IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-577

No. COA20-521

Filed 19 October 2021

Surry County, Nos. 19 CRS 293, 19 CRS 51128, 19 CRS 51129

STATE OF NORTH CAROLINA

v.

BYRON DONNELL GREEN

Appeal by defendant from judgments entered 26 February 2020 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 22 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General John H. Schaeffer, for the State.

Michael E. Casterline, P.A., by Michael E. Casterline, for defendant.

ARROWOOD, Judge.

¶ 1 Byron Donnell Green ("defendant") appeals from judgments entered 26 February 2020 for convictions of attempted murder, discharging a weapon into occupied property inflicting serious injury, and assault with a deadly weapon with intent to kill inflicting serious injury. For the following reasons, we find that defendant received a fair trial free of error.

I. Background

¶ 2 In the afternoon of 20 April 2019, Craig Sheff ("Sheff") was in the Simmonstown neighborhood of Mount Airy, driving away from his parents' house on Eleanor Avenue after picking up his two young children, with plans to take them to a McDonald's. Sheff's girlfriend, Tori Dunning ("Dunning"), was seated in the passenger seat, while the children sat in the back of the vehicle; Sheff's daughter, who was seven years old, sat behind Sheff, while his son, who was nine, sat behind Dunning.

¶ 3 As Sheff proceeded on Eleanor Avenue, a gray Ford Escape approached from the opposite direction. Defendant was driving the Ford Escape, and Barry Pilson ("Pilson"), defendant's cousin, was riding in the front passenger seat. The Ford Escape crossed the centerline and "swooped in front of" Sheff's vehicle to initiate a three-point turn, blocking Sheff's way on Eleanor Avenue. Sheff stopped abruptly so as not to collide with the Ford Escape. Sheff then lowered his window and shouted at defendant, mentioning he had his children with him in his vehicle,[1] as defendant proceeded to back into a driveway. Sheff then drove past defendant and continued on his way to McDonald's toward U.S. Highway 103 ("Highway 103"). Unbeknownst

[1] From the Record and transcripts, it is unclear what exactly Sheff shouted at defendant and whether defendant shouted to Sheff as well. According to Sheff's testimony, he shouted: "I got my f-ing kids with me." According to Dunning, Sheff shouted: "Move your f-ing car. I have my kids in the car."

to either Sheff or Dunning, as Sheff drove away, defendant exited the Ford Escape with a gun and shot in the direction of Sheff's vehicle multiple times.

¶ 4 Moments after driving onto Highway 103, Sheff noticed the same Ford Escape "approaching [him] real fast." Sheff pulled over off the side of the road and into a driveway to let defendant pass. Sheff did not come to a full stop but slowed down his vehicle significantly. "[B]y the time [he] got over into the driveway," Sheff looked into his rearview mirror and saw defendant "coming up beside [his] car with the window rolling down." Sheff could see defendant was pointing a gun, while Pilson had tilted his seat back. When the Ford Escape reached the back end of Sheff's vehicle, Sheff "heard [a] bang[,]" followed by his children crying, while defendant "[s]ped off."

¶ 5 Dunning called 911 and took a picture of defendant's vehicle "before it got too far out of sight[,]" capturing a Ford Escape that had a personalized license tag that read "Fabalous [sic]."[2] Then, seeing that his children were hurt and there "was blood and glass everywhere," Sheff drove to a local hospital. Sheff's son had sustained a bullet injury entering his chin and exiting his neck; his daughter sustained a bullet injury through her nose and "out the side of her face," as well as "glass burns[.]" Both children were ultimately transported by ambulance to a different hospital in Winston-Salem. Sheff's son was released later that night, while his daughter was

[2] During her testimony, Dunning identified the picture she took of the Ford Escape, State's Exhibit 10, and stated she "believe[d]" its license plate "said fabulous, but . . . spelled funny."

hospitalized for about "a week and a half" and required surgeries both during her hospitalization and after.

¶ 6 Around 4:30 p.m. on 20 April 2019, police officers arrived at defendant's residence, where they found a Ford Escape bearing a license plate that read "FABALOUS." Police then questioned defendant and Pilson, and subsequently arrested defendant. When defendant was taken to jail, the police removed from his person, among other items, a white hat.[3]

¶ 7 On 13 May 2019, a Surry County grand jury indicted defendant on two charges of attempted first degree murder (19 CRS 293); assault by pointing a gun, and discharging a weapon into occupied property/vehicle inflicting serious bodily injury (19 CRS 51128); and two charges of assault with a deadly weapon with intent to kill inflicting serious injury (19 CRS 51129).[4]

¶ 8 The matter came on for trial on 17 February 2020 in Surry County Superior Court, with Judge Puckett presiding. During the trial, which lasted several days, the State called as witnesses, among others: Sheff; Kent Brown ("Brown"), a resident on Eleanor Avenue; Dunning; Pilson; and Judy Barnes ("Barnes"), defendant's fiancée

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[3] At trial, the State introduced the hat, and other items removed from defendant the evening of 20 April 2019, as its Exhibit 33.

[4] The State ultimately dismissed the charge of assault by pointing a gun at trial.

at the time of the incident. Defendant did not call any witnesses or put on any evidence.

¶ 9 At trial, both Sheff and Dunning testified that they recognized defendant as the driver during their interaction with the Ford Escape on Eleanor Avenue. Specifically, Sheff recognized defendant from "the community" and had briefly gone to school with defendant about twenty years prior, though he had never interacted with defendant directly. Dunning did not know defendant personally but had recognized him from Facebook and had "heard of him." Sheff did not recognize Pilson, whereas Dunning "immediately recognized" Pilson as she had attended high school with him, though she had not seen him for "four or five years" since graduating. Dunning noted defendant was wearing a hat when she saw him on 20 April 2019, while Sheff specifically recalled defendant wearing a white hat on that day.

¶ 10 Brown, a resident of Eleanor Avenue, testified that on the afternoon of 20 April 2019 he and his girlfriend were walking from Brown's cousin's residence, also on Eleanor Avenue, to Brown's home. As Brown was walking, he saw "[defendant]'s vehicle pull across the road on . . . Sheff's side." Defendant was "getting ready to back up in [a] driveway[,]" keeping "the road blocked off as he[] [wa]s backing up." According to Brown, defendant and Sheff then "had some words[,]" to the effect of: " 'You['re] blocking the road,' and something about [Sheff] having his kids in the car." Brown recognized both Sheff and defendant; Brown knew Sheff because they

had grown up in the same neighborhood, whereas he "knew of" defendant and knew what defendant looked like through Facebook. Brown also noted defendant was wearing a white hat on 20 April 2019. Brown did not recognize Pilson, but saw that defendant had a passenger sitting next to him.

¶ 11 According to Brown, while defendant was backing into a driveway, Brown was standing on the same side of the road, approximately fifteen or twenty feet away. After Sheff drove away, Brown heard defendant say "he was 'getting ready to cap this n[*****].' " Then, defendant got out of his car and pointed a gun, with the safety still on, in Brown's direction. When defendant went to remove the safety, Brown and his girlfriend moved away from defendant's line of fire and into a yard. Defendant "fire[d] off three shots toward the back end of [Sheff]'s vehicle." Then, Defendant returned to his vehicle and, according to Brown, said he was going to " 'go kill this n[*****].' "

¶ 12 At trial, Pilson testified that in the afternoon of 20 April 2019, he and defendant came across Sheff's vehicle while driving on Eleanor Avenue. According to Pilson, defendant "went to make a three-point turn in the road" and "had backed up into a driveway . . . when [Sheff] had c[o]me up the road[.]" Pilson testified there were a few exchanges back and forth between Sheff and defendant, during which Sheff had said "[s]omething about moving the car and something about his kids in the car[.]" Then, after Sheff drove away, defendant grabbed a gun, stepped out of his vehicle, and "started shooting at the back of [Sheff]'s car." Pilson did not know where

the gun had come from but assumed defendant had picked it up from his house, where the two had been earlier that day. Then, according to Pilson, defendant "got back in his car[,]" said, " 'I'm going to shoot that n[*****] in the face[,]' " and "chased [Sheff]'s car down."

¶ 13 According to Pilson, defendant caught up to Sheff's car on Highway 103. When Sheff pulled over, defendant "slowed down beside of [Sheff's] car" while Pilson "reclined [his] seat a little bit." Next, defendant lowered the passenger-side window and "shot out of the car into [Sheff]'s car." Defendant then "sped up and said, 'I don't know how I missed; I hit the back glass[,] . . . . All I shoot is head shots; I don't miss.' "

¶ 14 Barnes, defendant's then-fiancée, testified that on 20 April 2019, "around four o'clock[,]" she was inside the home she and defendant shared when defendant came in and was immediately followed by the Mount Airy Police Department. Barnes also testified that, at the time, she owned a dark gray Ford Escape, which she and defendant shared, with a "specialty tag" that read "Fabalous." After police officers apprehended defendant, Barnes spoke with him briefly; according to Barnes, defendant told her, "I messed up."

¶ 15 After defendant was arrested, Barnes received a "series" of phone calls from defendant while he was in jail.[5] At trial, Barnes corroborated that, during one such

[5] Among its numerous exhibits, the State included recordings of phone calls between Barnes and defendant while defendant was in jail.

call, defendant told her, "Holler at the witness, holler at [Sheff], and give him some money[,]" which Barnes took to mean defendant was "trying to get somebody not to testify." Defendant also told Barnes, "There's two kids I hit." During another phone call, defendant asked Barnes to "come to court and say [she] shot the kids[,]" which Barnes "didn't like . . . at all." During another call, defendant talked about "a whatchamacallit [sic]" that Barnes kept in the trunk of her car, which Barnes understood to mean her gun, which she had kept in her car at times; defendant also asked Barnes, "Why didn't you take the bullets?"

¶ 16 At the close of all evidence, Assistant District Attorney Quentin E. Harris ("ADA Harris") and Assistant District Attorney Tim Watson ("ADA Watson") made closing arguments for the State. After ADA Harris's closing argument, ADA Watson began his as follows:

> Somebody ought to do something about crime in Surry County. You ever heard anybody say that? Have you ever said it? Now those lawmen, Sheriff's Department, they ought to do more about crime in Surry County. You ever heard that? You ever said it? Yeah. Those DAs ought to stop making plea bargains with people over there in Dobson. You ever heard that? You ever said it? Yeah. Those judges, they ought to stop giving them a slap on the wrist over there in Dobson. You ever heard that? You ever said it? I've heard it. Yeah, somebody ought to do something about crime in Surry County. Yeah, they should. About serious crime.
>
> And, folks, I want you to think about this. Today in Dobson, North Carolina, in this very courthouse, in courtroom number 1, that somebody is you.

> . . . .
>
> It takes citizens like you to come in this courtroom and once and for all say enough is enough. Enough is enough of [defendant] and what he does out on the streets. It's time for people like you to come in here and hear this case and hear the evidence and see the witnesses and hear all that's done -- see the pictures, see the evidence of what he's done, and say enough is enough. Yeah. Somebody ought to do something about the serious crime in Surry County. I agree.

¶ 17 Further on into his closing argument, ADA Watson continued: "Yes, ladies and gentleman, somebody ought to do something about crime in Surry County. You're absolutely right. And today, that somebody is you. My goodness." At this point, Defense counsel objected and was overruled:

> MR. ERDMAN: Your Honor, I'm going to object to that argument as being inflammatory, and for Mr. Watson refraining from transferring the jurors' feelings from unrelated matters to this case at hand. He's done that several times, Your Honor.
>
> THE COURT: Overruled.

ADA Watson proceeded with his closing statement: "Somebody ought to do something about the crime in Surry County. Got to do something about the shootings in Surry County." Finally, he concluded:

> Yeah, folks. Somebody ought to do something about crime in Surry County. You better believe it. Folks, today in Dobson, North Carolina, in this courthouse, in this very courtroom, that somebody is you. What you going to do? [sic] Thank you.

¶ 18 On 26 February 2020, the jury returned guilty verdicts on two counts of attempted first degree murder, one count of discharging a firearm into occupied

property inflicting serious bodily injury, and two counts of assault with a deadly weapon with intent to kill inflicting serious injury. The jury also found aggravating factors due to the victims', Sheff's two children, "very young" age. The trial court found defendant a Record Level VI and sentenced him "in the aggravated range." The trial court then entered a consolidated judgment for the two attempted murder convictions, sentencing defendant to a term of 393 to 487 months imprisonment. For the remaining convictions, the trial court sentenced defendant to three consecutive separate terms of 182 to 231 months imprisonment each.

¶ 19 Defendant gave oral notice of appeal in open court, followed by written notice of appeal on 6 March 2020. Defendant's appeal is properly before this Court pursuant to N.C. Gen Stat. §§ 7A-27(b) and 15A-1444.

II. Discussion

¶ 20 Defendant contends the trial court erred by overruling defense counsel's objection to the State's closing argument, claiming ADA Watson "repeatedly urged jurors to end crime in Surry County by convicting" defendant. We disagree.

¶ 21 "A challenge to the trial court's failure to sustain a defendant's objection to a comment made during the State's closing argument is reviewed for an abuse of discretion . . . ." *State v. Copley*, 374 N.C. 224, 228, 839 S.E.2d 726, 728 (2020) (citation and quotation marks omitted; alteration in original). "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." *Id.* at 228, 839 S.E.2d at 729 (citation and quotation marks omitted). "We first determine if the remarks were improper and then determine if the remarks were of such a magnitude that their inclusion prejudiced [the] defendant." *Id.* (citation and quotation marks omitted; alteration in original). "Assuming that the trial court's refusal to sustain the defendant's objection was erroneous, the defendant must show that there is a reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted." *Id.* (citation and quotation marks omitted).

¶ 22 Because our Supreme Court has held "that the analysis of prejudice is ultimately dispositive" in these cases, "[h]ere, we need not conduct the two-part analysis in its entirety." *Id.* (citing *State v. Murrell*, 362 N.C. 375, 392, 665 S.E.2d 61, 73 (2008) ("Even assuming, *arguendo*, the impropriety of the prosecutor's reference to Dr. Kramer, defendant has failed to demonstrate prejudice.")). "Thus, we assume without deciding that [ADA Watson]'s comments . . . were improper" and focus solely on whether these comments prejudiced defendant in this case. *See id.* at 228-29, 839 S.E.2d at 729.

¶ 23 "[I]n the guilt-innocence phase of a non-capital trial, the court must look to the evidence of defendant's guilt as well as to the remainder of the closing argument to determine whether the argument was prejudicial." *Id.* at 229, 839 S.E.2d at 730.

Specifically, "the purpose of a prejudice analysis is to determine whether there is a reasonable possibility that the jury would have acquitted defendant had his objection to the State's argument been sustained. It is defendant's burden to show this." *Id.* at 230, 839 S.E.2d at 730 (citation omitted).

¶ 24 At issue in *Copley* was whether the State's mention of race in its closing argument—particularly, noting that the victim was black and the defendant was white—prejudiced the defendant's case. *Id.* at 227, 839 S.E.2d at 728. Our Supreme Court concluded that the "[d]efendant himself admitted . . . on cross-examination that he had not been truthful with investigators[,]" and the State's closing argument at trial focused on these admissions. *Id.* at 231, 839 S.E.2d at 730. Thus, according to the Supreme Court, "the allegedly improper argument was a small part of the prosecutor's much more extensive argument . . . ." *Id.* Further, the Supreme Court considered whether, based on the State's evidence, "there [wa]s a reasonable possibility the jury would have acquitted defendant if the prosecutor's remarks had been excluded." *Id.* (citation omitted). Ultimately, because of the evidence presented by the State, including "numerous witnesses" and "numerous exhibits[,]" the defendant failed to show there was a reasonable possibility the jury would have acquitted him had his objection been sustained. *Id.* at 231-32, 839 S.E.2d at 731. Thus, our Supreme Court held that the State's remarks on race did not prejudice the defendant. *Id.* at 232, 839 S.E.2d at 731.

¶ 25 The outcome here is similar. Here, defendant argues ADA Watson "repeatedly made comments" during the State's closing argument that "directed the jury to consider facts outside the record and were calculated to mislead and prejudice the jury[,]" thus causing defendant to be "deprived . . . of his right to a fair trial" when the trial court overruled defense counsel's objection. This is, however, the extent of defendant's argument; on appeal, defendant merely reiterates that the State's comments on the state of crime generally in Surry County were improper, without "show[ing] that there is a reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted." *See id.* at 228, 839 S.E.2d at 729 (citation and quotation marks omitted).

¶ 26 Looking at the State's contested comments in the context of ADA Watson's closing argument as a whole, even assuming the comments were improper they did not make up the bulk of the State's overall argument; not only did ADA Watson's closing argument focus on the strength of witness testimony at trial, but it was also preceded by ADA Harris's own closing argument, to which defendant did not object. Thus, ADA Watson's "allegedly improper argument was a small part of the [State]'s much more extensive argument . . . ." *See id.* at 231, 839 S.E.2d at 730.

¶ 27 Additionally, here, as in *Copley*, the State presented "numerous witnesses" as well as "numerous exhibits." *See id.* at 231, 839 S.E.2d at 731. Specifically, among its exhibits the State presented recordings of the many phone calls defendant made

from jail to his then-fiancée, Barnes, during which defendant told her, "There's two kids I hit[,]" and asked Barnes to lie and admit to the shooting herself. The State also presented the white hat authorities removed from defendant's person when he was arrested.

¶ 28 With regard to witness testimonies, the jury heard from, among others, Sheff, Dunning, Pilson, and Brown, all of whom independently identified defendant as the driver of the Ford Escape on 20 April 2019. Moreover, Pilson, defendant's cousin, confirmed he sat in the passenger seat throughout the entirety of the alleged incident, and corroborated much of Sheff's and Dunning's respective testimonies. Barnes confirmed she owned a Ford Escape, with a license plate that read "Fabalous," which she shared with defendant, and testified as to the contents of defendant's phone calls to her from jail. Finally, as ADA Watson emphasized in his closing argument, Sheff, Pilson, and Brown each testified that on 20 April 2019 defendant was wearing a white hat.

¶ 29 Defendant has failed to show that, but for the State's allegedly improper statements made during its closing argument, the jury would have acquitted him. *See id.* at 230, 839 S.E.2d at 731. Thus, in light of *Copley*, we determine the trial court's ruling was "the result of a reasoned decision." *See id.* at 228, 839 S.E.2d at 729 (citation and quotation marks omitted). Accordingly, the trial court did not abuse its discretion by overruling defendant's objection to the State's remarks during its

closing argument.

III. Conclusion

¶ 30 Accordingly, for the foregoing reasons, we hold the trial court did not err in overruling defendant's objection.

NO ERROR.

Judges CARPENTER and GRIFFIN concur.

Report per Rule 30(e).