidence by the jury during deliberation. *State v. Lewis*, 321 N.C. 42, 49, 361 S.E.2d 728, 732-33 (1987). Where a Defendant fails to object to portions of an opening statement that form the basis of his appeal, our review is limited to an examination of whether the trial court was required to intervene *ex mero motu*. *Gladden*, 315 N.C. at 417, 340 S.E.2d at 685. "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." *State v. Waring*, 364 N.C. 443, 499, 701 S.E.2d 615, 650 (2010) (*purgandum*).

To establish that the trial court erred by failing to intervene *ex mero motu* during opening statements, a defendant must show (1) that the prosecutor's remarks during opening statements were improper, and, if so, (2) that the remarks were so grossly improper as to impede the defendant's right to a fair trial. *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). When determining the impropriety of a prosecutor's remarks, "the comments must be viewed in the context in which they were made and in light of the overall factual circumstances to which they referred." *State v. Call*, 349 N.C. 382, 420, 508 S.E.2d 496, 519 (1998). Only where this Court "finds both an improper [remark] and prejudice will [we] conclude that the error merits appropriate relief." *Huey*, 370 N.C. at 179, 804 S.E.2d at 469.

During opening statements, the prosecutor stated in pertinent part:

> As we indicated during jury selection, there are no eyewitnesses that the State will have testifying to this because David Doyle, Ladies and Gentlemen, is dead. And you'll see from the pictures[,] he was face down in a puddle of blood. It's important you remember the blood David Doyle shed. Not only does it show the viciousness and brutality in how he died, it is very important as part of the evidence in this case.
>
> We talked about it during jury selection, but you're going to hear during the course of this trial the State has evidence that three individuals were involved with this robbery and murder. The Defendant, Daniel Blakney, a person named Peter Gould, and an individual who is the Defendant's brother, Tardra Bouknight.
>
> And the evidence the State is going to show you, since we don't have an eyewitness to prove that these individuals were the murderers and robbers of Mr. Doyle, will be surveillance video, we'll also have phone records, we'll have DNA and then we'll have shoes. I'll talk a little bit more about those in a few minutes.

Defendant argues that the prosecutor made an improper statement with the comment, "[T]here are no eyewitnesses that the State will have testifying to this because David Doyle, Ladies and Gentlemen, is dead." According to Defendant, the State effectively implied that "there are no eyewitnesses to the crimes" except the decedent. However, Defendant fails to view the prosecutor's comment within the context in which it was made and in light of the overall factual circumstances to which it referred. *Call*, 349 N.C. at 420, 508 S.E.2d at 519.

The prosecutor did not state that there were no eyewitnesses to the crimes besides the decedent, but instead stated that there were no eyewitnesses the State intended to call because all surviving eyewitnesses participated in the commission of the crime. Subsequently, the prosecutor named all three men who were believed to have participated in the crime and forecasted the evidence it would rely on in light of the fact that it lacked a disinterested eyewitness "to prove that *these* individuals were the murders and robbers." Accordingly, Defendant has failed to carry his burden of demonstrating that the prosecutor's remarks during opening statements were improper. Because Defendant cannot satisfy the first prong of our *ex mero motu* analysis, we conclude the trial court did not abuse its discretion by failing to intervene on Defendant's behalf.

II. Conviction Based On False Evidence

Next, Defendant contends that the prosecutor's remarks during opening statements resulted in Defendant being convicted based upon false evidence. This argument ignores the purpose of opening statements and the trial court's instruction to the jury prior to opening statements.

Opening statements are not evidence and may not be considered as evidence by the jury during deliberation. Moreover, it is well-settled in North Carolina that jurors are presumed to understand and comply with the instructions of the trial court. *State v. Britt*, 288 N.C. 699, 713, 220 S.E.2d 283, 292 (1975).

Prior to opening statements being made in this case, the trial court correctly instructed the jury as follows:

> First of all, the attorneys will give an opening statement. The purpose of an opening statement is narrow and limited. It's an outline of what the attorney believes the competent and admissible evidence will be. An opening statement, however, is not evidence. It must not be considered by you as evidence. Following the opening statements[,] evidence will be offered.

Here, the court correctly instructed the jury of the "narrow and limited" purpose of opening statements. The judge informed the jury that opening statements are not evidence and that evidence would be presented following opening statements. Defendant has failed to identify anything in the record that would overcome the presumption that the jurors understood and complied with the trial court's instruction. Therefore, Defendant's contention that the State's opening statement resulted in Defendant being convicted based upon false evidence is meritless.

Conclusion

For the reasons state herein, Defendant has failed demonstrate that the prosecutor made an improper remark during opening statements. Thus, the trial court did not err. Additionally, Defendant's argument that the State's opening statement resulted in Defendant being convicted based upon false evidence is without merit.

NO ERROR.

Judges INMAN and HAMPSON concur.

Report per Rule 30(e).