

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1374

Filed: 19 May 2015

Iredell County, No. 13 CRS 54397

STATE OF NORTH CAROLINA, Plaintiff,

v.

MICHAEL JOHN GODBEY, Defendant.

Appeal by defendant from judgment entered 12 August 2014 by Judge Anderson Cromer in Iredell County Superior Court. Heard in the Court of Appeals 6 May 2015.

*Attorney General Roy Cooper by Special Deputy Attorney General Elizabeth Leonard McKay, and Associate Attorney Karmina J. Ishak, for the State.*

*Winifred H. Dillon for defendant-appellant.*

STEELMAN, Judge.

It was not error or plain error for the trial court to allow the State to cross-examine defendant about a case that defendant discussed in his direct testimony. Defendant's argument regarding his active, non-probationary, sentence is dismissed as moot, since his sentence has expired.

I. Factual and Procedural Background

On 8 August 2013 Michael Godbey (defendant) went to the Iredell County courthouse annex, where he was involved in an incident with a female security guard. He was charged with assault on a female, was convicted in district court on 4 March

2014, and appealed to Superior Court for trial *de novo*. The charge against defendant came on for trial at the 11 August 2014 criminal session of Superior Court for Iredell County. Defendant, who is hearing impaired, used the services of an interpreter during the trial.

A. The State's Evidence

On 8 August 2013 Marsha Isenhour<sup>1</sup> was employed by the Wilson Security Company as a security officer at the Iredell County courthouse annex. Ms. Isenhour checked courthouse visitors through a metal detector and, if an alarm sounded when a person passed through the metal detector, she used a metal detection wand to determine the source of the alarm. At around 10:00 a.m. defendant entered the courthouse and when he passed through the metal detector the alarm sounded. Ms. Isenhour knew that defendant was hearing impaired, so she held up her hands, gestured to defendant to stop, and spoke clearly so he could read her lips. Defendant continued to walk towards Ms. Isenhour and when she turned to seek assistance from a co-worker, defendant shoved her from behind into the wall, pushing her “with both hands quite forcefully.” Her co-worker restrained defendant until a bailiff escorted him outside. Once outside, defendant made “threatening gestures,” and looked at Ms. Isenhour while holding his hand “like he was shooting a gun.”

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<sup>1</sup> Although the witness's name is spelled “Eisenhour” in the trial transcript, defendant and the State agree that the correct spelling is “Isenhour.”

Lloyd Elliott also worked for Wilson Security at the courthouse annex. On 8 August 2013 he heard the alarm sound and turned to see Ms. Isenhour holding up her hands in front of defendant and yelling “Stop!” However, defendant did not stop, but “slammed her into the wall.” Mr. Elliott saw that defendant had not tripped, but intentionally pushed Ms. Isenhour into the wall. He stayed between defendant and Ms. Isenhour until a deputy took defendant outside. When defendant was outside, he had an “enraged look” on his face and made threatening gestures towards him and Ms. Isenhour.

B. Defendant’s Evidence

Defendant testified on his own behalf, with the assistance of an interpreter. In August 2013 he was the prosecuting witness in a criminal case and on 8 August 2013 he went to the Iredell County courthouse to learn why the case had been dismissed. He approached the metal detector and removed coins and keys from his pockets in order to walk through the checkpoint, but Ms. Isenhour and Mr. Elliott told him to get out of the building. He wrote a note asking Ms. Isenhour why she was telling him to leave the building and showed it to her. In response, she threatened him with the metal detector wand. At that point a deputy arrived and took him outside. Defendant testified that he did not understand why Ms. Isenhour was trying to bar him from the building and denied touching her or making threatening gestures. Defendant also

testified about a criminal case that had been dismissed in which he had “filed assault charges” against a man and was also cross-examined about the case.

On 12 August 2014 the jury found defendant guilty of assault on a female. Defendant stipulated that he had a prior record level III for purposes of misdemeanor sentencing. As discussed below, the trial court initially imposed a split sentence of 30 days imprisonment followed by a term of probation, but subsequently changed the judgment to 120 days imprisonment without probation.

Defendant appeals.

## II. Cross-examination of Defendant

In his first argument, defendant contends that the trial court “committed plain error in admitting evidence that [defendant’s] criminal complaint against [another man] was dismissed for insufficient evidence because the admission amounted to a judicial opinion that [defendant] was not credible.” Defendant has failed to establish the existence of error or plain error.

### A. Standard of Review

“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4). However:

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For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

B. Analysis

On direct examination, defendant testified that he went to the courthouse annex on 8 August 2013 to learn why a criminal case in which he was the prosecuting witness had been dismissed two days earlier. Defendant stated that he “didn’t have [a] chance to tell [his] side of the story on August the 6<sup>th</sup>,” and that he had never been told why the case was dismissed. Defendant testified that:

I just want to know why the case I had filed against the gentleman [had] been dismissed. I just went to the DA's office to try to find out what was going on and explain my side of the case. The DA apparently wasn't doing his job of representing me.

Defendant also testified that on both 6 August and 8 August 2013 Ms. Isenhour and Mr. Elliott had prevented him from entering the courthouse, telling him to “get out” and “leave the building.” Thus, defendant offered testimony regarding the case

that had been dismissed, including assertions that he had not been informed of the reasons for the dismissal and that he had been prevented from entering the courthouse to discuss the case with the prosecutor.

On cross-examination, defendant was questioned about the case in which he was the prosecuting witness, and the State introduced documents associated with the case, including the reports he filed with a magistrate about the alleged assault, and the records of the district court proceedings in that case. Defendant testified that in April 2013 he swore out a warrant before a magistrate, charging another man with simple assault. On 12 June 2013 defendant testified in district court as a prosecution witness. After the evidence was presented, the district court judge dismissed the charge. On 27 June 2013 defendant returned to the magistrate and initiated a new assault proceeding against the same defendant for the same alleged assault. A trial date was set for 6 August 2013, but when defendant went to court on that date, he learned that the second charge had been dismissed because the defendant in that case had been acquitted of the assault at the earlier district court trial. Defendant testified that on August 6<sup>th</sup> Ms. Isenhour prevented him from entering the courthouse, that he returned on 8 August 2013 to learn more about the dismissal of the assault charge, and that Ms. Isenhour and Mr. Elliott were “lying” about the incident on 8 August 2013.

“Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.” *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981) (citations omitted). “In such a case, the defendant has ‘opened the door’ to this testimony and will not be heard to complain.” *State v. Stanfield*, 292 N.C. 357, 364, 233 S.E.2d 574, 579 (1977) (citation omitted). We hold that, by testifying about the earlier assault case in his direct testimony, defendant opened the door to cross-examination on this subject and that the trial court’s decision to allow the testimony and introduction of documents pertaining to the earlier case was not error. Because the trial court did not err, we do not reach the issue of plain error.

Defendant, however, contends that the documents detailing dismissal of the charge constitute a “judicial opinion” on defendant’s credibility, given that defendant testified under oath before a magistrate and at the district court trial. However, a charge may be dismissed for a variety of reasons; for example, a witness’s unimpeached and credible testimony may simply not establish the elements of a criminal offense. The bare fact that the earlier charge was dismissed does not constitute a judicial opinion on defendant’s credibility.

This argument is without merit.

### III. Sentencing

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In his second argument, defendant contends that he is “entitled to a new sentencing hearing because the trial court erred when it based its imposition of sentence on [defendant’s] exercise of his right to appeal.” We conclude that, although the trial court erred, the issue is now moot, given that defendant has served his sentence and cannot be resentenced.

At the sentencing hearing, the trial court listened to the arguments from the prosecutor and defense counsel, and questioned defendant about his living situation.

The trial court then engaged in the following dialog with counsel:

THE COURT: All right. Stand, please. Find there's a factual basis for all of this. I've accepted the verdict of the jury. On a conviction of and a guilty finding of assault on a female, the Court's going to enter the following judgment. It's a class A1 misdemeanor, record level III with six priors. It's 150 days suspended for one year upon the following terms and conditions. You pay the court costs. Are you court-appointed?

MR. LITTLE: I am court-appointed, Your Honor. At this time I have a total right at 21 hours. . . .

THE COURT: At what rate?

MR. LITTLE: That's, I believe, the \$60 rate.

THE COURT: Be an additional \$1,260. You can pay this while you're on probation; however, this includes the following terms and conditions. It will be a 30-day sentence starting today in the Iredell County Jail. When you get out, you're to move to Buncombe County, live with your mother for the remainder of the probation period and not reside, if not with your mother, then at a place in Buncombe County that's been secured for you. Probation

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will be transferred up there. You're to also enroll in anger management classes and complete anger management class before the end of your probation. First anger management class missed is to result in an arrest by the probation officer and placed under a \$50,000 secured bond. That's my judgment. He's in custody of the Sheriff's Department for 30 days.

MR. LITTLE: Your Honor, if I may, Mr. Godbey has told me he does wish to file notice of appeal in this matter. We would ask that the active portion of the sentence be held in abeyance during the pendency of the appeal. I know that that could take quite awhile. No idea how it might go, might not go, but we'd ask that the active portion of the sentence be held in abeyance [during] the pendency of the appeal.

THE COURT: Well, my judgment has changed. This will be an active sentence of 120 days, no probation, notice his appeal, appoint appellate counsel. I'm not waiving -- I'm not setting a bond. He's in the custody of the Sheriff's Department for 120 days.

On appeal, defendant argues that, although the 120 day sentence is within the statutorily permissible range, the transcript indicates that the trial court changed his judgment from a split sentence of 30 days followed by a period of probation to an active term of imprisonment in response to defendant's decision to appeal.

"A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive. If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977)

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(citing *State v. Swinney*, 271 N.C. 130, 155 S.E. 2d 545 (1967)). “It goes without saying that no person should ever be penalized for exercising a constitutional right or his right of appeal.” *State v. Stafford*, 274 N.C. 519, 525, 164 S.E.2d 371, 375 (1968).

In this case, the trial court first entered a detailed judgment and then, immediately after defense counsel informed the court that defendant wished to appeal, the trial judge stated “Well, my judgment has changed.” We agree with defendant that the only reasonable interpretation of the above dialog is that the trial court’s decision to change its judgment was an improper response to defendant’s notice of appeal. However, we are not required to reach a definitive conclusion on this issue, because the issue of alleged error in defendant’s sentence has become moot.

The record reflects that on 12 August 2014 defendant was sentenced to 120 days in the custody of the Iredell County Sheriff. We take judicial notice of the records of Iredell County, which show that defendant’s custody was transferred to Mecklenburg County, pursuant to the Statewide Misdemeanant Confinement Program, and that defendant was released on 10 December 2014, following expiration of his sentence. Generally, “ ‘this Court will not hear an appeal when the subject matter of the litigation . . . has ceased to exist.’ ” *In re Swindell*, 326 N.C. 473, 474, 390 S.E.2d 134, 135 (1990) (quoting *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968)). “Once a defendant is released from custody, ‘the subject matter of [a sentencing error] has ceased to exist and the issue is moot.’ ” *State v. Stover*, 200 N.C.

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App. 506, 509, 685 S.E.2d 127, 130 (2009) (quoting *Swindell*, 326 N.C. at 475, 390 S.E.2d at 135). “In the instant case, defendant already has served his [term of imprisonment]. Furthermore, defendant has not argued to the Court any collateral adverse legal consequences that may result from the . . . defendant's sentence. Therefore, we hold that the issue of whether defendant’s active sentence [was improperly imposed] is moot.” *Stover*, 200 N.C. App. at 509, 685 S.E.2d at 130-31.

IV. Conclusion

We conclude that the trial court did not err by allowing the State to cross-examine defendant about a criminal case that defendant had testified about in his direct testimony. The issue of whether defendant’s sentence was improperly imposed is dismissed as moot.

NO ERROR IN PART, DISMISSED IN PART.

Judges STEPHENS and McCULLOUGH concur.