An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-234

Filed 7 November 2023

Montgomery County, No. 21CRS50211

STATE OF NORTH CAROLINA

v.

PHILLIP ANDREW HALL

Appeal by defendant from judgment entered 23 May 2022 by Judge Kevin M. Bridges in Montgomery County Superior Court. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lisa M. Taylor, for the State.

Glover & Petersen, P.A., by James R. Glover, for the defendant-appellant.

TYSON, Judge.

Phillip Andrew Hall ("Defendant") appeals from a judgment entered upon a jury's verdict of guilty of second-degree forcible rape. We find no error.

I. Background

C.H., a thirty-four-year-old female, was arrested for shoplifting at a Wal-Mart store on 16 February 2021 in Biscoe. (initials used to protect the identity of victim).

C.H. was transported to Troy where she appeared before a magistrate, was charged with shoplifting, and released.

C.H. received a ride back to Biscoe and began walking to the home she shared with her parents and children in Seagrove. C.H. suffered from severe obsessive-compulsive disorder, which required her to live with her parents and rendered her unable to drive a car or work.

Defendant observed C.H. walking along the road in the rain and witnessed her fall. Defendant believed C.H. was wearing pajama pants, and she appeared to be wet and dirty. Defendant pulled his truck into a Dairy Queen parking lot and offered C.H. a ride. C.H. accepted Defendant's offer and sat down in the front passenger seat of Defendant's truck.

Defendant asked C.H. if she wanted anything, and she replied for a drink and some cigarettes. Defendant drove to an ATM machine and withdrew currency. Defendant asked C.H. if she needed some money. She responded yes and he gave her $20.00. Defendant went across the street to a Quick Chek convenience store and purchased a Mountain Dew soft drink and a pack of Marlboro cigarettes for C.H.

While Defendant was inside the convenience store, C.H. used Defendant's cell phone to call her grandmother to let her know where she was. C.H. told her grandmother to save the telephone number she was calling from in case something happened to her.

Defendant drove to his parents' house and parked the truck. Defendant knew

his parents were away because they typically took Defendant's daughter with them to church on Tuesday evenings. Defendant and C.H. each drank a beer that he had in his truck. Defendant asked C.H. to show him her breasts. C.H. complied. Defendant asked C.H. what else she had for him, and stated he wanted to get "behind that ass."

C.H. testified Defendant reached across the center console of the truck, wrapped the crook of his arm around her neck, and applied pressure on the front of her throat. C.H. could not dislodge his arm and could not get enough air to breathe. C.H asked Defendant why he had choked her. Defendant responded because C.H. had not offered to have sexual relations with him.

C.H. testified she became scared, closed her eyes, and laid back. Defendant got on top of her, engaged in vaginal intercourse, and drove her home. Defendant testified C.H. and him talked and then they had engaged in consensual vaginal intercourse. Defendant drove her home and met her father outside in the yard.

Defendant was indicted for one count of second-degree forcible rape, one count of assault by strangulation, and assault on a female. A jury initially advised the trail court they could not reach an unanimous verdict. After an *Allen* charge, the jury acquitted Defendant of assault by strangulation and of assault on a female, but convicted Defendant of second-degree forcible rape. *See Allen v. United States*, 164 U.S. 492, 41 L.Ed. 528 (1896).

Defendant was sentenced as a prior record level I, with 0 prior record level

points to an active sentence of 50 to 120 months. Defendant was also ordered to enroll in Satellite-Based Monitoring ("SBM") for a period of ten (10) years upon his release. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2021).

III. Issue

Defendant argues the trial court erred by failing to intervene *ex mero motu* during the State's closing argument.

IV. Standard of Review

Our Supreme Court has held:

> 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*. Under this standard, [o]nly 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. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Waring, 364 N.C. 443, 499-500, 701 S.E.2d 615, 650 (2010) (citations and internal quotation marks omitted), *cert. denied*, 564 U.S. 832, 181 L.Ed.2d 53 (2011).

V. Closing Argument

Defendant argues, despite his failure to object during closing arguments, the trial court prejudicially erred by not intervening *ex mero motu* to stop the State from making certain statements during closing arguments. He argues the State's reliance on scriptures and events from the Bible and the inclusion of facts, purportedly not based on properly admitted evidence nor any reasonable inference to be drawn from such admitted evidence, was improper.

Defendant challenges the following portions of the State's closing argument:

> When we started this, I talked about Matthew 25:40-45.
>
> And whatever your faith, whatever your spirituality, there's a lot of good lesson[s] in the book, there's a lot to think about.
>
> 25: 40-45 talks about a great assemblage, a great judgment. And the Lord says to half the people, depart from me
>
> What?
>
> And he said: I was hungry, you did not feed me. I was thirsty, you did not give me anything to drink. I was a stranger, you did not invite me in. I had no clothes, you did not clothe me.
>
> And the group that was being dismissed said, Lord, whoa, whoa, whoa, we have done everything you've asked. We have always done our best. When in the world did we fail to give you food or drink, invite you into our homes, clothe you, look after you when you were sick?
>
> And the Lord says, invariably, truly, I say unto you, if you have done it to the least of my brethren, you have done it to me. You have not done it for the least of my brethren,

> you have not done it for me.
>
> . . .
>
> She screwed up at Walmart. This girl, whose only other offense is a bounced check at Prevo Drug in 2008. She screwed up at the Walmart.
>
> . . .
>
> To her, it seems like the admonition from the book: Feed the hungry, clothe the unclothed, shelter the stranger, take care of the sick. She's all those. She's all of those.
>
> . . .
>
> [C.H.] has very little. She has very little. She's 34 years old. She's crippled up by a condition that she cannot control and barely manages to moderate. She lives with her parents, who love her very much. They love her very much. They have stood by her through this, they have been here for her when he didn't have to work.
>
> They don't have any money. It's a hardship to miss a day at [the furniture factory] to come here and testify.
>
> . . .
>
> It's hard for a person like [C.H.] to get justice. She's among the poorest of the poor, the weakest of the weak. She's been victimized throughout time by people who think there are no consequences because of who she is and where she lives, what she looks like, where she comes from, how she walks, how she acts. People who think, because of who they are, there's no consequences.

The record discloses no objection or comment from Defendant during these closing remarks or thereafter.

After *State v. Waring,* our Supreme Court also stated:

> when defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was 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) (citation omitted). Only where this Court "finds both an improper argument *and* prejudice will this Court conclude that the error merits appropriate relief." *Id.* (citation omitted) (emphasis supplied).

In North Carolina, "counsel is allowed wide latitude in the argument to the jury," but cannot "place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." *State v. Hill*, 311 N.C. 465, 472-73, 319 S.E.2d 163, 168 (1984) (citations and internal quotation marks omitted).

The Supreme Court of the United States has further stated: "it is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L.Ed.2d 144, 157 (1986) (citation and internal quotation marks omitted). "The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (citation and internal quotation marks omitted).

Here, the State argued to the jury about C.H.'s status of walking down a road

alone in the rain, after being charged with shoplifting and released, her mental condition, and her status as someone in need of help when Defendant initially observed and approached her. The State's comments did not fall below the standard in *Darden,* and the prosecutor's remarks are not shown to be so improper to satisfy the first prong of *Huey*. *Darden*, 477 U.S. at 181, 91 L.Ed.2d at 157; *Huey*, 370 N.C. at 179, 804 S.E.2d at 469.

Presuming, without deciding, Defendant met the first prong of *Huey*, he has not shown the remarks were "so grossly improper as to impede the defendant's right to a fair trial" for this Court to conclude 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" to award a new trial. *Huey*, 370 N.C. at 179, 804 S.E.2d at 469; *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996).

VI. Conclusion

On the issue before us, Defendant has failed to show the trial court erred by declining to intervene *ex mero motu* during the State's closing argument in the absence of Defendant's failure to object or to otherwise preserve error. Defendant received a fair trial, free from preserved or prejudicial errors. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges DILLON and GRIFFIN concur.

Report per Rule 30(e).