IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-900

Filed: 6 March 2018

Wake County, Nos. 15 CRS 207674–75

STATE OF NORTH CAROLINA

v.

MICHAEL DESHAUN MCMANNUS

Appeal by defendant from judgment entered 5 May 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 23 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Anna Davis, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone for defendant-appellant.

BRYANT, Judge.

Where the record indicates that defendant waived the assistance of counsel knowing and understanding the permissible range of punishments should he be found guilty, the trial court did not err in allowing defendant to represent himself at trial. While defendant does not challenge the trial court's admission into evidence of an

application for a restraining order, he does challenge the publication of the same to the jury. Thus, defendant cannot establish plain error where he acknowledges the assertions made in the application mirrored the victim's testimony at trial. Lastly, we hold the trial court did not err by imposing restitution.

During a motions hearing conducted before the Honorable Donald W. Stephens, Judge presiding in Wake County Superior Court, defendant Michael Deshaun McMannus was arraigned on charges of first-degree kidnapping, common law robbery, assault on a female, communicating threats, and injury to personal property. At that time, defendant expressed dissatisfaction with his public defender's refusal to move for a dismissal of the indictments and warrant against him. Speaking on his own behalf, defendant moved the court to dismiss an indictment and a warrant. His motions were denied and a trial date was set. Between arraignment and trial, defendant appeared in Wake County Superior Court two separate times, each time before a different judge. Defendant either requested or defended the exercise of his right to represent himself and each time engaged in an inquiry regarding his right to represent himself.

Beginning on 2 May 2016, defendant's trial was before the Honorable Paul C. Ridgeway. Judge Ridgeway again addressed defendant's waiver of his right to counsel and his intent to represent himself. The court reviewed with defendant each charged offense, offense class, and sentence exposure for each offense, should

defendant be found guilty. The court inquired as to defendant's level of education, whether he suffered from any mental illness, took medication that might impair him, understood that he had a right to legal counsel, and that the court would not advise or suggest a course of action on his behalf. The court then asked defendant if he still intended to proceed without legal counsel. Defendant asserted that he would proceed without legal counsel. The court found that defendant knowingly, voluntarily, and understandingly waived his right to counsel, including court appointed counsel, and elected to represent himself. The court appointed standby counsel, and the next day, a jury was impaneled. Defendant's trial commenced.

The evidence presented at trial indicated that during the evening of 4 April 2015, defendant arrived on foot and unannounced at the home of Erin Hill, a woman with whom defendant previously had a dating relationship. Though the relationship had ended at least four months before, they remained on friendly terms. That night defendant asked Hill (who lived in Raleigh) if she would give defendant a ride to his home (in Durham). Hill agreed to allow defendant to drive the two of them to his residence, and from there, Hill would drive herself back. Once in the car, defendant asked if he could make a phone call from Hill's phone. Hill handed defendant her cell phone, but instead of calling anyone, defendant opened Hill's text messages. Hill got out of the vehicle and began walking to a neighbor's house. She told defendant to get out of her car and return her phone; she then told him he would have to find another

ride. But after further conversation, Hill again agreed to ride with defendant to Durham. Hill returned to the vehicle and sat in the back seat where defendant had thrown her phone. Defendant threw Hill's purse in the backseat and drove out of Hill's apartment complex.

Defendant stopped the vehicle at an intersection with Rock Quarry Road and said, "[S]o you really moved on with your life, huh[?]" Concerned for her safety, Hill attempted to exit the vehicle, but defendant locked the car doors, turned onto Rock Quarry Road, and accelerated the vehicle to speeds of "at least eighty or ninety miles an hour." While driving, defendant turned his body and began beating Hill with his fist. From Rock Quarry Road, defendant drove onto Interstate 40, where Hill contemplated jumping from the vehicle. "[H]e said you know I want you to jump out of the car because I want to run over you." Hill remained in the vehicle until defendant exited the interstate and stopped at a stop light on Page Road in Durham. Hill exited her vehicle and ran toward another car stopped at the intersection. She told the driver of the other vehicle that she needed help: she had been beaten, and her car was being taken to Lynn Road. Defendant drove away in Hill's vehicle.

Using her rescuer's cell phone, Hill called 9-1-1. Emergency medical personnel arrived at the scene, took photographs of Hill's injuries, spoke with her rescuer, and transported her to a WakeMed Hospital. Hospital staff treated Hill for a concussion, a black eye, lacerations to her lip requiring six stitches, a bite mark on her arm,

abrasions on her chest, and torn fingernails. Law enforcement officers met Hill at the hospital, and upon her release, she gave a statement identifying defendant as the person who assaulted her. A few days later on 10 April, Hill's car was located in the parking lot of an apartment complex within walking distance of defendant's address. Photographs of the vehicle showed blood on the back seat. Meanwhile, Hill obtained a domestic violence protective order ("DVPO") against defendant.

Defendant testified on his own behalf and presented alibi testimony from his mother and his younger sister, each of whom testified that defendant was at the home of his mother in Durham on the evening of 4 April 2015 at the time Hill testified that defendant was with her.

Defendant was convicted by the jury of first-degree kidnapping and assault on a female. Defendant was found not guilty of common law robbery and injury to personal property. After the jury determined the existence of an aggravating factor—that defendant "took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense"—the trial court entered a consolidated judgment against defendant on the charges of first-degree kidnapping and assault on a female, sentencing defendant to a term of ninety-six to 128 months. Defendant was also ordered to pay $8,186.49 in restitution. Defendant appeals.

On appeal, defendant argues that the trial court (I) erred by allowing defendant to proceed *pro se*; (II) committed plain error by permitting the jury to consider the restraining order entered against defendant; and (III) erred by imposing restitution.

I

Defendant argues that the trial court failed to adhere to the requirements of our General Statutes, section 15A-1242 (entitled "Defendant's election to represent himself at trial"), and thus, erred by allowing him to proceed *pro se*. Defendant contends that because the three judges, before whom he appeared and of whom he requested the opportunity to represent himself, were not consistent as to the number of months or days to which defendant might be sentenced should he be found guilty, defendant did not comprehend "the range of permissible punishments," N.C. Gen. Stat. § 15A-1242(3) (2017), and is entitled to a new trial. We disagree.

"Prior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A–1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*." *State v. Watlington*, 216 N.C. App. 388, 393–94, 716 S.E.2d 671, 675 (2011) (citing *State v. Whitfield*, 170 N.C. App. 618, 620, 613 S.E.2d 289, 291 (2005); *State v. Evans*, 153 N.C. App. 313, 314–15, 569 S.E.2d 673, 674–75 (2002)).

The Supreme Court of the United States has held that the Sixth Amendment provides the accused with the right to self-representation "—to make one's own

defense personally—. . . [because] it is he who suffers the consequences if the defense fails." *Faretta v. California*, 422 U.S. 806, 819–20, 45 L. Ed. 2d 562, 572–73 (1975). "[A]n accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol." *McKaskle v. Wiggins*, 465 U.S. 168, 173, 79 L. Ed. 2d 122, 130 (1984) (citing *Faretta*, 422 U.S. 806, 45 L. Ed. 2d 562). As set forth in North Carolina General Statutes, section 15A-1242(3),

> [a] defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> . . . .
>
> (3) Comprehends the nature of the charges and proceedings and *the range of permissible punishments*.

N.C. Gen. Stat. § 15A-1242(3) (emphasis added). Where a court has conducted a pre-trial *Faretta* inquiry[1] and determined that a defendant's waiver of counsel was knowing and intelligent in satisfaction of N.C. Gen. Stat. § 15A-1242, a judge

[1] *Faretta v. California*, 422 U.S. 806, 819–20, 45 L. Ed. 2d 562, 572–73 (1975) ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.").

presiding over the trial, different than the judge who conducted the pre-trial inquiry, does not need to conduct another inquiry. *See State v. Lamb*, 103 N.C. App. 646, 648–49, 406 S.E.2d 654, 655–56 (1991).

> Once given, a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. Indeed, "[t]he burden of showing the change in the desire of the defendant for counsel rests upon the defendant."

State v. Kinlock, 152 N.C. App. 84, 88, 566 S.E.2d 738, 741 (2002) (alteration in original) (citation omitted) (quoting *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540–41 (1974)), *aff'd*, 357 N.C. 48, 577 S.E.2d 620 (2003).

In regard to his request to represent himself at trial, defendant appeared three times in Wake County Superior Court, before the Honorables Michael J. O'Foghludha, Graham Shirley, and Paul Ridgeway.

Defendant first raised the issue of having his appointed counsel dismissed and that he be allowed to represent himself on 11 January 2016 before Judge O'Foghludha. In pertinent part, Judge O'Foghludha reviewed with defendant the charges against him and the sentencing range for each charge should defendant be found guilty. First-degree kidnapping, a Class C felony, was represented as having a sentencing range, "depending on what the State alleges against you and what your prior record is," of between 182 to 231 months or "about 20 years." Common law robbery, a Class G felony, was represented as having a sentencing range of "again,

depending on your record" of thirty-one to fifty months. Assault on a female, a Class A1 misdemeanor, was represented as having a sentencing range of up to 150 days. And communicating threats and injury to personal property, both Class 1 misdemeanors, were represented as having a sentencing range of up to 120 days each.

In his brief before this Court, defendant acknowledges that the sentencing ranges related to him by Judge O'Foghludha were accurate, with the exception that the exposure for common law robbery, a Class G felony, was thirty-one to forty-seven months rather than thirty-one to fifty months. *See* N.C. Gen. Stat. §§ 15A-1340.17, -1340.23 (2017).

On appeal, defendant contends that he received inconsistent statements regarding his sentencing exposure from the judges before whom he appeared after appearing before Judge O'Foghludha, and as a result, he could not comprehend the range of permissible punishments to which he was exposed. However, in support of his contention that section 15A-1242 ("Defendant's election to represent himself at trial") was not satisfied, defendant only challenges the court's recitation of the range of permissible punishments. We note that, as defendant acknowledges, Judge O'Foghludha conducted a *Faretta* inquiry and properly informed defendant of the range of permissible punishments. Thus, defendant's waiver of counsel was good and sufficient until the proceedings terminated or until defendant made known that he desired to withdraw the waiver and have counsel assigned to him. *See Kinlock*, 152

N.C. App. at 88, 566 S.E.2d at 741; *Lamb*, 103 N.C. App. at 648–49, 406 S.E.2d at 655–56. As defendant failed to make known a desire to withdraw his waiver and have counsel assigned to him, the trial court did not err in allowing defendant to represent himself at trial. As to this point, defendant's argument is overruled.

Defendant also mentions that no judge before whom he appeared seeking to exercise his right to represent himself informed him "about restitution as a part of the 'range of permissible punishments' he might receive if convicted." However, restitution is not a mandatory result of conviction. "Restitution is not intended to punish defendants, but to compensate victims. There is no predetermined fine or presumption of damages." *State v. Daye*, 78 N.C. App. 753, 758, 338 S.E.2d 557, 561, *aff'd*, 318 N.C. 502, 349 S.E.2d 576 (1986). *Cf. State v. Taylor*, 187 N.C. App. 291, 294, 652 S.E.2d 741, 743 (2007) (remanding for a new trial, holding "[w]hile the trial court correctly informed defendant of the maximum 60-day imprisonment penalty for a Class 2 misdemeanor . . . it failed to inform defendant that he also faced a maximum $1,000.00 fine for each of the charges" (citation omitted)). The trial court did not err in failing to include restitution as a form of punishment within the permissible range of punishments defendant may receive upon conviction in order to determine that defendant knowingly and intelligently waived his right to counsel and could represent himself. Accordingly, we overrule defendant's argument.

II

Next defendant argues that the trial court committed plain error by allowing the jury to consider a civil domestic violence file, State's exhibit No. 7, and not limiting its use. Defendant does not contest the admission of the domestic violence file, but argues that the trial court committed plain error by failing to give a limiting instruction. We disagree.

> 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 affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations omitted). And "the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *Id.*

Defendant asks that we hold that the trial court committed plain error by failing to give a limiting instruction before publishing evidence to the jury. "The rule, however, in this State has long been that an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such instruction." *State v. Quarg*, 334 N.C. 92, 101–02, 431 S.E.2d 1, 5 (1993) (citing *State v. Smith*, 315 N.C. 76, 82, 337 S.E.2d 833, 838 (1985)); *see also State v. Moseley*, 338 N.C. 1, 41, 449 S.E.2d 412, 436–37 (1994) (holding the trial court's failure to give a

limiting instruction on the consideration of photographs and testimony during the sentencing phase of a capital murder prosecution did not amount to plain error); *State v. Lark*, 198 N.C. App. 82, 94, 678 S.E.2d 693, 702 (2009) (stating "an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such instruction" (citation omitted) and holding "the trial court did not commit plain error by failing to give a limiting instruction").

At trial, on direct examination, Hill testified that after she was attacked by defendant she applied for and was granted a DVPO. The State moved to introduce the application for the protective order into evidence for illustrative purposes, as State's exhibit No. 7. Over defendant's objection, the trial court entered the application into evidence.

> Q. In your application to the Court to obtain the restraining order what do you recall telling the Court about why you needed the protective order?
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> A. I basically stated that I was just scared for my life. I felt that his intent was to not just harm me but to kill me. That's the way I felt, so I needed something to protect me.

The State moved to publish the application for the protective order to the jury, but when questioned as to whether all of the pages of the application were included in the exhibit, the State withdrew the request to publish. On re-direct examination, Hill testified that the application for the DVPO contained her handwritten statement regarding the events that led her to seek the protective order, including assertions

that defendant had emailed Hill asking how she wanted to get her "stuff" back. The State moved to publish the entire DVPO application to the jury. Defendant did not object at that time and the trial court directed that the entire application be published to the jury.

On appeal, defendant argues that "[b]y permitting the jury to consider State's Exhibit No. 7, the domestic violence file, for all purposes, instead of simply for illustrative purposes, the jury was allowed to use the domestic violence civil pleadings in [defendant]'s criminal prosecution against him as proof of the facts alleged in it." However, defendant also acknowledges that "[t]hat handwritten statement presents the very facts that Ms. Hill testified about at trial; it was directly probative of the elements of the offenses charged against [defendant]."

Even if we were to presume that the trial court erred in publishing the document to the jury absent a limiting instruction *and* that failure to give a limiting instruction for the consideration of evidence already admitted comes under the umbrella of instructional or evidentiary error to which the plain error standard may be applied, defendant acknowledges that the information presented in Hill's application for the DVPO "present[ed] the very facts that Ms. Hill testified about at trial." Thus, on this record, we cannot say that the failure to give a limiting instruction before publishing the evidence to the jury had "a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d

at 334 (citation omitted). Therefore, the trial court's failure to give a limiting instruction before publishing Hill's DVPO application to the jury where the facts in the application were the subject of Hill's previously admitted testimony as to the events of 4 April 2015 did not amount to plain error. *See Quarg*, 334 N.C. at 101–02, 431 S.E.2d at 5. Accordingly, defendant's argument is overruled.

III

Lastly, defendant argues that the trial court erred by imposing restitution on him without taking into consideration his ability to pay. Defendant contends that the trial court failed to consider his ability to pay restitution and failed to exercise its discretion to order partial restitution. We disagree.

"While defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A–1446(d)(18)." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (citation omitted).

Pursuant to General Statutes, section 15A-1340.36,

> [i]n determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters. The amount of restitution must be limited to that supported by the record, and the court *may*

> order partial restitution when it appears that the damage or loss caused by the offense is greater than that which the defendant is able to pay.

N.C. Gen. Stat. § 15A-1340.36(a) (2017) (emphasis added).

> The amount of restitution ordered by the trial court must be supported by the evidence. *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995). However, "[w]hen . . . there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986).

State v. Davis, 167 N.C. App. 770, 776, 607 S.E.2d 5, 10 (2005).

> In applying this standard our appellate courts have consistently engaged in fact-specific inquiries rather than applying a bright-line rule. Prior case law reveals two general approaches: (1) when there is *no* evidence, documentary or testimonial, to support the award, the award will be vacated, and (2) when there is specific testimony or documentation to support the award, the award will not be disturbed.

State v. Moore, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011); *see also id.* ("[T]he quantum of evidence needed to support a restitution award is not high."). Moreover, a court is not required to make written findings of fact or conclusions of law in support of its award of restitution. *See State v. Riley*, 167 N.C. App. 346, 348, 605 S.E.2d 212, 214 (2004) (citing N.C. Gen. Stat. § 15A–1340.36(a) (2003)).

Defendant does not challenge the basis for the restitution amount awarded. Defendant contends that the trial court erred by failing to consider his ability to pay the award and by failing to exercise its discretion to order partial restitution.

During the sentencing phase, the trial court inquired as to whether defendant would like to be heard on the matter of the $8,186.49 medical bill.

> [The Defendant]: Yes, sir.
>
> Well, at this time I have been incarcerated now since May the 5th, 2015. I'm going – apparently I'm going to prison. I mean, I don't have a way to pay that, your Honor.
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> THE COURT: Yes, sir. I understand that.
>
> THE DEFENDANT: Just to be honest, I don't have a way to pay that.
>
> THE COURT: Yes. If I find this amount it will be made part of your judgment. It is what it is. Whether it's ever collected is another matter, but it just simply becomes part of the judgment.
>
> THE DEFENDANT: Okay. But, you know, like I said, I just don't have a way to pay it.

We note that the order awarding restitution did not impose conditions for repayment which defendant could not reasonably meet. *See id.* at 348–49, 605 S.E.2d at 214 (upholding an award of restitution in the amount of $78,081.00 to be paid during the defendant's five year probationary period (equaling sixty monthly payments of $1,305.35) where the defendant's net monthly income was $1,409.76 and the defendant failed to present evidence of her husband's income or his contribution to the household expenses). *Cf. State v. Mucci*, 163 N.C. App. 615, 627, 594 S.E.2d 411, 419 (2004) (reversing an order imposing probation and restitution for the court's failure to consider the defendant's ability to pay the restitution where the defendant,

who earned the income which supported his family, would have to pay an average of $10,000.00 per year in restitution, fines, and costs, and complete twenty-five hours of community service per week during his probationary period). Defendant does not contest the basis for the restitution award, and the record does not indicate the trial court failed to consider defendant's ability to pay the restitution amount. Therefore, the trial court did not abuse its discretion by ordering restitution in the amount of $8,186.49 or failing to award partial restitution. Accordingly, defendant's argument is overruled.

AFFIRMED.

Judges TYSON and BERGER concur.

Report per Rule 30(e).