IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-682

No. COA20-753

Filed 7 December 2021

Mecklenburg County, No. 17 CRS 244216-17, 25-33, 35

STATE OF NORTH CAROLINA

v.

CARLOS DeMARCUIS BURCH, Defendant.

Appeal by Defendant from judgment entered 12 February 2020 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for Defendant-Appellant.

INMAN, Judge.

¶ 1 In this case we must consider whether a prosecutor's argument referencing the race of crime victims was relevant to show the defendant was guilty or, on the other hand, it unfairly prejudiced the defendant by gratuitously interjecting the issue of race to portray the defendant as a racist and to inflame jurors.

¶ 2 Carlos DeMarcuis Burch ("Defendant") appeals from a judgment following a jury verdict finding him guilty of felony fleeing to elude arrest, possession of a stolen vehicle, three counts of conspiracy to commit robbery with a firearm, three counts of robbery with a firearm, and four counts of attempted robbery with a firearm, all related to a string of armed robberies. Defendant argues the trial court erred when it failed to intervene *ex mero motu* during the prosecutor's alleged grossly improper and "racially charged" comments in closing argument and the trial court plainly erred by admitting in-court, "cross-racial, suggestive" identifications without a pre-trial line-up. After careful review, we hold Defendant has failed to demonstrate reversible error.

I. FACTS & PROCEDURAL BACKGROUND

¶ 3 Evidence presented in the trial court tended to show the following:

¶ 4 Defendant and two other men participated in three armed robberies of Latino, non-English-speaking men in the early morning hours of 23 November 2017 in Charlotte.

¶ 5 Around 6:30 am that day, three men were in a work van, on their way to pick up a co-worker, when the driver noticed a black four-door vehicle with a Florida license plate following them. As the driver stopped to pick up the co-worker, the black vehicle pulled behind the van and two Black men got out of the car with guns. The

driver of the car was tall and thin, with long hair. He approached the driver's side of the van, pointed a shotgun at the men inside, and demanded their money. The driver of the van gave the gunman his wallet. The passenger from the black car, who was shorter, heavier set, and had shorter hair compared to the man armed with the shotgun, approached the passenger side of the van. He was armed with a pistol. One of the victims noticed a third person in the black vehicle.

¶ 6 At about 6:45 am, a few miles south of the first robbery, a "blue Jeep" with out-of-state tags pulled behind a different work van as it stopped to pick up a passenger. Two Black men got out of the Jeep and walked toward the van; one man wielded a shotgun and had braided hair and the other man had a pistol. The man with the shotgun tried to open the driver's door, but the co-worker being picked up walked out of his residence and distracted the men. The co-worker believed there was a separate driver.

¶ 7 At 7:00 am, at a nearby residential construction site, a man carrying a long gun ran into a house where three men were beginning work. The gunman ordered everyone onto the ground and demanded their wallets. One of the victims could not understand the man's commands, so the gunman struck him in the face with his weapon. Another victim struggled with the gunman over his weapon. A second man with a gun then arrived. The three workers surrendered their wallets and the two assailants ran back to their vehicle. A third man drove the car.

¶ 8 Officers were instructed to look out for a black Jeep with Florida tags—the car had been reported stolen on 15 November 2017 and was allegedly used in the robberies. The next day, Officer Andrea Mullins ("Officer Mullins") spotted Defendant at a gas station, driving the stolen Jeep. She described Defendant as a Black man with shoulder-length dreadlocks. Officer Mullins attempted to stop Defendant by turning on her blue lights, but Defendant pulled out of the gas station and led police on a high-speed chase. He eventually stopped the Jeep and fled on foot. An officer caught Defendant and took him into custody. In the center console of the Jeep, investigators discovered stolen items from the previous day's robberies. Defendant admitted to being a passenger in the car during the robberies but denied participating. He gave police the name of his two co-conspirators.

¶ 9 Three of the victims, separately to police after the robberies, described the perpetrator(s) as "two Black males;" "[B]lack male, about 5'10," thin build, mid 30s, shoulder length dreads;" and "young [Black male]," approximately "5'8" and 140 [pounds]." The detective assigned to the case did not administer a pre-trial line-up, because he "had enough to believe that [Defendant] was, in fact, involved in the incident. And a sequential line-up was not necessary, because it's an investigative tool."

¶ 10 Defendant was charged in connection with the string of robberies and his case came on for trial on 3 February 2020. The key issue at trial was the identity of the

gunman with the shotgun who robbed the victims. The State produced eyewitness testimony consistent with the above recitation of facts from four of the victims.[1] At trial, these witnesses identified Defendant as the person who robbed them at gunpoint and described the perpetrator as (1) a "[B]lack male with dreads;" (2) having braided hair; (3) a dark-skinned "person of color" with braided hair; and (4) having "black skin," a "long face," and "[t]hick lips." Defense counsel cross-examined these witnesses, testing the reliability and credibility of their identifications, but counsel did not object to the admissibility of the in-court identifications at trial.

¶ 11 During closing argument, the prosecutor made the following appeal to the jury:

> Ladies and gentlemen of the jury, the reality, and perhaps sort of the understated part of this case, is that these men were a vulnerable population. And not in the sense that they were, for example, the elderly or the handicapped, but vulnerable in a different sense. And you heard a little bit about this from Wilbert's testimony, and Ricardo. That they left. They didn't want to report it. They didn't want to be involved with the police. They were scared about that. And that, will anybody care about Spanish-speaking residents of Charlotte who may or may not be legal residents? Who have only been here so long. Weren't born here. Would anybody care about the fact that they'd been robbed at gunpoint?
>
> And that's why this defendant and his co-suspects were out trolling on Thanksgiving morning, robbing Hispanic male victims. That's what they were out there doing. And that's why they were doing it. And the thing is, why rob them instead of any other type of population? Anybody else that

[1] Many of the victims testified through translators.

> might have been out on the road that morning?
>
> Because they figured nobody would care. Who cares? They speak Spanish. They don't even speak English. Whatever. They weren't born here. Whatever. Nobody is gonna care about this.
>
> And the question is, whether this jury cares. Understanding, as we discussed, that no matter what their status as residents is, or are, they have the same protections under the criminal laws that anybody else does. They have the same right to come into this courtroom. And have testified and told you that this defendant stuck a gun in their face, along with his co-suspects, and stole from them.
>
> For most of them, what little it was. My wallet. My personal documents from my home country. Maybe one witness testified it was a slightly greater amount of cash. But over what? Hardly anything. Think about that. Think about the terror that these men must have felt in those moments. Over what? Forty bucks?
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> Again, it's reprehensible. Absolutely reprehensible conduct. Aside from the bare fact that it is unlawful. And so the question is, as representatives of Mecklenburg County will you take this evidence, apply the law that the Judge gives you, and hold this defendant accountable for what he did?
>
> Will you care enough to do that? Will you render a fair and just verdict based on the truth of this case?

Defense counsel did not object to the prosecutor's comments during the argument to the jury.

¶ 12 The jury found Defendant guilty on all charges and the trial court sentenced him to four consecutive active prison terms of 84 to 113 months. Defendant gave oral

notice of appeal.

II. ANALYSIS

1. Prosecutor's Comments During Closing Argument

¶ 13 Defendant argues that the trial court should have intervened *ex mero motu* during the prosecutor's closing argument because the prosecutor's comments were grossly improper and racially suggestive. We disagree.

¶ 14 We review unobjected to, alleged improper closing arguments to determine "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). "[T]he prosecutor's remarks must be both improper and prejudicial." *Id.*, 558 S.E.2d at 107-08. To establish prejudice, the defendant must show the prosecutor's comments "so infected the trial with unfairness that it rendered the conviction fundamentally unfair." *State v. Robinson*, 346 N.C. 586, 607, 488 S.E.2d 174, 187 (1997) (citation omitted). We consider the statements made in closing argument in the "context in which the remarks were made and the overall factual circumstances to which they referred," not in isolation. *State v. Thompson*, 359 N.C. 77, 110, 604 S.E.2d 850, 873 (2004) (quotation marks and citation omitted).

¶ 15 "Although it is improper gratuitously to interject race into a jury argument where race is otherwise irrelevant to the case being tried, argument acknowledging race as a motive or factor in a crime may be entirely appropriate." *State v. Diehl*, 353

N.C. 433, 436, 545 S.E.2d 185, 187 (2001) (citation omitted).

¶ 16 The prosecutor's comments during closing argument in this case appropriately acknowledged the victims' common race as a factor in the armed robberies. *See id.* The shared characteristics of the victims, including their race, were relevant to show who Defendant and his co-suspects targeted to rob. Defendant's statement to police that "I was present when some amigos were robbed" demonstrates the probative value of the victims' race to show a common plan or scheme in the series of robberies. The prosecutor's argument urged jurors to infer that Defendant chose his victims not because of his racial prejudice toward them but because they would be less likely to report the crimes or be believed or helped by the community.

¶ 17 Even if we held the prosecutor's comments were improper, which we do not, Defendant has failed to demonstrate prejudice, which is required to establish reversible error. Defendant has not and cannot show that, when taken in the context of the entire closing argument, the comments "so infected the trial with unfairness that it rendered [Defendant's] conviction fundamentally unfair." *Robinson*, 346 N.C. at 607, 488 S.E.2d at 187. For this reason, we hold that the trial court did not commit reversible error by failing to intervene *ex mero motu*.

2. In-Court Identifications

¶ 18 Next, Defendant contends the trial court plainly erred and violated his constitutional rights to due process and a fair trial by admitting in-court, cross-racial,

suggestive identifications without a pre-trial line-up. Again, we disagree.

¶ 19 Constitutional challenges not raised at trial are generally waived on appeal. *State v. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018). Defense counsel here did not object to the cross-racial in-court identifications, so Defendant implores us to exercise Rule 2 of the North Carolina Rules of Appellate Procedure to address his unpreserved constitutional argument. N.C. R. App. P. 2 (2021) ("To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . ."). In light of controlling precedent discussed below we decline Defendant's request.

¶ 20 Our Court recently reviewed the issue of an in-court identification in *State v. Glenn*, 274 N.C. App. 325, 852 S.E.2d 436 (2020). The defendant in *Glenn* did not challenge the victim's pre-trial identifications or in-court identification of him as the perpetrator. *Id.* at 338, 852 S.E.2d at 446. Defense counsel cross-examined the victim. *Id.* We held the trial court did not err in admitting the in-court identification because the "[d]efendant had the opportunity to test the reliability of [the victim's] in-court identification through the rights and opportunities generally designed for that purpose, and the defects of the in-court identification [the] [d]efendant complains of were solely issues of credibility for the jury to resolve." *Id.* (citing *Perry v. New Hampshire*, 565 U.S. 228, 233, 181 L. Ed. 2d 694, 703 (2012); *State v. Simpson*, 327

N.C. 178, 189, 393 S.E.2d 771, 777 (1990); *State v. Miller*, 270 N.C. 726, 732, 154 S.E.2d 902, 906 (1967)) (cleaned up).

¶ 21 In-court identification testimony presents an issue of reliability and credibility solely for the jury. As in *Glenn*, Defendant does not allege any impermissibly suggestive pre-trial identification. Also, like in *Glenn*, at trial defense counsel cross-examined each witness about their in-court identifications.[2] Based on binding precedent and on the face of this record, we will not exercise Rule 2 because there is no constitutional error as alleged by Defendant. *See Glenn*, 274 N.C. App. at 338, 852 S.E.2d at 445 ("Defendant's [in-court identification] argument does not trigger due process concerns.").

III. CONCLUSION

¶ 22 For the above reasons, we hold the trial court did not err in failing to intervene *ex mero motu* during the prosecutor's closing argument. We decline to exercise Rule 2 to consider the merits of Defendant's second argument.

NO ERROR.

Judge DIETZ concurs.

Judge GRIFFIN concurs in the result only.

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[2] Defense counsel asked about how dark it was at the time of the robberies, whether they could make out the features of the assailants, and their proximity to the perpetrators, among other things.