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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-643

Filed: 21 March 2017

Onslow County, Nos. 14 CRS 57645-46

STATE OF NORTH CAROLINA

v.

ROBERT LEE MORRIS

Appeal by defendant from judgments entered 4 March 2016 by Judge Wayland J. Sermons, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 11 January 2017.

Attorney General Roy Cooper¹, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Kimberly P. Hoppin, for defendant-appellant.

CALABRIA, Judge.

Where the trial court carefully considered the impact of a witness' outburst and issued a curative instruction to the jury, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. Where the offense of which

¹ When the briefs and records in this case were filed, Roy Cooper was Attorney General. Joshua H. Stein was sworn in as Attorney General on 1 January 2017.

defendant was convicted was not an aggravated offense, the trial court erred in sentencing him to lifetime sex offender registration, and we reverse that sentence and remand for resentencing. Where defendant failed to preserve his constitutional objection, we decline to consider it for the first time on appeal. Where the cold record does not reveal whether defense counsel's performance fell below an objective standard of reasonableness, we dismiss defendant's ineffective assistance of counsel claim without prejudice.

I. Factual and Procedural Background

In late 2013 or early 2014, C.C.² moved from Raleigh to Jacksonville with her children. Robert Lee Morris ("defendant") was her boyfriend, and father of her youngest child. G.C., one of C.C.'s daughters, testified that defendant lived with them in Raleigh, and later in Jacksonville. She testified that she was afraid of defendant, because he hurt her by "stick[ing] his penis in [her] butt and in [her] mouth[.]" and that this behavior started in Raleigh, and continued in Jacksonville.

In October of 2014, G.C. had a conversation with her grandmother, and asked to spend the night at her grandmother's house. The grandmother testified that G.C. told her that defendant had touched her inappropriately, specifically that "he had put his penis in her rear" and "made her suck on his penis." The grandmother confronted defendant, and she and C.C. reported the allegations to law enforcement and social

² Pseudonyms used to protect the privacy of the minor victim and her family.

STATE V. MORRIS

Opinion of the Court

services. On 10 October 2014, a child interview specialist spoke with G.C. This interview was recorded.

Defendant was charged with two counts of first-degree sex offense with a child by an adult, two counts of indecent liberties with a child, and two counts of crime against nature. During the trial, the recording of G.C.'s interview was admitted as evidence, and played for the jury. During the playing of the interview, G.C.'s grandmother began crying loudly. The trial court sent her and the jury out of the courtroom, and defendant moved for a mistrial. This motion was denied.

The jury returned verdicts finding defendant guilty of all charges. The trial court consolidated judgments for the first counts of sex offense with a child and crime against nature, and sentenced defendant to a minimum of 300 and a maximum of 420 months imprisonment. The trial court also sentenced defendant to a minimum of 19 and a maximum of 32 months imprisonment for the first count of indecent liberties with a child. Likewise, the trial court consolidated the second counts of sex offense with a child and crime against nature, and sentenced defendant to a minimum of 300 and a maximum of 420 months imprisonment, plus a minimum of 19 and a maximum of 32 months imprisonment for the second count of indecent liberties with a child. All of these sentences were to be served consecutively, in the custody of the North Carolina Department of Adult Correction. The trial court further ordered that, upon

his release, defendant was to register as a sex offender and enroll in satellite-based monitoring (“SBM”) for the remainder of his natural life.

Defendant gave oral notice of appeal at trial. However, SBM is a civil penalty, which requires the filing of written notice of appeal, which defendant did not file. Defendant therefore filed a petition for writ of certiorari with respect to the issue of SBM which this Court, in its discretion, grants. *See State v. Green*, 229 N.C. App. 121, 128, 746 S.E.2d 457, 464 (2013).

II. Motion for Mistrial

In his first argument, defendant contends that the trial court erred in denying his motion for a mistrial. We disagree.

A. Standard of Review

“‘Our standard of review when examining a trial court’s denial of a motion for mistrial is abuse of discretion.’” *State v. Dye*, 207 N.C. App. 473, 482, 700 S.E.2d 135, 140 (2010) (quoting *State v. Simmons*, 191 N.C. App. 224, 227, 662 S.E.2d 559, 561 (2008)). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Analysis

When the recording of G.C.’s interview was played for the jury, her grandmother began to cry loudly. The trial court then instructed the grandmother

and the jury to leave the courtroom. Defendant then moved for mistrial, arguing that the grandmother's behavior was highly prejudicial. The trial court denied this motion, instead making the following observation:

The Court then, further, is going to indicate for the record that the Court, immediately upon hearing the outburst of the witness -- of [the grandmother] in the audience, which occurred at 11:06 a.m., during the playing of a videotape, instructed [the grandmother] to leave the courtroom. When [the grandmother] did not immediately stand up and leave the courtroom, the Court ordered the bailiff to remove the jury from the courtroom; that there was a possible passage of less than 60 seconds from the time the Court asked Ms.-- of the outburst until the time the Court removed the jury from the courtroom.

The trial court then called the jury back into the courtroom, and issued the following instruction to the jury:

Ladies and gentlemen of the jury, you are not to consider any outburst by any spectator in the audience in this trial. That is not evidence, and it is not proper for you to consider. I'll ask you to strike it from your mind. Put it out of your mind and not consider it, under any circumstances.

Defendant contends, however, that this instruction was insufficient, and that the outburst sufficiently prejudiced the jury that a mistrial was warranted.

With respect to a mistrial, we have previously held that

a “[m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict.” *State v. Smith*, 320 N.C. 404, 418, 358 S.E.2d 329, 337 (1987) (citation and quotation marks omitted). The trial court “must declare a mistrial upon the defendant’s motion if there occurs during the trial

an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2003). However, "[n]ot every disruptive event which occurs during trial automatically requires the court to declare a mistrial." *State v. Allen*, 141 N.C. App. 610, 617, 541 S.E.2d 490, 496 (2000) (citation omitted), *disc. review denied and appeal dismissed*, 353 N.C. 382, 547 S.E.2d 816 (2001).

Dye, 207 N.C. App. at 481-82, 700 S.E.2d at 140. Thus, the fact that the grandmother's outburst may have been disruptive does not automatically require the trial court to declare a mistrial. Rather, it is in the discretion of the trial court to determine whether such a disruption has caused "substantial and irreparable prejudice to the defendant's case."

Defendant contends that, because there was no forensic evidence or expert testimony presented regarding the alleged conduct, the evidence boiled down to a "credibility contest[.]" He contends that the grandmother's outburst overcame the "lack of overwhelming evidence" of his guilt, and takes issue with the fact that the trial court did not interview the jurors individually to determine whether they could still be fair and impartial in rendering a verdict. Nonetheless, our standard of review is whether the trial court abused its discretion; that is, whether its ruling was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." In the instant case, the trial court clearly gave consideration to the fact that it immediately instructed the grandmother to leave the

courtroom; that when she did not do so immediately, the bailiff removed the jury from the courtroom; and that the entire occurrence took “less than 60 seconds[.]” Further, the trial court gave the jury a curative instruction, advising them not to consider the outburst. “Jurors are presumed to follow the trial court’s instructions.” *State v. Gregory*, 340 N.C. 365, 408, 459 S.E.2d 638, 663 (1995), *cert. denied*, 517 U.S. 1108, 134 L.Ed.2d 478 (1996). As such, we hold that the trial court did not abuse its discretion in denying defendant’s motion for a mistrial.

III. Sex Offender Registration

In his second argument, defendant contends that the trial court erred in sentencing him to lifetime registration as a sex offender. We agree.

A. Standard of Review

On appeal from an order requiring a defendant to register as a sex offender, “‘we review the trial court’s findings of fact to determine whether they are supported by competent record evidence, and we review the trial court’s conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.’” *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004) (citation, quotation marks, and brackets omitted), *cert. denied*, 543 U.S. 1156, 161 L.Ed.2d 122 (2005)).

B. Analysis

Defendant contends that the trial court erred in requiring him to register as a sex offender for his lifetime, as the offenses of which he was convicted did not qualify him for mandatory lifetime registration.

Our General Statutes provide, *inter alia*, that a defendant “who is convicted of an aggravated offense” shall be subject to lifetime registration as a sex offender. N.C. Gen. Stat. § 14-208.23 (2015). An aggravated offense is defined as

any criminal offense that includes either of the following:
(i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6(1a) (2015). If, on the other hand, a defendant is convicted of a reportable but non-aggravated offense which does not require lifetime registration, he is only subject to registration for a period of thirty years. N.C. Gen. Stat. § 14-208.7(a) (2015). In determining whether an offense is aggravated or not, “the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction.” *State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009).

In the instant case, defendant was charged under N.C. Gen. Stat. § 14-27.4A.³ That statute provides that “[a] person is guilty of statutory sexual offense with a child

³ This statute was recodified as N.C. Gen. Stat. § 14-27.28, effective 1 December 2015.

by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years.” N.C. Gen. Stat. § 14-27.4A(a) (2015). This offense does not require that the State demonstrate “the use of force or the threat of serious violence[,]” as required by N.C. Gen. Stat. § 14-208.6(1a)(i), nor does it require that the State demonstrate that defendant engaged in “a sexual act . . . with a victim who is less than 12 years old[,]” as required by N.C. Gen. Stat. § 14-208.6(1a)(ii).

The elements of the charge of which defendant was convicted do not align with those of an aggravated offense. Further, the trial court did not find defendant to be a recidivist or sexually violent predator. The trial court therefore erred in sentencing defendant to lifetime sex offender registration, and we reverse this sentence, and remand for resentencing. On remand, the trial court is instructed to sentence defendant in accordance with N.C. Gen. Stat. § 14-208.7(a) as a non-aggravated offender.

IV. Satellite-Based Monitoring

In his third argument, defendant contends that the trial court erred in sentencing him to lifetime SBM. We disagree.

A. Standard of Review

On appeal from an order imposing SBM, “ ‘we review the trial court’s findings of fact to determine whether they are supported by competent record evidence, and

we review the trial court’s conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.’” *Kilby*, 198 N.C. App. at 367, 679 S.E.2d at 432 (quoting *Garcia*, 358 N.C. at 391, 597 S.E.2d at 733 (citation, quotation marks, and brackets omitted)).

“In general, a constitutional issue may not be raised for the first time on appeal.” *State v. Haddock*, 191 N.C. App. 474, 478-79, 664 S.E.2d 339, 343 (2008).

B. Analysis

Defendant contends that the trial court’s SBM order, lacking an inquiry into the reasonableness of SBM in the instant case, violated defendant’s Fourth Amendment rights under the United States Constitution. Defendant cites a recent decision of the Supreme Court of the United States, in which the Court held that SBM “effects a Fourth Amendment search[.]” and that therefore it was necessary for the trial court to consider the reasonableness of the imposition of SBM under the circumstances. *Grady v. N.C.*, 575 U.S. ___, ___, 191 L. Ed. 2d 459, 462 (2015). We acknowledge that, in light of *Grady*, this Court has reversed orders requiring lifetime registration and enrollment in SBM, and remanded for new hearings to consider the reasonableness of SBM. See *State v. Blue*, ___ N.C. App. ___, 783 S.E.2d 524 (2016); *State v. Morris*, ___ N.C. App. ___, 783 S.E.2d 528 (2016).

Defendant's constitutional argument, whether well-founded or not, was not preserved by objection or motion at the hearing.⁴ Defendant did not raise this argument below, and it may not be raised for the first time on appeal. And while we have chosen, in our discretion, to grant certiorari with respect to defendant's failure to provide written notice of appeal on the issue of SBM, that discretion does not extend to permitting defendant to raise this argument for the first time on appeal. This argument is therefore dismissed.

We note, however, that this case has been remanded to the trial court for resentencing on the issue of lifetime sex offender registration. On remand, we encourage the trial court to reconsider its sentence of lifetime SBM, in accordance with *Grady*, *Blue*, and *Morris*.

C. Ineffective Assistance of Counsel

Defendant further contends that the failure to preserve this constitutional issue is the result of ineffective assistance of counsel.

It is well established that ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims

⁴ We note that defendant's SBM hearing preceded the *Grady* decision, and that therefore defendant could not have raised that issue at trial. Nonetheless, it is inappropriate to raise such an argument for the first time on appeal.

STATE V. MORRIS

Opinion of the Court

without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citations and quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005).

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

Even assuming *arguendo* that defense counsel's failure to preserve this issue has resulted in prejudice to defendant, the question is whether this failure constituted "deficient performance" that "fell below an objective standard of reasonableness." The cold record does not establish whether defense counsel's failure to preserve this issue fell below an objective standard of reasonableness. Accordingly, we hold that this argument has been raised prematurely. We dismiss defendant's ineffective assistance of counsel claim without prejudice, allowing defendant to bring that claim pursuant to a motion for appropriate relief in the trial court.

V. Conclusion

The record demonstrates that the trial court considered the impact of the grandmother's crying in the courtroom very carefully, and provided a curative instruction to the jury immediately following the outburst. As such, we hold that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. However, because the trial court erroneously sentenced defendant to lifetime sex offender registration when the offense with which he was charged did not constitute an aggravated offense, we reverse that sentence, and remand for resentencing. Although defendant did not preserve his constitutional argument concerning lifetime SBM, on remand, the trial court is encouraged to reconsider its SBM sentence in light of *Grady*, *Blue*, and *Morris*. Because the cold record does not establish whether defense counsel's failure to preserve defendant's constitutional argument fell below an objective standard of reasonableness, we hold that the issue of ineffective assistance of counsel has been raised prematurely, and dismiss it without prejudice.

NO ERROR IN PART, REVERSED AND REMANDED IN PART, DISMISSED
IN PART.

Judges McCULLOUGH and INMAN concur.

Report per Rule 30(e).