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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 20-117

Filed: 1 December 2020

Guilford County, No. 18 CRS 89697, 19 CRS 25151

STATE OF NORTH CAROLINA

v.

DONALD LEE SAPP, JR., Defendant.

Appeal by defendant from judgment and order entered 22 July 2019 by Judge Martin B. McGee in Guilford County Superior Court. Heard in the Court of Appeals 21 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth Forrest, for the State.

Gilda C. Rodriguez, for defendant-appellant.

YOUNG, Judge.

This appeal arises out of a conviction for felonious larceny and felonious breaking and entering. The trial court did not err in overruling Defendant's objection to the State's comment in closing argument that Defendant was a "convicted liar." Furthermore, Defendant did not properly preserve any other issues with the State's closing argument. However, we hold that Defendant brought his claim for ineffective

assistance of counsel prematurely. Accordingly, we affirm the trial court's decision in part, and dismiss in part without prejudice to Defendant filing a motion for appropriate relief in the trial court.

I. Factual and Procedural History

On 6 December 2018, a Dollar General security system notified law enforcement and store management that there was a breaking and entering. When Officer Samuel Tallent ("Officer Tallent") arrived on the scene, he found Donald Lee Sapp, Jr. ("Defendant") holding the cash register. Defendant was compliant with Officer Tallent's commands and indicated that there was someone else in the store ("Gibson"). Defendant and Gibson were both arrested. Officer Tallent testified that it looked like Defendant had been drinking "a little bit" of alcohol, and on a scale of one to ten, he put Defendant "around a three or four." Defendant was not exhibiting signs of extreme intoxication. Defendant's answers were coherent, and he did not have to seek any type of medical treatment. Officer Tiesha Mercer ("Officer Mercer") was also on the scene, and she testified that Defendant's responses to her were coherent and logical, and she did not remember an odor of alcohol on him.

Defendant testified that he remembers the events leading up to Dollar General but has no recollection of arriving at Dollar General. He also testified that he had past convictions for identity theft, defrauding a drug or alcohol screening test,

obtaining property by false pretenses, common law robbery, assault on a female, assault on a government official, and attempted financial card theft.

The jury found Defendant guilty of felonious larceny and felonious breaking and entering. Defendant pleaded guilty pursuant to *Alford* to attaining the status of a habitual felon and habitual breaking and/or entering. As a part of his plea, Defendant informed the court that he was satisfied with his lawyer's legal services. The trial court consolidated the convictions and sentenced Defendant to a minimum of 128 months and a maximum of 166 months imprisonment. Defendant gave oral notice of appeal in open court.

II. Closing Arguments

The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection. In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision.

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, 131, 558 S.E.2d 97, 106-107 (2002) (citations and quotation marks omitted).

Defendant contends that the trial court erred when it overruled Defendant's objection to the State's statement during its closing argument that Defendant was a "convicted liar." We disagree.

The North Carolina Supreme Court has held that closing arguments must: "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passions or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *State v. Tart*, 372 N.C. 73, 80, 824 S.E.2d 837, 842 (2019) (internal quotation marks and citation omitted).

In the State's closing arguments, the State referred to Defendant as a "convicted liar." This comment was not a personal opinion, but instead referred to Defendant's past conviction for defrauding a drug or alcohol screening and Defendant's past convictions for identity theft and obtaining property by false pretenses. *Id.* The State's comment does not rise to the level of "name-calling," and even if it did, our Supreme Court has found that name-calling alone is not prejudicial enough to warrant a new trial. *See State v. Roache*, 358 N.C. 243, 297-98, 595 S.E.2d 381, 416 (2004); *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002); *State v. Smith*, 279 N.C. 163, 165, 181 S.E.2d 458, 459 (1971).

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Furthermore, the State's comment did not refer to matters beyond the record as Defendant testified to these matters at the hearing. The State was not appealing to passions or prejudices, and the comment was constructed from fair inferences drawn only from evidence properly admitted at trial. Defendant cannot show that the trial court overruling the objection was not the result of a reasoned decision. Accordingly, the trial court did not abuse its discretion in overruling Defendant's objection to the State's comment during its closing argument.

Even if the comment were improper, the evidence of Defendant's guilt was so overwhelming that he could not show that absent the comment the jury would have reached a different result. There was a surveillance video showing that Defendant broke into Dollar General, and Defendant admitted that it was him in the video. Even though he claimed he had no memory of being at Dollar General, the video shows him acting with intent to break-in and remove items from the store. Furthermore, Defendant was not showing signs of extreme intoxication, was coherent, compliant and was able to follow law enforcement's directions. Therefore, Defendant failed to meet his burden of showing that the State's comment was so prejudicial as to warrant a new trial. Accordingly, the trial court did not abuse its discretion in overruling Defendant's objection to the State's comment.

Defendant also contends that the State made numerous statements during its closing argument which insinuated that Defendant was lying, and that the trial court

abused its discretion by not intervening *ex mero motu* during the State's closing argument. However, Defendant admits that his trial counsel did not object. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . ." N.C.R. App. P. 10(a)(1). Therefore, we do not reach the merits of this argument.

III. Ineffective Assistance of Counsel

Defendant further contends that he received ineffective assistance of counsel at sentencing, because his trial counsel failed to put the State to its burden of proof for Defendant's prior two possession of drug paraphernalia offenses, thereby causing the convictions to be classified as Class 1, rather than Class 3, misdemeanors. For the following reasons, we dismiss this argument.

It is well established that ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation omitted) (quoting *State v. Fair*, 354 N.C. 131, 166, 577 S.E.2d 500, 524 (2001)), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005).

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Defendant contends that trial counsel should have argued the State was required to present evidence that his 1996 and 2007 possession of drug paraphernalia convictions were for possession of non-marijuana paraphernalia, rather than having Defendant stipulate to the Class 1 misdemeanor convictions. Specifically, Defendant contends that a determination that his prior convictions did not involve marijuana would have impacted the classification of his prior offenses. It is possible that, had trial counsel argued this issue, it may have had an impact upon the outcome. However, the record before us is silent on the question of whether defendant's prior offenses in fact involved marijuana. Because a determination of whether Defendant's prior convictions involved marijuana requires an evidentiary hearing, Defendant's claim for ineffective assistance of counsel is dismissed without prejudice to Defendant filing a motion for appropriate relief in the trial court.

NO ERROR IN PART, DISMISSED WITHOUT PREJUDICE IN PART.

Judges DILLON and INMAN _____.

Report per Rule 30(e).