IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-651

Filed: 6 March 2018

Durham County, No. 16 CRS 55759

STATE OF NORTH CAROLINA

v.

CARLTON SOLOMON

Appeal by defendant from judgment entered 14 December 2016 by Judge Beecher R. Gray in Durham County Superior Court. Heard in the Court of Appeals 13 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Francisco Benzoni, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant.

ELMORE, Judge.

Carlton Solomon ("defendant") appeals from judgment entered upon a jury verdict finding him guilty of misdemeanor indecent exposure under N.C. Gen. Stat. § 14-190.9(a2). On appeal, defendant contends the trial court erred in its jury instructions by conflating the elements of that offense and essentially relieving the

State of its burden to prove that defendant acted with the purpose of arousing or gratifying sexual desire. Defendant also argues the trial court erred in ordering restitution that fails to comply with the statutory definition or bases for such an award under N.C. Gen. Stat. §§ 15A-1340.34 and -1340.35.

Because defendant has failed to meet his burden of showing that the jury was misled or its verdict affected, we find no error in the trial court's jury instructions, which constituted a correct explanation of the law. We vacate the trial court's restitution award as it exceeds the statutory bases upon which such an award may be premised, and we remand the restitution portion of defendant's sentence to the trial court for a new sentencing hearing.

I.

The State presented evidence tending to show that defendant exposed his private parts to his neighbor, Maria Sandoval, while she was in her backyard and he was inside of his home, but standing nude at his back window.

Ms. Sandoval testified to the following:

The two neighbors' yards were separated by a privacy fence with slight gaps between its boards. On approximately four occasions prior to 12 February 2016, when Ms. Sandoval was home alone and letting her dog out or cleaning in her backyard, defendant knocked on his window as if he were trying to get Ms. Sandoval's attention. On each occasion, Ms. Sandoval then looked up to see defendant standing nude at his

window. None of these prior occasions involved masturbation, and Ms. Sandoval never reported defendant's conduct to law enforcement.

On 12 February 2016, Ms. Sandoval went into her backyard with her dog as usual, and she again heard knocking at defendant's window. On this occasion, Ms. Sandoval attempted to use her cell phone to obtain video evidence of defendant's conduct. She walked toward defendant's window and "saw him completely naked masturbating" for approximately twenty seconds, but when she took her cell phone out, defendant moved away from the window. Two blurry, still-frame photographs from a short video purportedly showing defendant naked at the window were entered into evidence for illustrative purposes.

Ms. Sandoval reported the 12 February 2016 incident to law enforcement. Following the incident, she sought psychological help for anxiety and panic attacks. Additionally, Ms. Sandoval's husband, Leonardo Rodriguez, had a taller fence erected to completely block the view from defendant's window to their backyard.

Mr. Rodriguez testified to the following:

Ms. Sandoval called Mr. Rodriguez at work on 12 February 2016 and told him that defendant "was knocking on the window again naked, he was masturbating while she was in the backyard." Mr. Rodriguez immediately left work and went home. When he arrived, Ms. Sandoval was "sad, angry, distressed, she was crying." Mr. Rodriguez paid a third party to erect a taller fence and estimated the labor costs to

have been at least $150.00, though no receipt was presented as to that amount. A Lowe's receipt for $447.85 in materials and delivery costs was entered into evidence.

Defendant presented no evidence at trial. However, in his opening statement, defense counsel asserted that defendant was merely pranking Ms. Sandoval on the date of the alleged offense because he did not like her looking in his back window. According to defendant, "he made what he believed looked like a fake penis, and he held that standing in front of his window and pretended that he was masturbating with it to play a joke on Ms. Sandoval."

Defendant was charged with indecent exposure under subsection (a2) of N.C. Gen. Stat. § 14-190.9, which reads as follows:

> [A]ny person who shall willfully expose the private parts of his or her person in the presence of anyone other than a consenting adult on the *private premises* of another or so near thereto as to be seen from such private premises *for the purpose of arousing or gratifying sexual desire* is guilty of a Class 2 misdemeanor.

N.C. Gen. Stat. § 14-109.9(a2) (2015) (emphasis added). As of the trial date, there were no pattern jury instructions available for an alleged violation of subsection (a2), which was enacted in December 2015. Defendant and the State agreed that the pattern jury instructions for indecent exposure occurring in a public place, rather than on private property, were inapplicable to subsection (a2).

During the charge conference, defendant requested that the trial court divide its jury instructions into four distinct elements that track the exact language of subsection (a2).

> [DEFENDANT]: Judge . . . I would ask the court to quote the language of the statute 14-190.9(a2). . . . [That subsection] does have some additional elements because [defendant] is inside of his own home, Judge, so . . . I would ask the court to quote the language of (a2).
>
> . . . .
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> What I would suggest to the court . . . I would suggest read first that the defendant willfully exposed his private parts, second, the exposure was to anyone other than a consenting adult, third, the exposure was on the private premises of another or so there near to as to be seen from such private premises, and then I would actually recommend four, for the purpose of arousing or gratifying sexual desire. That's what I would suggest, Judge.

This request was made in the midst of an extensive discussion on the matter, at the end of which the trial court concluded that a two-element charge would be the most appropriate. The trial court ultimately instructed the jury as follows:

> The defendant has been charged with indecent exposure. For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant willfully exposed his private parts.
>
> Second, that the defendant exposed his private parts in the presence of anyone other than a consenting adult on the private premises of another or so near thereto as to be seen from such private premises for the purpose of arousing or gratifying sexual desire.

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant willfully exposed his private parts in the presence of anyone other than a consenting adult on the private premises of another or so near thereto as to be seen from such private premises for the purpose of arousing or gratifying sexual desire, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

After approximately 40 minutes of deliberations, the jury returned a verdict of guilty. The trial court imposed a suspended sentence of 12 months supervised probation; ordered restitution in the amount of $600.00, which represented the $447.85 receipt from Lowe's as well as the estimated labor costs to erect the taller fence; and prohibited defendant from having any contact with Ms. Sandoval or her family. Defendant entered timely notice of appeal.

II.

In his first argument on appeal, defendant contends the trial court erred in its jury instructions on indecent exposure by conflating the elements of an offense allegedly committed under N.C. Gen. Stat. § 14-190.9(a2). Specifically, defendant argues that the trial court's two-element charge likely confused or misled the jury as to the State's burden of proving that defendant acted for the purpose of arousing or gratifying sexual desire.

"The chief purpose of a [jury] charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case

and in reaching a correct verdict." *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971) (citations omitted). "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010) (citation omitted).

> The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by the instruction.

State v. Blizzard, 169 N.C. App. 285, 296–97, 610 S.E.2d 245, 253 (2005) (citation, quotation marks, and brackets omitted). "[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

North Carolina's indecent exposure statute, N.C. Gen. Stat. § 14-190.9, enumerates five separate offenses. Defendant was charged under subsection (a2) of the statute, which addresses exposure that occurs on private property rather than in a public place. Unlike other misdemeanor indecent exposure offenses, subsection (a2) has the additional requirement that the exposure be "for the purpose of arousing or gratifying sexual desire" (the "purpose or intent element").

On appeal, defendant contends the trial court erred in refusing to use his proposed jury instructions, which would have divided subsection (a2) into four distinct elements rather than two. Defendant argues that

> [p]resumably, because it is not a crime to be naked or exposed in your own home, an (a2) offense, which takes place in one's private premises and the victim witnesses the exposure from her own private residence, has the additional purpose or intent element in order to ensure that legal and permissible behavior is not criminalized.

Defendant notes that where the same purpose or intent element appears in subsection (a1) of the statute, which addresses felonious indecent exposure, the pattern jury instructions specifically set out "for the purpose of arousing or gratifying sexual desire" as its own distinct element. *See* N.C.P.I.—Crim. 238.17A. Defendant contends that in the present case, "the trial court's decision to bury the purpose or intent element within what the court designates as the second element of the offense . . . undermines the only thing that makes otherwise legal conduct illegal."

We agree that N.C. Gen. Stat. § 14-109.9(a2) likely has an additional purpose or intent element in order to protect permissible behavior occurring on private property. However, we disagree that the instructions given here "bur[ied] the purpose or intent element," relieved the State of its burden to show that defendant acted with a sexual purpose or intent, or "likely caused some jurors to convict [him] based on . . . legal conduct," as defendant argues.

Defendant relies on this Court's decisions in *State v. Brown*, 162 N.C. App. 333, 335, 590 S.E.2d 433, 435 (2004), and *State v. Stanford*, 169 N.C. App. 214, 216, 609 S.E.2d 468, 470 (2005), to support his argument that "the unclear and confusing jury instructions were compounded by the fact that the allegations of masturbation . . . were mere speculation and supposition." However, the issue in both of those cases was whether the evidence of sexual purpose or intent was sufficient to support a conviction; neither *Brown* nor *Stanford* is relevant to the issue here of whether the trial court's jury instructions were appropriate.

In *State v. Mundy*, the defendant appealed his conviction for armed robbery "on the ground that [the trial court] failed to instruct the jury that a taking of personal property with 'felonious intent' is an essential element of the offense charged and failed to explain and define 'felonious intent.' " 265 N.C. 528, 529, 144 S.E.2d 572, 573 (1965). In ordering a new trial, our Supreme Court in *Mundy* held that

> [i]n giving instructions the [trial] court is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon. Ordinarily the reading of the pertinent statute, without further explanation, is not sufficient.

Id. (citation omitted); *see also State v. Norman*, No. COA16-1005, 2017 WL 1632644 at *4 (N.C. Ct. App. 2017) (unpublished) (holding that trial court committed plain

error by failing to define assault element of assault on a law enforcement officer in its initial instruction to jury and when jury subsequently asked for clarification).

The instant case is distinguishable from *Mundy*. Here, there were no pattern jury instructions available, and the trial court did not expand upon or modify any elements of the offense as set forth in N.C. Gen. Stat. § 14-190.9(a2). However, defendant did not request that the trial court define or explain any element of the offense for the jury, nor does he argue on appeal that the jury did not understand what it meant to act "for the purpose of arousing or gratifying sexual desire." In fact, the trial court's instructions did not differ substantively from those suggested by defendant during the charge conference. *See State v. West*, 146 N.C. App. 741, 744, 554 S.E.2d 837, 840 (2001) ("[W]hile Defendant's proposed jury instructions were certainly a correct statement of the law, the trial court's instructions were proper as they presented in substance what Defendant had requested."). The trial court recited the purpose or intent element twice and instructed the jury that all essential elements of the offense, including the purpose or intent element, must be found beyond a reasonable doubt. Moreover, the jury had a printed copy of the charging statute to use as a reference during its deliberations.

For the reasons stated herein, defendant has failed to meet his burden of showing that the jury was misled or that its verdict was affected by the trial court's

instructions. Accordingly, we hold that the trial court did not err in dividing its jury instructions into two elements rather than four, as requested by defendant.

III.

In his second argument on appeal, defendant contends the trial court's order of restitution does not comply with the statutory definition or bases for such an award under N.C. Gen. Stat. §§ 15A-1340.34 and -1340.35. Specifically, defendant argues that erecting a taller fence "does not compensate for any losses [the victim] suffered" and "has no relation to any professional care received by [the victim]."

Awards of restitution are reviewed *de novo*. *State v. Hunt*, ___ N.C. App. ___, ___, 792 S.E.2d 552, 563 (2016). "When a restitution award is vacated, the typical remedy is to remand the restitution portion of the sentence for a new sentencing hearing." *Id.* (citation omitted).

Pursuant to N.C. Gen. Stat. § 15A-1340.34, a trial court shall "require that the defendant make restitution to the victim or the victim's estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(b) (2015). "However, this provision (entitled 'Restitution generally') must be read in conjunction with the following provisions contained in N.C. Gen. Stat. § 15A-1340.35 (20[15]) (entitled 'Basis for restitution')." *State v. Wilson*, 158 N.C. App. 235, 240, 580 S.E.2d 386, 390 (2003).

"In the case of an offense resulting in bodily injury to a victim," the trial court shall consider

> (a) The cost of necessary medical and related professional services and devices or equipment relating to physical, psychiatric, and psychological care required by the victim;
>
> (b) The cost of necessary physical and occupational therapy and rehabilitation required by the victim; and
>
> (c) Income lost by the victim as a result of the offense.

N.C. Gen. Stat. § 15A-1340.35(a)(1). "Reading the statutory provisions together, the more specific statute explains and provides context for the broad language employed in the section concerning restitution generally. The trial court's basis for awarding restitution is limited to quantifiable costs, income, and values of the kind set out in N.C. Gen. Stat. § 15A-1340.35." *Wilson*, 158 N.C. App. at 240, 580 S.E.2d at 390.

Here, the State argues that the restitution award is proper because it will prevent a repeat incident and assist the victim in avoiding further psychological harm, such as panic attacks. The State contends that the award is therefore "related to" the psychological care required by the victim. We disagree.

"We note restitution was not sought for treatment administered by" a psychologist; "otherwise, any costs associated with such treatment would clearly be appropriate as a basis for restitution." *Id.* at 241–42, 580 S.E.2d at 390–91. Rather, the trial court's $600.00 restitution award was based on a Lowe's receipt for materials as well as testimony regarding the labor costs associated with erecting a taller fence.

Because it exceeds the statutory authority granted under N.C. Gen. Stat. § 15A-1340.35, we vacate the trial court's restitution award and remand the restitution portion of the sentence for a new sentencing hearing.

IV.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge MURPHY concur.

Report per Rule 30(e).