NO. COA10-320

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

STATE OF NORTH CAROLINA

v. Durham County
No. 07 CRS 50838

ADRIAN LEE BULLOCK

Appeal by Adrian Lee Bullock from judgment entered 24 June 2009 by Judge Abraham P. Jones in Durham County Superior Court. Heard in the Court of Appeals 14 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

William D. Spence for defendant appellant.

HUNTER, JR., Robert N., Judge.

Adrian Lee Bullock ("defendant") was convicted of statutory rape and taking indecent liberties with a child and appeals on numerous grounds. For the following reasons, we find no reversible error.

I. Factual and Procedural Background

Defendant was indicted for statutory rape or sexual offense of a person who is fifteen years old, second-degree kidnapping, and taking indecent liberties with a child. At trial, the State first offered the prosecuting witness, Sarah, who was fifteen at the time

of the alleged crime.[1] She testified as follows. On Wednesday, 18 July 2007, she was walking her dog when she saw defendant, her neighbor, spraying for ants in his yard. Defendant stated he was out of ant killer, and Sarah traveled to her residence where she obtained some ant killer for him. When she returned to defendant's residence, defendant grabbed Sarah's arm, pulled her into his residence, and led her to his bedroom. There, defendant forced Sarah onto his bed, and inserted his penis into her vagina over her objections. Sarah did not mention oral sex during her testimony. She saw and heard the *Jerry Springer Show* on defendant's television during the encounter. She stated defendant had black sheets on his bed, there was a Playstation video game console on his floor, and there were several pictures on the table next to his bed. Sarah testified that when the sexual encounter was over, she walked out of defendant's bedroom, out of the residence, and returned to her own residence where she immediately took a shower. After the shower, she called her friend Jessica, who suggested Sarah tell her parents about the incident. Sarah also called her grandmother who demanded she do the same by Saturday. Sarah told her father about the incident that Friday.

Sarah's father called the Durham County Sheriff's Department, and Sarah was taken to the emergency room. At the hospital, she was interviewed by Dr. Anne-Caroline Norman. After meeting with Dr. Norman, she was interviewed and examined by Dr. Karen St. Claire. Dr. Aditee Narayan testified for the State at trial because Dr. St.

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[1]Pseudonyms are used to conceal the identity of the victim.

Claire was out of town. Dr. Narayan testified she had examined Dr. St. Claire's medical evaluation report; she discussed the findings, stating the report revealed a bruise to the hymen and abrasions extending from the outer part of the hymen through the floor of the vagina. Dr. Narayan testified these injuries were "consistent with an injury that happened a few days prior [to the examination]." She also testified the injuries were consistent with the "history of the sexual assault that [Sarah] provided."

Donna Stanley, a licensed clinical social worker who had been Sarah's therapist for fourteen months following the incident, testified about Sarah's mental state following the encounter with defendant. She stated Sarah had exhibited various symptoms, such as flashbacks and depression, but had gradually improved. She also testified that Sarah had experienced crying spells and dreams about the alleged rape. Stanley commented that Sarah had an impressive memory: "She had an amazing memory. The details were consistent over the whole fourteen months, which is almost like a photographic memory."

Defendant testified and denied raping or assaulting Sarah, but admitted her description of his bedroom was correct. His wife, who was not home during the incident, testified she telephoned and spoke with defendant on the day of the incident around 11:20 a.m. for at least twenty to twenty-five minutes and that nothing seemed out of the ordinary. She also testified that after being notified of Sarah's allegations, defendant appeared to be shocked, upset, and puzzled.

A biologist testified Sarah's undergarments, as well as tests taken from Sarah's person, did not reveal the presence of semen. Another expert could find no transfer of hair from defendant to Sarah. Dr. Norman testified that, when she interviewed Sarah at the emergency room, Sarah stated defendant had performed oral sex on her. Scott Bradsher, the coordinator for the local television station, testified the *Jerry Springer Show* ran in the area from 12:00 p.m. to 1:00 p.m. on the date of the encounter, but conceded the footage Sarah claimed to have seen and heard could have been a recording.

The jury found defendant guilty of statutory rape and taking indecent liberties, but not guilty of second-degree kidnapping. He was sentenced to a concurrent active term of 316 to 389 months on the statutory rape conviction and 25 to 30 months on the indecent liberties charge. He gave oral notice of appeal in open court and appealed to this Court.

II. Jurisdiction

Defendant appeals as a matter of right pursuant to N.C. Gen. Stat. § 15A-1444(a) (2009). We have jurisdiction over his appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009).

III. Analysis

Defendant appeals both convictions. His argument can be summarized as follows: (1) it was plain error to admit portions of Dr. Narayan's and Dr. St. Claire's expert testimony and portions of Stanley's and Dr. St. Claire's non-expert testimony; (2) the trial court committed reversible error by denying defendant's motions to

dismiss at the close of all the evidence; and (3) the trial court committed reversible error by failing to intervene *ex mero motu* during the State's closing argument. After careful review, we conclude the trial court did not commit reversible error.

A. The Testimonial Evidence

Defendant argues the admission of Dr. Narayan's expert testimony, Dr. St. Claire's expert testimony, Dr. St. Claire's non-expert testimony, and Stanley's non-expert testimony impermissibly bolstered Sarah's credibility. Defendant failed to object at trial, so we review for plain error. N.C. R. App. P. 10(a)(4).

When a defendant fails to object at trial, plain error review requires him to meet a heavy burden on appeal:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial'" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (alteration and footnotes omitted in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). To amount to plain error, the error in question must have "tilted the scales,"

causing the jury to rule against the defendant. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983).

1. The Expert Testimony

North Carolina Rule of Evidence 702(a) addresses the admissibility of expert testimony:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C.R. Evid. 702(a). However, expert testimony is not admissible to vouch for a witness's credibility. *State v. Heath*, 316 N.C. 337, 342, 341 S.E.2d 565, 568 (1986). This limitation on expert testimony is derived from the application of North Carolina Rules of Evidence 608(a) and 405(a). Rule 608(a) states that the credibility of a witness may be attacked or supported by reputation or opinion evidence as provided by Rule 405(a). N.C.R. Evid. 608(a). Rule 405(a) states that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." N.C.R. Evid. 405(a). Our courts have concluded that, when read together, Rules 608 and 405 prohibit experts from testifying as to a witness's credibility. *Heath*, 316 N.C. at 342, 341 S.E.2d at 568; *see also, e.g., State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) ("[T]he testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence.").

In sexual abuse cases, there is an inherent conflict between (1) the need for expert medical testimony that tends to establish whether abuse has occurred and (2) the prohibition on admitting that very testimony for the purpose of bolstering a victim's credibility. Our courts have developed a significant body of case law attempting to reconcile these competing interests. An expert may not testify that sexual abuse has "*in fact*" occurred without a foundation of physical evidence supporting that opinion. *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam). Nor may an expert rely solely on interviews with a child as a basis for testifying that the child was "sexually abused." *State v. Grover*, 142 N.C. App. 411, 419, 543 S.E.2d 179, 183-84 (citing *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90, (1997)), *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). But "it is . . . well-settled that testimony based on the witness's examination of the child witness and expert knowledge concerning the abuse of children in general is not objectionable because it supports the credibility of the witness or states an opinion that abuse has occurred." *Dick*, 126 N.C. App. at 315, 485 S.E.2d at 89; *accord In re Butts*, 157 N.C. App. 609, 617, 582 S.E.2d 279, 285 (2003) ("[O]therwise admissible expert testimony is not rendered inadmissible merely because it enhances a witness's credibility."). Furthermore, "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 (citing *State v. Hall*, 330 N.C. 808,

818, 412 S.E.2d 883, 888 (1992); *State v. Aguallo*, 322 N.C. 818, 822-23, 370 S.E.2d 676, 678 (1988); *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987)).

Defendant contends the physical evidence was insufficient to support Dr. Narayan's testimony. He argues that, "in effect," Dr. Narayan testified that "the physical examination of [Sarah] was consistent with her being pulled into the defendant's house and raped by him." Defendant also claims Dr. Narayan's testimony "indicated that defendant was the very one who had assaulted [Sarah]."

Defendant's account mischaracterizes the record. Dr. Narayan's opinion was based on Dr. St. Claire's report, so before giving her opinion, Dr. Narayan related the details of that report. The report contained Sarah's case history, including the allegations of rape. After discussing the results of the physical examination Dr. St. Claire had performed, and describing the general symptoms of child sexual abuse, the following exchange occurred:

> Q. Based on your review of the medical record in this case and Dr. St. Claire's interview and examination, are you able to form an expert opinion regarding the cause of the genital injury?
>
> A. Yes.
>
> Q. What is your expert opinion?
>
> A. Based on the information documented, it is most consistent—it is determined that her physical exam findings, which we discussed already, are consistent with the history of sexual assault that she provided.

Dr. Narayan's reference to "the history of sexual assault . . . [Sarah] provided" clearly refers to the sexual act itself. She was testifying as to "the cause of the genital injury"—not the events leading up to the cause of the genital injury. She did not testify that Sarah's account of the sexual assault, or the events surrounding it, were accurate. Nor did she state that she believed Sarah or that Sarah's story was credible.

This reading falls in line with our Supreme Court's decision in *State v. Aguallo*. There, the expert witness testified the victim's hymen had been lacerated. *Aguallo*, 322 N.C. at 822, 370 S.E.2d at 678. When asked whether the victim's injuries were consistent with what the victim had told her, the expert replied, "I felt it was consistent with her history." *Id.* The Court provided the following analysis:

> Essentially, the doctor testified that the physical trauma revealed by her examination of the child was consistent with the abuse the child alleged had been inflicted upon her. We find this vastly different from an expert stating on examination that the victim is "believable" or "is not lying." The latter scenario suggests that the complete account which allegedly occurred is true, that is, that this defendant vaginally penetrated this child. The actual statement of the doctor merely suggested that the physical examination was consistent with some type of penetration having occurred. The important difference in the two statements is that the latter implicates the accused as the perpetrator of the crime by affirming the victim's account of the facts. The former does not.

Id.

Considering Dr. Narayan's testimony in context, it is apparent defendant's reliance on several post-*Aguallo* decisions, is

misplaced. In *State v. O'Connor*, this Court held it was error to admit a portion of an expert's written report that explicitly stated a victim's allegations of sexual assault were credible. 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002). The mistake by the trial judge constituted *plain error* "because there was no physical evidence of abuse and the State's case was almost entirely dependent" on the victim's credibility. *Id.* Here, Dr. Narayan did not explicitly endorse Sarah's allegations as credible.

Defendant also relies on *State v. Couser*, which is distinguishable. There, a physician testified "that her diagnosis of the victim was 'probable sexual abuse.'" *State v. Couser*, 163 N.C. App. 727, 729, 594 S.E.2d 420, 422 (2004). We held the trial court erred by admitting that testimony because there was an insufficient basis for the expert's conclusion. On cross-examination, the testifying expert admitted the abrasions forming the basis of her opinion "were not diagnostic nor specific to sexual abuse." *Id.* at 730, 549 S.E.2d at 422. We held it was *plain error* because the State's only direct evidence was the victim's testimony, which was corroborated by other witnesses. *Id.* at 731, 594 S.E.2d at 423 (distinguishing *Stancil*). Unlike the physician in *Couser*, Dr. Narayan did not state Sarah was the probable victim of sexual abuse—only that the physical evidence was *consistent* with the sexual penetration described by Sarah. There was plenty of evidence for that conclusion. Therefore, *Couser* does not provide a basis for us to conclude the trial court below committed error.

Defendant's reliance on *State v. Streater* is also misplaced. In that case, the expert testimony amounted to an impermissible opinion regarding the victim's credibility because there was no physical evidence supporting the expert's conclusion that his findings were consistent with the victim's account of the sexual assault. *State v. Streater*, __ N.C. App. __, __, 678 S.E.2d 367, 374 (2009) (explaining the expert "testified that there was no physical evidence of anal penetration"). We concluded the trial court committed *plain error* because the victim's testimony was the only direct evidence implicating the defendant on the charge of first-degree sexual offense. Here, there was physical evidence supporting Dr. Narayan's conclusion. We find no error, let alone plain error, in the admission of Dr. Narayan's testimony.

Defendant contends the admission of the following expert testimony by Dr. St. Claire amounted to plain error:

> I had a detailed history from [Sarah], with her telling me what had happened. I felt that these genital injuries were consistent with trauma and with the history that she had provided. Although they are not specific for sexual trauma, they certainly are consistent with that, in particular, the bruising on the hymen[,] and felt that these [injuries] were consistent with the history of a sexual assault that she provided.

In addition to making the same arguments we have already discussed above, which we reject in this context as well, defendant claims this testimony is baseless because there was no evidence of vaginal intercourse. This contention, of course, ignores the substantial physical evidence of recent bruising and abrasions. Furthermore, Dr. St. Claire's testimony that the genital injuries *could* be caused

by other sources does not conflict with her testimony that the injuries are *consistent* with a history of sexual assault. *Cf. State v. Ewell*, 168 N.C. App. 98, 103, 606 S.E.2d 914, 918 (2005) (stating that testimony indicating a child exhibits characteristics consistent with abuse is admissible "'to inform the jury that the lack of physical evidence of abuse is not conclusive that abuse did not occur'" (quoting *State v. Bush*, 164 N.C. App. 254, 258, 595 S.E.2d 715, 718 (2004))). Therefore, we conclude it was not error, and certainly not plain error, to admit Dr. St. Claire's expert testimony.

2. The Non-expert Testimony

Defendant next argues admitting Donna Stanley's and Dr. St. Claire's non-expert testimony was plain error because it impermissibly bolstered Sarah's testimony. Stanley, a licensed social worker who was Sarah's therapist for fourteen months after the offense occurred, testified as a non-expert witness. In an attempt to explain why Sarah did not immediately report the encounter with defendant, and to gauge the effect of the incident on Sarah, the State questioned Stanley regarding Sarah's interaction with her parents. In the course of that discussion, Stanley indicated Sarah's parents had been supportive since the incident. When asked whether this was "clinically significant," Stanley replied as follows: "Yes. It's extremely helpful in healing a rape victim to be believed. If her parents did not doubt [her story], they believed, and showed it in action by going to the police and doing what they needed to do to address it." Defendant argues this

testimony amounted to plain error, not because it skirted the line between lay and expert opinion, but because it conveyed a message that Stanley and Sarah's parents believed Sarah's account of the incident. Defendant also contends the admission of similar remarks on the subject of Sarah's memory made by Dr. St. Claire and Stanley constituted plain error. Stanley stated that over the course of fourteen months, the details of Sarah's story had remained the same, remarking that "she had an amazing memory." Dr. St. Claire made similar comments.

Lay witness opinion testimony must be limited to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.R. Evid. 701. Therefore, a non-expert witness is prohibited from vouching for the veracity of another witness. *See State v. Robinson*, 355 N.C. 320, 334-35, 561 S.E.2d 245, 255 (2002) (applying Rule 701). Of course, lay opinion testimony is not automatically inadmissible simply because it also favorably reflects on the credibility of another witness. *See Dick*, 126 N.C. App. at 315, 485 S.E.2d at 89 (stating this rule in the context of expert testimony); *In re Butts*, 157 N.C. App. at 617, 582 S.E.2d at 285 (same).

We express no opinion as to whether the admission of each of these three pieces of evidence was error, because even assuming it was, it would not rise to the level of *plain error*. There were numerous witnesses whose testimony *permissibly* bolstered Sarah's credibility. As discussed above, the expert testimony, which was

properly admitted, likely had an incidental benefit to Sarah's credibility. Furthermore, defendant admitted Sarah had accurately described his bedroom. Thus, the jury had numerous occasions to judge Sarah's credibility independent of the allegedly improper testimony. Consequently, defendant has failed to establish either Stanley's or Dr. St. Claire's non-expert testimony "tilted the scales," causing the jury to rule against him.

B. Defendant's Motions to Dismiss

Defendant next argues the trial court erred by failing to grant defendant's motions to dismiss the charges of statutory rape and indecent liberties. We disagree. The denial of a motion to dismiss for insufficient evidence is reviewed *de novo* on appeal. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citing *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 478, 617 S.E.2d 61, 64 (2005)). When confronted with a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator. *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). Substantial evidence has been defined as the amount of relevant evidence reasonably needed to support a conclusion. *Vause*, 328 N.C. at 236, 400 S.E.2d at 61. The evidence, which may be direct or circumstantial, must be viewed in the light most favorable to the State, giving the State the benefit of every reasonable inference. *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002) (citing *State v. Lucas*, 353 N.C. 568,

581, 548 S.E.2d 712, 721 (2001); *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988)).

1. The Statutory Rape Charge

A person is guilty of statutory rape if he or she "engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person." N.C. Gen. Stat. § 14-27.7A(a) (2009). Defendant claims his motion should have been granted because the district attorney failed to address whether defendant was married to the victim. He concedes, however, that he testified he was married to his wife, Kitoria Downey, for approximately five years, which overlaps with the date of the crime. Therefore, there was substantial evidence that defendant and Sarah were not married.

Defendant also argues there was insufficient evidence that he engaged in vaginal intercourse with Sarah. As a general rule, the testimony of a single witness is sufficient to defeat a motion to dismiss. *State v. Vehaun*, 34 N.C. App. 700, 704, 239 S.E.2d 705, 709 (1977). This rule does not apply, however, "when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with the physical conditions established by the State's own evidence." *State v. Wilson*, 293 N.C. 47, 51, 235 S.E.2d 219, 221 (1977) (citing *State v. Miller*, 270 N.C. 726, 731, 154 S.E.2d 902, 905 (1967)). Defendant contends the exception applies because there was conflicting testimony as to whether Sarah could have seen and heard the *Jerry Springer Show* on

defendant's television. A representative of the local television station with exclusive rights to run the *Jerry Springer Show* testified that the program was not scheduled to run until an hour after the time Sarah testified she was forced into defendant's residence, although the representative admitted the show could have been a recording. Sarah accurately described defendant's room, correctly testifying there were black sheets on his bed, a Playstation video game console on his floor, and several pictures on his table. Viewed in the light most favorable to the State, the *potential* misidentification of a daytime talk show during a forced sexual encounter does not make Sarah's testimony "inherently incredible." We find no error in the trial court's denial of defendant's motion to dismiss.

2. The Indecent Liberties Charge

A person that is at least sixteen years old and at least five years older than the victim is guilty of taking indecent liberties with a child if he "[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire." N.C. Gen. Stat. § 14-202.1(a)(1) (2009). Defendant first argues there was not substantial evidence that he acted for the purpose of arousing or gratifying a sexual desire. His argument lacks merit because a jury may infer from a defendant's actions that his purpose was to arouse himself or gratify his sexual desire. *See State v. Rogers*, 109 N.C. App. 491, 505-06, 428 S.E.2d 220, 228-29 (1993) (permitting an inference that the defendant

intended to arouse himself or gratify his sexual desire); *State v. Slone*, 76 N.C. App. 628, 631, 334 S.E.2d 78, 80 (1985) (same). Sarah testified defendant grabbed her, forced her into his home, and then raped her. This testimony alone is sufficient to defeat a motion to dismiss, even without corroboration.

Defendant also argues his motion to dismiss should have been granted because a conviction on statutory rape and indecent liberties charges arising from the same transaction violates the double jeopardy clause. Defendant has abandoned this argument because he failed to raise double jeopardy in his assignments of error. *See State v. Bell*, 359 N.C. 1, 27-28, 603 S.E.2d 93, 111-12 (2004) (declining to review a double jeopardy argument when defendant failed to object on double jeopardy grounds at trial and failed to address double jeopardy in his assignments of error); *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002) ("It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal."); *State v. Hamilton*, 351 N.C. 14, 22, 519 S.E.2d 514, 519 (1999) ("Our scope of appellate review is limited to those issues set out in the record on appeal.").

C. The State's Closing Argument

Finally, defendant argues the trial court should have intervened *ex mero motu* during the State's closing argument when his trial counsel failed to object to the prosecutor's credibility-related statements and allegedly emotionally charged argument. We

conclude the trial court's failure to intervene does not necessitate a new trial. To constitute reversible error, "the prosecutor's remarks must be both improper and prejudicial. Improper remarks are those calculated to lead the jury astray." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107-08 (2002). But when a defendant fails to object during the State's closing argument, he has a heavier burden of persuasion on appeal:

> [The] defendant must show that the alleged impropriety was so gross that the trial court abused its discretion in not correcting the arguments *ex mero motu*. Under this standard, only 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.

Wiley, 355 N.C. at 620, 565 S.E.2d at 42 (citations and internal quotation marks omitted).

Generally, "counsel possesses wide latitude to argue facts in evidence and all reasonable inferences arising from those facts." *Id.* at 620, 565 S.E.2d at 42. While attorneys may not express their personal opinions, they may argue the jury should not believe a particular witness. *State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005) (citing *State v. Jones*, 358 N.C. 330, 350, 595 S.E.2d 124, 137 (2004); *State v. Golphin*, 352 N.C. 364, 455, 533 S.E.2d 168, 227 (2000)); *see also* N.C. Gen. Stat. § 15A-1230(a) (2009) (forbidding attorneys from expressing "personal beliefs as to the truth or falsity of evidence"). A prosecutor may give the jury "reasons to believe the state's witnesses," *Wiley*, 355 N.C. at

622, 565 S.E.2d at 43, and may "argue that the State's witnesses are credible," *Augustine*, 359 N.C. at 725, 616 S.E.2d at 528. Statements during closing argument "must be considered in the context in which the remarks were made and the overall factual circumstances to which they referred." *Id.* (citation and internal quotation marks omitted).

Defendant argues a litany of the prosecutor's comments were grossly improper because the prosecutor impermissibly inferred and explicitly stated defendant and his wife were lying. These statements include the following: "Frankly, unless you choose to believe the made-up testimony of the defendant and his wife, then the testimony is uncontradicted"; "Now, then we spoke to Kitoria Downey, the co-master conspirator, with her husband, who's been practicing every day, engaged in a dialogue to try to thwart you and try to hide the truth from you"; and, "That's part of the lie, part of the misrepresentation."

We recently found it was not reversible error when a trial judge failed to intervene *ex mero motu* after the following prosecutorial comments:

> You can look at that statement and when you do you know that when Detective Ward got up there on the stand and said we didn't believe him, you can see why, because it's in that statement. He was lying. . . . But later he found out that this statement means he's guilty of kidnapping, robbery, sex offense and murder. What can he do? Well, somehow he's got to get rid of this statement, this statement that he gave of his own free will.
>
> . . .

> He's had four year[s], ladies and gentlemen, to think about what he would say. He's had access to all the [d]iscovery, the complete investigation. And he used that to craft this story because that's what he told you when he took the stand, he told you a story.

State v. Sanders, __ N.C. App. __, __, 687 S.E.2d 531, 538, *disc. review denied*, 363 N.C. 858, 695 S.E.2d 106 (2010). After reviewing the record and the context in which the prosecutor's statements were made, we conclude that while the prosecutor's credibility-related statements certainly bordered on impropriety, they were not so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. *Cf. State v. Roache*, 358 N.C. 243, 300, 595 S.E.2d 381, 418 (2004) (admonishing "counsel to refrain from suggesting that the expert's opinion testimony has been bought or is perjured for compensation," but nevertheless determining counsel's comments were not grossly improper).

Defendant also contends the following statement was improper because it invited the jurors to decide the case based on emotion and sympathy: "You really didn't need but one witness, and she's the first one I called to the stand. Do not tell [Sarah] that you do not believe her." Defendant argues this case is distinguishable from several North Carolina Supreme Court cases where there was significant evidence against the defendants and the Court suggested the prosecutors' comments were inappropriate, but did not justify new trials. *See id.* at 297-98, 595 S.E.2d at 416 (ruling prosecutor's comments were improper but did not necessitate a new trial given the overwhelming evidence against defendant); *State v. McCollum*, 334 N.C. 208, 224-25, 433 S.E.2d 144, 152-53 (1993)

(ruling defendant was not denied due process by prosecutor's comments asking jurors to imagine the victim was their child when the evidence against defendant was overwhelming); *State v. Boyd*, 311 N.C. 408, 418, 319 S.E.2d 189, 197 (1984) (expressing displeasure with the prosecutor's comments, but concluding they were not grossly improper and noting there was substantial evidence against defendant). He claims this case is distinguishable because there is not overwhelming evidence against him.

His argument fails because the prosecutor's comments were not improper in this respect as they did not invite the jurors to decide the case based on emotion and sympathy. The prosecutor's comments were not a blatant appeal to the juror's emotions; rather, the prosecutor suggested the jury was confronted with conflicting accounts of what transpired and encouraged the jury to side with Sarah's version. A closing argument is not impermissible merely because it may provoke an emotional response. *Cf., e.g., In re Butts*, 157 N.C. App. at 617, 582 S.E.2d at 285 (2003) (stating that otherwise admissible expert testimony is not inadmissible because it incidentally enhances a witness's credibility). Therefore, the trial court did not commit reversible error by failing to intervene.

IV. Conclusion

No reversible error.

Judges HUNTER, Robert C., and WALKER concur.

Report per Rule 30(e).