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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1325

Filed: 20 June 2017

Mecklenburg County, Nos. 14 CRS 233044–45, 233047

STATE OF NORTH CAROLINA

v.

JOSE DANIEL GONZALEZ, Defendant.

Appeal by defendant from judgment entered 21 July 2016 by Judge W. David Lee in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra Gruber, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

ELMORE, Judge.

Defendant Jose Daniel Gonzalez appeals from a judgment entered upon his convictions for sex offense in a parental role, indecent liberties with a child, and statutory sex offense with a child. After careful consideration, we find no error in the trial court's judgment.

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On 2 September 2014, a grand jury indicted defendant on one count each of sex offense in a parental role, indecent liberties with a child, and statutory sex offense with a child. Defendant was tried between 18 and 21 July 2016. At trial, M.F.,¹ who was defendant's stepdaughter at the time of the events in question, testified to the following for the State:

On 17 August 2014, when M.F. was thirteen, she and her brother were at home with defendant while her mother was at work. Defendant came inside after mowing the lawn and told M.F. that he wanted to watch a video together. He took M.F. back outside, where he showed her a pornographic video on her tablet. M.F. went to her room once the video was over.

Defendant later went into M.F.'s room, where she was playing games on her tablet. M.F. told defendant she was feeling her hormones. Defendant said that he felt the same way and that he had an erection. Defendant instructed M.F. to lie down on the bed and proceeded to take off her pants and underwear. He spread her legs and performed oral sex on M.F. Defendant then told M.F. to "give him a hand job." M.F. put her hand on defendant's penis and defendant ejaculated. Defendant told M.F. not to tell her mother.

The next day, M.F.'s mother saw that M.F. was upset and asked if there was something wrong. M.F. said she "couldn't tell her" and started to cry. Her mother

¹ The name of the child victim has been replaced with initials.

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asked, “Did somebody touch you?” but M.F. “just stayed quiet.” Her mother asked if the person was male or female, and M.F. eventually told her it was a male. Her mother then began naming names and eventually asked if it was defendant who touched her. M.F. said it was him. M.F.’s mother then went home to get M.F.’s sister and brother, and the four of them went to M.F.’s aunt’s house. The next day they went to the police department and spoke with detectives.

Officer Kamesha Bridges of the Charlotte-Mecklenburg Police Department testified that she called defendant and asked if he would come answer questions at the police department, to which defendant agreed. Defendant initially denied sexual contact with M.F. but eventually admitted that he performed oral sex on M.F. and that she gave him a “hand job.”

Defendant offered no evidence at trial. The jury found defendant guilty of all three charges. The trial court consolidated the convictions for judgment and sentenced defendant to 228 to 334 months of imprisonment. Defendant gave notice of appeal in open court.

Defendant’s sole contention on appeal is that the prosecutor’s reference during closing arguments to the lack of evidence showing the victim was untruthful violated defendant’s Fifth Amendment rights against self-incrimination and to remain silent. He points to the following statements as forming the basis for his argument on appeal:

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[PROSECUTOR]: What I didn't hear was that she has a lying problem. Because as far as I know—maybe y'all know different—that depression then doesn't lead to pathological lying. Or that ADHD, one of the symptoms is pathological lying. Because surely if she had that diagnosis we would have heard that.

Defense counsel is here to vigorously represent his client, just like he told you himself. So wouldn't we have heard if—

[DEFENSE COUNSEL]: Objection, your Honor. Fifth Amendment. Fourteenth.

THE COURT: Absolutely. Go ahead.

[PROSECUTOR]: Wouldn't we have heard if there was something more than depression and ADHD?

“Under the United States and North Carolina constitutions, a defendant has the right to refuse to testify at trial.” *State v. Parker*, 185 N.C. App. 437, 444, 651 S.E.2d 377, 382 (2007) (citing *State v. Mitchell*, 353 N.C. 309, 543 S.E.2d 830, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001)). As such, “ ‘any reference by the State regarding [a defendant’s] failure to testify is violative of his constitutional right to remain silent.’ ” *Id.* (alteration in original) (quoting *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994)).

“In cases in which counsel makes a contemporaneous objection to opposing counsel’s argument, this Court reviews the decision of the trial court for abuse of discretion.” *State v. Peterson*, 361 N.C. 587, 606, 652 S.E.2d 216, 229 (2007) (citing *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002)), *cert. denied*, 552 U.S.

1271, 170 L. Ed. 2d 377 (2008). Our appellate courts apply a two-part analysis to assertions of improper closing remarks: “[T]his Court first determines if the remarks were improper Next, we determine if the remarks were of such a magnitude that their inclusion prejudices defendant, and thus should have been excluded by the trial court.” *Id.* at 606–07, 652 S.E.2d at 229 (alteration in original) (quoting *Jones*, 355 N.C. at 131, 558 S.E.2d at 106).

When the prosecutor’s statements are read in their proper context, the trial court could not be said to have abused its discretion in overruling defendant’s objection. In this case, defense counsel attempted to impeach the victim’s credibility in part by highlighting her mental health issues. In his opening argument, defense counsel stated:

What you’re going to hear is plenty of people telling you what [M.F.] said happened. They don’t know what happened. They know what she told them. . . .

I am not trying to ascribe any ill intent to her. But [M.F.], as you will hear, has been a somewhat troubled child. She is under professional care at the time this incident happened.

Her mother is with her [19 August 2014], feels that something is wrong with her, asks her what’s wrong, and you’ll hear testimony that she says nothing’s wrong. . . .

She asks and asks, [M.F.] denies and denies. And at some point [M.F.] tells this story about what happened. And that point comes after her mother threatens to take her to the hospital if she doesn’t tell.

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But this is a girl who's troubled, who is under professional care, who—something's going on. It could be anything; she's a thirteen year old girl that has . . . hormones are raging. . . .

At the end of this case what you're going to be left with are accusations made against her stepfather by a troubled young girl, who was pressured into making those claims about her step-father. And the question you're going to have to answer for yourselves is is [sic] that enough. Is that enough to convict him. Is that enough to fully satisfy you and entirely convince you that this incident took place?

During cross-examination, M.F. admitted that she was taking medications for attention deficit hyperactivity disorder (ADHD) and depression at the time of the incident. M.F. also admitted during cross-examination that her mother said if M.F. didn't tell her what had happened, she would take M.F. back to the behavioral hospital. In his closing argument, defense counsel highlighted M.F.'s mental health diagnoses, her medications, and her potential difficulty navigating her feelings as a result of puberty. He argued that "the circumstances that make her sympathetic also call into question, to some degree, her credibility." Defense counsel further stated that M.F. "had already shown evidence of being somewhat troubled, as evidenced by her harming herself and being hospitalized. . . . Those were all red flags, and [Officer Bridges] chose to ignore them all."

To rebut defense counsel's contentions that M.F.'s allegations were not credible due in part to her mental health issues and the challenges she was facing, the

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prosecutor highlighted the fact that no evidence had been introduced showing that any of these things affected her capacity for telling the truth:

Victim is lying. Maybe victim is crazy. Maybe that's it. M.F.'s lying because Mom's threatened her. That was a big point, is that Mom threatened her. Again, let's back up. How did Mom get to that point? I know my child. I knew something was wrong. I was concerned that my child was not safe. So it is not a threat. It is a concern for her safety because something is wrong, because the defendant has molested her.

She is lying because she has mental health issues. You go to a therapist, right? You talk to your therapist? You've known your therapist for a while? You've been to the hospital, right? Tell me which one, so that everyone can hear that you went to Billingsley.

What I didn't hear was that she has a lying problem. . . .

“Closing arguments must be viewed in context and in light of the overall factual circumstances to which they referred.” *State v. Anderson*, 200 N.C. App. 216, 223, 684 S.E.2d 450, 456 (2009) (citing *State v. Flowers*, 347 N.C. 1, 36, 489 S.E.2d 391, 412 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998)). While a prosecutor may not comment on a defendant's choice not to testify in his or her defense, our appellate courts have held that “the prosecutor can comment on the defendant's failure to present evidence that refutes the State's theory of the case and that such an argument is not a comment on the defendant's failure to testify.” *State v. Barrett*, 343 N.C. 164, 179, 469 S.E.2d 888, 897 (citing *State v. Taylor*, 337 N.C. 597, 613, 447 S.E.2d 360, 370–71 (1994); *State v. Morston*, 336 N.C. 381, 406, 445

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S.E.2d 1, 15 (1994); *State v. Mason*, 315 N.C. 724, 732, 340 S.E.2d 430, 436 (1986)), *cert. denied*, 519 U.S. 953, 136 L. Ed. 2d 259 (1996).

In the present case, given that defense counsel attempted to use M.F.'s mental health as a means of impeaching her credibility, it was entirely appropriate for the prosecutor to comment on the fact that defendant had not, in fact, presented any evidence supporting the notion that M.F.'s depression and ADHD rendered her testimony less reliable. We further note that testimony regarding how depression and ADHD might affect one's capacity for honesty would necessarily require expert testimony—not the testimony of defendant. The challenged portions of the prosecutor's closing argument were not of such character that the jury would necessarily take them to be a comment on defendant's refusal to testify. *See Parker*, 185 N.C. App. at 444, 651 S.E.2d at 382. We find no error in the trial court's judgment.

NO ERROR.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).