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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1104

Filed: October 3, 2017

Johnston County, No. 15CRS52234

STATE OF NORTH CAROLINA,

v.

JUAN MANUEL VILLA, Defendant.

Appeal by defendant from judgment entered 31 March 2016 by Judge C. Winston Gilchrist in Johnston County Superior Court. Heard in the Court of Appeals 5 April 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anita LeVeaux, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

BERGER, Judge.

On March 31, 2016, a Johnston County jury found Juan Manuel Villa (“Defendant”) guilty of indecent liberties with a child. Defendant asserts on appeal that the prosecutor made improper comments to the jury, and that the trial court erred by failing to deliver a corrective instruction. We disagree.

Factual & Procedural Background

On December 12, 2014, Defendant and his fourteen-year-old step-daughter, “Amy,”¹ were visiting her grandmother’s home during Amy’s winter vacation from school. Amy, at the time, was not living with Defendant because she had been estranged from her mother, Defendant’s wife, from a young age.

At trial, the State presented evidence which tended to show the following. Amy was lying on a bed in her grandmother’s home when Defendant, thirty-three years old at the time of the incident, entered the room. Defendant initiated a conversation with Amy, asking her about her relationship with her girlfriend and offering to buy lingerie and other items for them. Then, Defendant tickled Amy. She instructed him to stop. Defendant told her he liked touching her, and then he reached under her shirt and fondled her breast. Amy continued to object.

Amy’s younger sister ran into the room, which caused Defendant to pull his hand out from Amy’s shirt, and he instructed Amy’s sister to leave the room. Once Amy’s sister left, Defendant placed his hand inside Amy’s underwear. Amy’s younger brother then entered the room and continued entering and leaving as he argued with another sibling. In response, Defendant removed his hand from Amy’s underwear, touching Amy’s vagina in the process. Defendant tried to kiss Amy, but she turned

¹ A pseudonym is used throughout to protect the identity of the minor child pursuant to N.C.R. App. P. 3.1(b), and for ease of reading.

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her head to avoid his advances. After the incident ended, Defendant gave Amy twenty dollars and told her not to tell anyone what he had done.

Amy reported the incident to Smithfield Police Officer Victor Denoble on April 20, 2015. Four days later, Smithfield Police Detective Chris Blinson questioned Defendant. Defendant admitted to Detective Blinson that he had tickled Amy, kissed her neck, touched her breasts, and touched her buttocks. Defendant also admitted he was aware that his actions were inappropriate and wrong.

The record shows that Defendant's trial strategy was to discredit Amy as a witness by highlighting specific instances where Amy ran away from home, had physical altercations with her aunt, got in trouble at school, and expressed a desire for her mother to die. In response, the State not only acknowledged in closing argument that Amy was not a perfect teenager, but also emphasized that Amy's struggles were similar to other teenagers. The State asserted in its closing argument: "[a]nd you know what, shame on every single last one of us for dragging that girl in here placing her on that stand." To this comment, Defendant objected. The trial court sustained the objection but gave no corrective instruction.

On March 31, 2016, the jury returned a verdict finding Defendant guilty of indecent liberties with a child. The trial court sentenced him to nineteen to thirty-two months in prison. This sentence was suspended, and Defendant was placed on supervised probation for sixty months. He timely appealed.

Analysis

The Sixth Amendment of the United States Constitution guarantees, *inter alia*, that one accused of a crime has the right to be tried by an impartial jury, and this right is exercised when the accused enters a plea of “not guilty.” U.S. Const. amend. VI. The North Carolina Constitution guarantees the same right to stand trial before a panel of twelve jurors upon entering a plea of “not guilty.” N.C. Const. art. I, § 24; *State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971). In North Carolina, the accused “should not and could not be punished for” availing himself of these constitutional rights. *State v. Langford*, 319 N.C. 340, 345, 354 S.E.2d 523, 526 (1987) (citation omitted).

The exercise of the right to a jury trial is thus considered no less fundamental in our jurisprudence than reliance upon the right to remain silent. Accordingly, prosecutorial argument complaining a criminal defendant has failed to plead guilty and thereby put the State to its burden of proof is no less impermissible than an argument commenting upon a defendant’s failure to testify [W]e discern no distinction between the two in terms of intrusion upon a criminal defendant’s constitutional rights. We therefore hold that reference by the State to a defendant’s failure to plead guilty is violative of his Sixth Amendment right to a jury trial.

State v. Thompson, 118 N.C. App. 33, 41, 454 S.E.2d 271, 276, *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995). Such an “error is not cured by later instruction in the court’s jury charge . . . [, but it] may be cured by withdrawal of the remark or by an immediate statement from the [trial] court that it was improper, followed by

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an instruction to the jury not to consider it.” *Id.* at 42, 454 S.E.2d at 276 (citation, quotation marks, and brackets omitted). “[A trial] court’s failure to give a curative instruction after such a reference does not warrant a reversal, however, if the State shows that the error was harmless beyond a reasonable doubt.” *State v. Larry*, 345 N.C. 497, 524, 481 S.E.2d 907, 923, *writ denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997) (citations omitted).

In *State v. Thompson*, this Court held the State’s comments, although violative of the Defendant’s right to a jury trial and right to plead not guilty, constituted no prejudicial error. *Thompson*, 118 N.C. App. at 43, 454 S.E.2d at 277. There, the State asserted in closing argument:

All the evidence you heard in this case came from the State. So why do you have to hear it? Everybody in the State [of] North Carolina that’s charged with a crime has a right to a jury trial and they are innocent until proven guilty. Every person who is charged with any crime, . . . is entitled to have twelve people hear their case. . . . Anyone can plead not guilty.

. . . .

[T]he District Attorney’s office . . . prove[s] . . . the case beyond a reasonable doubt that the man did what they’re charging him with. . . . [T]hose two things are great. . . . [They are also] like this pen right here. . . . It writes and draws and whatever you want to do with it. If I take it and stick it in somebody’s eye[,] it’s a bad thing. . . . [I]f *you let the law be like this pen, if a guilty person hides behind that law it’s like sticking the law in somebody’s eye.*

. . . .

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[J]ust because you plead not guilty doesn't mean you didn't do it. . . . [I]f you allow a guilty person like that man there to hide behind the law and use it—

. . . .

—it's like the coward's way out. It's like a person who says well, you know, maybe I did it, but who cares, maybe a jury won't convict me. Don't let that man take the coward's way out.

Id. at 38-39, 454 S.E.2d at 274-75 (emphasis added). The *Thompson* Court, because of the quantum of evidence introduced against the defendant, found these comments failed to prejudice the defendant beyond any reasonable doubt, even though the trial court erred by overruling the defendant's objection and by failing to give curative instructions. *Id.* at 43, 454 S.E.2d at 277.

In the case *sub judice*, even though Defendant asserts the State's comments violated his rights, they did not improperly refer to Defendant exercising his right to a jury trial. Therefore, no corrective instruction by the court to the jury nor a withdrawal of the remark was necessary. *See Id.* at 32, 454 S.E.2d at 276. Throughout the trial, Defendant attempted to cast doubt on Amy's testimony by highlighting her troubled past and tumultuous relationships. In response, the State attempted to defend Amy and her troubled past, stating:

A large amount of the questions that the defendant's attorney asked [Amy] just dealt with [Amy]. She's not perfect. She is definitely not perfect. And she sat right up there on that stand and she told you she wasn't perfect.

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She's a teenager. She's [a] teenaged girl and she is a girl. She's a child. She might be taller than I am, but she's a child.

Each one of you, every single last one of you during jury selection talked about the struggles either you yourself have had with a teenager or the struggles you've watched other people go through. And [Defendant's counsel] asked you what's the number one challenge that you've dealt with in dealing with teenagers. Several of you have personal experiences on an everyday basis. Almost every person here said protecting them and making sure that I get them on the right path and I teach them how to act. Each one of you that has come into contact with a teenager knows that they are not perfect. In fact, they are a mess. They're a mess, every last one of them. If you've had a teenager in your life that is anywhere close to perfect, congratulations because they are rare. *And you know what, shame on every last one of us for dragging that girl in here placing her on that stand—*

[Objection sustained.]

....

Ladies and Gentlemen, remind yourselves that teenagers are not perfect.

(Emphasis added).

The State asked the jury to focus not on Amy's imperfections as a teenager, but on the consistency of her testimony with the testimony of other witnesses and how those consistencies fulfilled the elements of the offense charged. Unlike the comment revealed in *Thompson*, the comment here was not addressing Defendant's exercise of his right to a jury trial. There was no implication that Defendant was unnecessarily forcing the State through the process of a jury trial despite apparent and

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incontrovertible guilt. The State's comment did not indicate that the jury would not have had to sit through the instant trial but for the defendant pleading not guilty. It only refers to Amy having to testify. As such, the State's closing argument did not violate Defendant's right to a jury trial and did not require intervention by the trial court.

Conclusion

We hold that the State's closing argument did not violate Defendant's constitutional right to a jury trial.

NO ERROR.

Judges ELMORE and INMAN concur.

Recommend Report per Rule 30(e).