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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-362-2

Filed 05 July 2023

Rowan County, Nos. 16 CRS 052274, 052275, 19 CRS 1637

STATE OF NORTH CAROLINA

v.

DAVID MYRON DOVER, Defendant.

Appeal by Defendant from judgments entered 19 September 2019 by Judge Richard S. Gottlieb in Rowan County Superior Court. Originally heard in the Court of Appeals 9 February 2021. By opinion filed 17 June 2022, the North Carolina Supreme Court reversed and remanded to this Court to consider Defendant's remaining arguments on appeal.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State.

Marilyn G. Ozer for defendant-appellant.

MURPHY, Judge.

After remand by our Supreme Court, Defendant David Myron Dover has one remaining issue to be considered: whether the trial court erred in denying his motion for a mistrial. Specifically, Defendant argues that the trial court committed

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prejudicial error when it failed to issue a curative instruction to the jury upon sustaining an objection to the State’s closing argument. Defendant further argues that the trial court abused its discretion in denying his motion for a mistrial on the basis of such an error.

BACKGROUND

On 16 May 2016, Defendant was indicted for one count of robbery with a dangerous weapon and one count of first-degree murder; and, on 20 May 2019, was indicted for having attained the status of habitual felon. A jury was impaneled for Defendant’s trial on 9 September 2019.¹

At trial, the State argued in closing that “[y]ou need a reasonable explanation for that money. If you don’t have a reasonable explanation for where that money came from—” at which point Defendant objected. A bench conference was held, and the objection was sustained. Defendant did not request a curative instruction, and the State immediately continued with its closing argument by rephrasing the remark: “If you can’t, in your own mind, reasonably resolve where that money came from, he’s guilty, period. In his world, there was no other place it could have come from.” Defendant did not object to the rephrasing.

Following closing arguments, Defendant moved for a mistrial on the basis that the State’s improper closing remark deprived him of due process and a fair trial. The

¹ For a full understanding of the facts and procedural history of this case, see *State v. Dover*, 278 N.C. App. 723, 724-28 (2021), *rev’d and remanded on other grounds*, 381 N.C. 535 (2022).

court denied the motion.

The jury found Defendant guilty of first-degree murder, both on the underlying felony of robbery with a dangerous weapon on the basis of malice, premeditation, and deliberation. The jury also found Defendant guilty of robbery with a dangerous weapon. The trial court sentenced Defendant to life without parole on the first-degree murder conviction and arrested judgment on the robbery with a dangerous weapon conviction. Defendant timely appealed.

ANALYSIS

Defendant argues on appeal that, upon the trial court's sustaining of the State's statement in closing argument, the trial court erred in failing to immediately issue a curative instruction. Defendant further argues that the State's closing argument, even when rephrased without objection, shifted the burden of proof from the State to Defendant to account for the source of the \$3,000.00 at issue. Taken together, Defendant contends that the trial court abused its discretion in denying his motion for a mistrial on these grounds. We disagree.

This Court reviews the trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Bradley*, 279 N.C. App. 389, 406, *disc. rev. denied*, 379 N.C. 636 (2021). A trial court abuses its discretion when its ruling "could not have been the result of a reasoned decision." *State v. Jones*, 355 N.C. 117, 131 (2002).

Generally, "counsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable

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inferences that can be drawn from that evidence.” *State v. Richardson*, 342 N.C. 772, 792-93, *cert. denied*, 519 U.S. 890 (1996). However, remarks that are “calculated to lead the jury astray . . . includ[ing] references to matters outside the record and statements of personal opinion” are improper. *Jones*, 355 N.C. at 133. If a closing argument remark is improper, “we determine if the remarks were of such magnitude that their inclusion prejudiced [the] defendant.” *Id.* at 131. Whether a statement is prejudicial requires “assess[ing] the likely impact of any improper argument in the context of the entire closing . . . [and] look[ing] to the evidence presented by the State to determine whether there is a reasonable possibility the jury would have acquitted [the] defendant if the prosecutor’s remarks had been excluded.” *State v. Copley*, 374 N.C. 224, 230-31 (2020).²

Our Supreme Court has held that “[w]here, immediately upon a defendant’s objection to an improper remark made by the prosecutor in [their] closing argument, the trial court instructs the jury to disregard the offending statement, the impropriety is cured.” *State v. Woods*, 307 N.C. 213, 222 (1982). This rule has been applied to hold that “any prejudice in a prosecutor’s closing argument [is] cured when the defendant timely object[s], the court [holds] a bench conference to resolve the objection, and the trial judge issue[s] a curative instruction once proceedings

² In neither Defendant’s briefs to this Court nor in his briefs at the Supreme Court did he explain why the State’s improper statements rose to a level of prejudice to create a “reasonable possibility” that the jury would have acquitted him but for the State’s improper closing remarks. *Copley*, 374 N.C. at 230-31.

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resume[].” *Bradley*, 279 N.C. App. at 410-11. However, a curative instruction is not the exclusive remedy available to a trial court judge when sustaining an improper argument; rather,

[t]he [c]ourt may correct the impropriety by at once checking the argument and restricting it within proper bounds, or [it] may correct it in [its] charge to the jury, or if a favorable verdict is given [it] may set aside the verdict and grant a new trial. It is difficult to lay down the line, further than to say that it must ordinarily be left to the discretion of the judge who tries the case; and [this] Court will not review [its] discretion, unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury.

Wilcox v. Glover Motors, Inc., 269 N.C. 473, 479 (1967).

Defendant attempts to support his argument by citing to a string of cases in which our courts have held that when a trial court issues a curative instruction after sustaining an improper closing remark, the prejudice is sufficiently cured. *See, e.g. Woods*, 307 N.C. at 222; *State v. Maynor*, 331 N.C. 695, 701-02 (1992); *State v. Garner*, 340 N.C. 573, 592 (1995), *cert. denied*, 516 U.S. 1129 (1996); *State v. Hardy*, 353 N.C. 122, 138 (2000), *cert. denied*, 534 U.S. 340 (2001); *State v. Sparrow*, 276 N.C. 499, 514 (1970); and *State v. Herring*, 322 N.C. 733 (1988). However, in each of these cases, the issue before our Supreme Court was whether a curative instruction was *sufficient* to remedy an improper closing remark, not whether a specific form of curative instruction was necessary.

Defendant also asserts that “[a] jury charge cannot cure an error arising in

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closing argument” and that a “curative instruction must be given immediately.” However, contrary to Defendant’s assertions, our Supreme Court in *Wilcox* squarely considered the discretion given to the trial court when faced with an improper closing remark. Notably, one of the discretionary options given is that it “may correct [an improper closing remark] in [its] charge to the jury.” *Wilcox*, 269 N.C. at 479.

Given our Supreme Court’s holding in *Wilcox* that a trial court may cure an improper closing remark through its instructions to the jury, we may consider whether the jury instructions in this case were sufficient to cure any prejudicial effect. Here, the jury was instructed that “[u]nder our system of justice, when a defendant pleads not guilty, the defendant is not required to prove the defendant’s innocence; the defendant is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.” As we “presume[] that jurors follow the trial court’s instructions,” we must presume that the jury in this case followed the judge’s instructions regarding the burden of proof when reaching its conclusion. *State v. Steen*, 352 N.C. 227, 249 (2000), *cert. denied*, 531 U.S. 1167 (2001). The jury instructions cured any potential problems arising from the State’s improper closing argument. Therefore, the lack of a more specific curative instruction regarding any burden-shifting effect of the State’s improper closing remark may have carried did

not render the omission an abuse of discretion.³

CONCLUSION

The trial court did not abuse its discretion in denying Defendant's motion for a mistrial.

NO ERROR.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).

³ Defendant also suggests the trial court erred because, after having his objection to the State's closing argument sustained, the State was able to rephrase its argument "in a manner which jurors would not have understood to have removed from Defendant the burden of proving an innocent source for the money." However, Defendant did not object to the rephrasing at trial and now makes no argument on appeal as to why the remark was so grossly improper that the trial court should have intervened *ex mero motu*. See *State v. Parker*, 377 N.C. 466, 471 (2021).