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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1012

Filed: 15 May 2018

Gaston County, No. 14 CRS 58642

STATE OF NORTH CAROLINA

v.

ANDREW CHRISTOPHER GIBSON

Appeal by defendant from judgment entered 17 May 2017 by Judge Thomas H. Lock in Gaston County Superior Court. Heard in the Court of Appeals 8 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth N. Strickland, for the State.

Marilyn G. Ozer for defendant.

DIETZ, Judge.

Defendant Andrew Christopher Gibson appeals his conviction for second degree sexual offense. As explained below, Gibson's evidentiary challenges are not preserved for appellate review because he either failed to timely object to the evidence or failed to make an offer of proof. We deny Gibson's petition for a writ of certiorari concerning the imposition of lifetime satellite-based monitoring because Gibson again

failed to preserve these arguments below and therefore would not prevail on appeal were this Court to issue a writ of certiorari.

Facts and Procedural History

On 10 July 2014 around 10 p.m., M.P.[1] and her friend Selena went out to a bar in Gastonia. At the bar, they had some drinks and hung out with a group of people including Selena's boyfriend and Defendant Andrew Christopher Gibson. M.P. did not know Gibson before they met that night. Around 1:30 a.m., the group left the bar and drove back to Selena's house.

When they arrived at Selena's house, M.P. was dizzy from drinking and went to bed. M.P. awoke when she heard a door slamming shut and then she felt hands on her body. She felt a man's hands on her vagina, touching and penetrating her. She did not move or scream because she was frightened and shocked. The man said, "you gonna take this d***," and turned M.P. over on her back, took her underwear off, and lay on top of her. The man rubbed his penis on her vagina and then put his penis in her vagina. M.P. finally was able to push the man off and ran outside for help, but no one was there. M.P. went back to the bedroom to get her phone and recognized Gibson as the man lying in the bed. Gibson asked M.P. if she wanted to cuddle. She told him she needed to leave, went in the bathroom, called Selena to tell her what had happened, and took a shower.

[1] We use initials to protect the victim's privacy.

Gibson left and M.P. went outside to wait for Selena to come back. When Selena got back, she took M.P. to the hospital. Hospital personnel performed a sexual assault examination on M.P., collected a rape kit, and interviewed her about the incident. M.P. also spoke to law enforcement at the hospital.

When police interviewed Gibson, he initially denied ever going inside the house or having any physical contact with M.P. He later changed his story to say that he did go inside the house, but did not have any sexual contact with M.P. and had only kissed her at the bar earlier in the night. Ultimately, Gibson admitted that he went in the house to go to the bathroom, saw M.P., and began kissing and touching her. But Gibson maintained that the sexual contact was consensual.

The State indicted Gibson for one count of second degree sexual offense and the case went to trial. During pre-trial motions, the State moved *in limine* to exclude any evidence regarding M.P.'s status as an undocumented immigrant and the possibility of obtaining a "U-Visa," arguing that it is irrelevant and unduly prejudicial. A U-visa is a type of visa available to undocumented immigrants who are victims of serious crimes and who cooperate with law enforcement in the investigation or prosecution of the crimes.

Gibson objected to the motion *in limine*, arguing that M.P.'s immigration status was relevant because "it's possible motive, it's possible bias" and "reflects on her credibility." The trial court agreed with the State and tentatively allowed the

motion *in limine*, but stated that "[b]efore she takes the stand, if you can find me some law . . . that would tend to support your arguments I will reconsider." Gibson objected to the ruling "under the constitutional grounds of confronting his accuser."

When the trial court revisited the motion *in limine* ruling after jury selection, Gibson did not make any additional arguments or present any case law. The trial court reaffirmed its earlier ruling to exclude any mention of M.P.'s immigration status. Gibson did not raise any further objections before M.P. testified and did not make an offer of proof as to what M.P.'s testimony would have been if he had been allowed to question her about her immigration status and the U-Visa.

At trial, M.P. testified that she did not want to engage in any sexual activity with Gibson, that she did not invite him into the house or the bedroom, and that she did not encourage or flirt with him earlier in the evening. She testified that she was 4' 11" tall and that Gibson was taller than her. Selena testified that she never saw M.P. talk to Gibson at the bar, that her boyfriend invited Gibson over, and that Gibson was still at her house when she left. Selena also testified that M.P. later called her, was very upset, and told Selena that Gibson had raped her. The nurse who treated M.P. in the emergency room at the hospital testified that M.P. reported that she woke up with a man on top of her, reported digital and penile penetration, and said that she was sore and unable to find her underwear after the assault.

Dr. Yogin Patel, the emergency room physician who treated M.P., testified as an expert for the State. Dr. Patel testified that "[a]fter conducting a history and physical exam" of M.P., his "clinical impression was sexual assault." He stated that "[t]he reasoning for that was, again, the patient's overall presentation when you consider she was tearful." Dr. Patel testified that the physical exam portion did not reveal any physical evidence of sexual assault, but that was not unusual considering that "[a] fair amount of time had elapsed between when the alleged assault had occurred and when she presented." Dr. Patel further testified that M.P. reported "soreness down there" and elected to take the prophylactic antibiotics he offered to her. He stated that he "would not have typically offered that unless I felt an assault had occurred; and so, hence, my clinical impression was sexual assault. She did endorse in her story that she had been held down, and so that is also part of what I dictated that it was an alleged assault." Before Dr. Patel testified, Gibson objected to him testifying that it was his opinion or clinical impression that an assault did occur. But after the State made an offer of proof as to what Dr. Patel's testimony would be, Gibson withdrew his objection, stating "[i]f that's the testimony that's given, then we would not object." Gibson did not raise any further objections during Dr. Patel's testimony.

Gibson testified that he was 6' 5" tall and weighed 183 pounds in 2014. He testified that he was drunk when he went back to Selena's house with the group after

they left the bar. When they arrived at Selena's house, M.P. went inside while everyone else stayed outside. Gibson asked where the bathroom was and went inside. He testified that he ran into M.P. in the hallway, she was not wearing any underwear, and they started kissing and rubbing on each other. Then M.P. started crying and told him to leave. Gibson testified that he left after asking her if she was okay.

On 17 May 2017, the jury convicted Gibson of second degree sexual offense. The trial court sentenced Gibson to 65 to 138 months in prison. The trial court also entered a Judicial Findings and Order for Sex Offenders form, finding that second degree sexual offense was an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a) and ordering that Gibson enroll in lifetime satellite-based monitoring. Gibson gave oral notice of appeal, but did not file a written notice of appeal from the satellite-based monitoring order.

Analysis

I. Testimony of emergency room physician

Gibson first argues that the trial court erred in allowing Dr. Patel, the State's expert witness, to testify that his clinical impression was sexual assault because that testimony constituted impermissible vouching for the credibility of the victim. We find that, regardless of whether this testimony constituted vouching, Gibson failed to preserve this issue for appellate review because he withdrew his objection to the testimony before it was presented.

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1). Where a defendant makes an objection to testimony but then withdraws it after hearing the proposed testimony, the issue is not preserved for review. *State v. Dye*, 207 N.C. App. 473, 476–77, 700 S.E.2d 135, 137 (2010); *see also State v. Farmer*, 177 N.C. App. 710, 716, 630 S.E.2d 244, 248 (2006).

Here, although Gibson initially objected to Dr. Patel's testimony that it was his opinion or clinical impression that an assault had occurred, Gibson withdrew that objection before Dr. Patel actually testified. After Gibson objected, the trial court allowed the State to make an offer of proof by conducting *voir dire* with Dr. Patel outside the presence of the jury. After hearing what Dr. Patel's testimony would be, Gibson withdrew his objection, stating, "If that's the testimony that's given, then we would not object." When the trial court brought the jury back into the courtroom, Dr. Patel gave the same testimony he had given during *voir dire* and Gibson did not raise any further objections.

Because Gibson withdrew his objection to Dr. Patel's testimony, we find that he failed to preserve his challenge to that testimony for appellate review. *Dye*, 207 N.C. App. at 476–77, 700 S.E.2d at 137; *Farmer*, 177 N.C. App. at 716, 630 S.E.2d at

248. Ordinarily, an issue not preserved for review in a criminal case might be subject to plain error review. But plain error review is available only if "the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4). Gibson has not argued that the admission of the challenged testimony constituted plain error, and therefore we may not review it under this standard. *State v. Parks*, 147 N.C. App. 485, 490, 556 S.E.2d 20, 24 (2001). Accordingly, we reject Gibson's argument as unpreserved.

To the extent Gibson raises an ineffective assistance of counsel claim regarding his counsel's decision to withdraw the objection, this claim involves issues of fact and is not suited for review on direct appeal. The decision to object and then, upon hearing the proposed testimony, withdraw the objection, implicates the sort of trial strategy that makes the issue unsuited for direct review on appeal. As our Supreme Court recently emphasized, "the determination of whether a defendant's [] counsel made a particular strategic decision remains a question of fact, and is not something which can be hypothesized." *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017). Accordingly, we dismiss Gibson's claim of ineffective assistance of counsel without prejudice to pursue it in a motion for appropriate relief in the trial court. *State v. Thompson*, 359 N.C. 77, 123, 604 S.E.2d 850, 881 (2004).

II. Exclusion of evidence of U-Visa and victim's immigration status

Gibson next argues that the trial court erred in granting the State's motion *in limine* to exclude any evidence regarding the U-Visa or M.P.'s immigration status. Gibson contends that this evidence was admissible and its exclusion violated his Confrontation Clause rights because the evidence was relevant to the victim's possible motivation for accusing him of sexual assault.

Gibson did not preserve this issue for appellate review because he failed to make an offer of proof showing what evidence about the U-Visa and M.P.'s immigration status he intended to introduce. "In order to preserve this issue for appellate review, the significance of the excluded evidence must be made to appear in the record. A specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Martinez*, __ N.C. App. __, __, 801 S.E.2d 356, 362 (2017) (citations omitted).

Here, we agree with Gibson that, depending on the evidence he planned to introduce, the trial court may have committed prejudicial error. For example, if by coming forward to report the crime, M.P. revealed her undocumented status and faced possible deportation, and if M.P. learned that, by agreeing to testify at Gibson's trial, she could receive a U-visa preventing her deportation, that evidence likely would have been admissible to challenge M.P.'s credibility, and its exclusion prejudicial.

But we have no way to know whether that scenario is true. Indeed, we do not know when or how M.P. became aware of the U-Visa program or when she applied for a visa, much less whether she qualified for this type of visa or the status of her visa application. Simply put, this Court has no way to evaluate whether the trial court's exclusion of this evidence under Rule 403 was an abuse of discretion, and whether exclusion of this evidence was prejudicial. As this Court previously has observed in similar cases, without an offer of proof "it is impossible for this Court to determine whether Defendant's arguments have merit." *Martinez*, __ N.C. App. at __, 801 S.E.2d at 362. "Accordingly, Defendant has failed to preserve these issues for our review." *Id.*

III. Petition for writ of certiorari

Finally, Gibson petitioned for a writ of certiorari seeking review of the trial court's satellite-based monitoring order. Gibson concedes that he did not file a written notice of appeal from that order and, thus, we cannot review the matter unless we issue a writ of certiorari.

Gibson argues that the trial court erred by ordering him to enroll in lifetime satellite-based monitoring because second degree sexual offense is not an aggravated offense under N.C. Gen. Stat. § 14-208.6 and because the trial court failed to determine if the satellite-based monitoring was reasonable under the Fourth Amendment.

In our discretion, we decline to issue a writ of certiorari. "A writ of certiorari is not intended as a substitute for a notice of appeal. If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals. Instead, as our Supreme Court has explained, a petition for the writ must show merit or that error was probably committed below." *State v. Bishop*, __ N.C. App. __, __, 805 S.E.2d 367, 369 (2017) (citation omitted).

Here, Gibson's arguments lack merit because, even if he asserted them through a timely written notice of appeal, the arguments would be rejected as unpreserved. "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court. Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003) (citations omitted).

At the satellite-based monitoring hearing, the trial court stated that Gibson's offense was "not only a sexually violent offense" but also "an aggravated offense under N.C.G.S. 14-208.6" and "accordingly, lifetime satellite based monitoring would be required." Gibson's counsel responded, "I do not disagree with that" and did not raise any challenge to whether second degree sexual offense was an aggravated offense. Gibson's counsel also did not challenge the reasonableness of the satellite-based monitoring although, at the time of the hearing, this Court's precedent established

that this type of Fourth Amendment challenge must be raised in the trial court to be preserved for appellate review. *Bishop*, __ N.C. App. at __, 805 S.E.2d at 369.

Gibson contends that he cannot waive his challenge concerning whether second degree sexual offense is an aggravated offense under N.C. Gen. Stat. § 14-208.6 because that question involves the trial court's subject matter jurisdiction. We reject this argument, which conflates a court's subject matter jurisdiction with its statutory authority to act. "[A] court's authority to act pursuant to a statute, although related, is different from its subject matter jurisdiction. Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (2001). Simply put, jurisdiction is "[t]he power of a court to hear and determine," which is separate from "the way in which that power may be exercised in order to comply with the terms of a statute." *Id.* Gibson's argument is a challenge to the trial court's statutory authority to impose satellite-based monitoring in this particular case–namely whether second degree sexual offense qualifies as an aggravated offense under N.C. Gen. Stat. § 14-208.6–not a challenge to the trial court's power to conduct a satellite-based monitoring proceeding.

In sum, neither of Gibson's challenges to the imposition of lifetime satellite-based monitoring are preserved for appellate review. We likewise reject Gibson's claim that his counsel's failure to raise these arguments below constituted ineffective

assistance of counsel. This Court has held that an ineffective assistance of counsel claim cannot be asserted in a satellite-based monitoring proceeding because "a claim for ineffective assistance of counsel is available only in criminal matters" and satellite-based monitoring "is not a criminal punishment." *State v. Wagoner*, 199 N.C. App. 321, 332, 683 S.E.2d 391, 400 (2009), *aff'd,* 364 N.C. 422, 700 S.E.2d 222 (2010); *see also State v. Springle*, 244 N.C. App. 760, 767, 781 S.E.2d 518, 523 (2016).

Accordingly, because we find no merit to Gibson's arguments, we exercise our discretion to deny Gibson's petition for a writ of certiorari.

Conclusion

For the reasons discussed above, we find no error in the trial court's judgment.

NO ERROR.

Judges HUNTER, JR. and ZACHARY concur.

Report per Rule 30(e).