An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-944

Filed: 15 May 2018

Stanly County, No. 15 CRS 001383

STATE OF NORTH CAROLINA

v.

TIMOTHY BROWN

Appeal by defendant from judgments entered 11 January 2017 by Judge Mark E. Klass in Stanly County Superior Court. Heard in the Court of Appeals 7 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jasmine S. McGhee, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

TYSON, Judge.

Timothy Brown ("Defendant") appeals from the trial court's judgments entered after jury verdicts found him guilty of first-degree kidnapping and two counts of second-degree sexual offense. We find no error at trial. The trial court was without jurisdiction to resentence Defendant after his notice of appeal. We vacate the corrected judgments and remand for resentencing.

I. Background

The State's evidence at trial tended to show: in July 2015, "B.P" a 21-year-old female, lived across the street from Defendant, a registered sex offender. Defendant was related to one of B.P.'s friends, and they had previously purchased marijuana from Defendant.

On the evening of 25 July 2015, B.P. went to Defendant's home to purchase marijuana. Defendant invited B.P. into his home and told her to have a seat on the couch, while he went into the garage to get the marijuana. Upon returning, Defendant sat down next to B.P. on the couch, handed her the marijuana, and accepted her payment.

Defendant began rubbing B.P.'s right thigh. B.P. removed his hand, told him "that's not what [she] wanted[,]" and tried to leave. Defendant stood up in front of B.P. and pushed her back down onto the couch. Defendant told her "he knows that [she] wants it" and B.P. began to cry.

B.P. attempted to leave a second time, but Defendant again forcefully pushed her back down onto the couch causing her arms to be pinned down underneath her. Defendant removed B.P.'s gym shorts and underwear while she continued to struggle against him and yelled for him to "stop." Defendant performed oral sex on B.P. for a few seconds. Defendant then picked her up in a "bear hug" and carried her to the back bedroom. Defendant held her down on the bed, removed his pants, and "started raping [her]." B.P. continued to cry and struggle and told Defendant "to please stop."

Defendant told B.P. the only way she could go home was if she performed oral sex on him. B.P. told him no and went to the front room to retrieve her clothes. Defendant followed her, blocked the door, and told her the only way she was going to go home was if she performed oral sex. B.P. did so for a few seconds and stopped. Defendant told her that it was not good enough, so she performed oral sex for a few more seconds and stopped. Defendant then let her leave his house.

Later that evening, B.P. told her mother what happened. Her mother took her to the hospital where they conducted a sexual assault examination and rape kit. The hospital notified the police, and officers arrived to interview B.P. She told the officers Defendant had raped her, and the officers collected her clothing for testing. The forensic expert testified that Defendant could not be excluded as a contributor to the DNA profile present on B.P.'s underwear from the night of the incident.

Defendant did not present any evidence. The jury found him guilty of second-degree rape, first-degree kidnapping, and two counts of second-degree sexual offense. The trial court arrested judgment on the second-degree rape, as it was an element of the kidnapping. The trial court sentenced Defendant to a term of 77 to 153 months of imprisonment for the two counts of second-degree sexual offense and a consecutive term of 77 to 105 months of imprisonment for the first-degree kidnapping conviction. Defendant gave oral notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court from a final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017) and N.C. Gen. Stat. § 15A-1444 (2017).

III. Issue

Defendant's sole argument on appeal is that the trial court erred by denying his motion for a mistrial.

IV. Standard of Review

"Generally a motion for mistrial is a matter addressed to the sound discretion of the [trial] judge." *State v. Hester*, 216 N.C. App. 286, 287, 715 S.E.2d 905, 906 (2011) (citation omitted). "This Court will find an abuse of discretion only where a trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Mabrey*, 184 N.C. App. 259, 265, 646 S.E.2d 559, 563 (2007) (citation omitted).

V. Analysis

A. Mistrial

The State called B.P.'s mother ("Ms. P") as a witness at trial. During Ms. P's testimony, the following exchange occurred:

> [THE STATE]: About what time was it that you got to the hospital, if you recall?
>
> [MS. P]: I don't really recall what time it was. I don't know exactly how long we were in the house and talking. I do know when we were in the house and talking – because I

> had gotten so upset – when I was talking to my sister, someone mentioned – I wanted to know who. I know of [Defendant] but not know him personally. So I asked my daughter that night to look him up on the computer. And that night I found out he was –
>
> [THE STATE]: Stop, please.
>
> [MS. P]: Okay.
>
> [THE STATE]: I'm sorry, Your Honor.
>
> THE COURT: No problem.

The State continued with its direct examination. At the close of Ms. P's testimony, Defendant moved for a mistrial based on Ms. P's unfinished statement that "And that night I found out he was –." The trial court denied the motion.

Defendant argues the trial court erred in denying his motion for a mistrial because Ms. P's unfinished statement "clearly referenced the online sex offender registry, and indicated to the jury [Defendant] was a registered sex offender with at least one prior conviction for a reportable sexual offense." Defendant argues he was substantially prejudiced by this improper testimony because it painted him as a sexual predator and enhanced the State's claim that the alleged sexual encounter was non-consensual.

"The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's

case." N.C. Gen. Stat. § 15A-1061 (2017). A "mistrial should not be allowed unless there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *State v. Brunson,* 180 N.C. App. 188, 191, 636 S.E.2d 202, 204 (2006) (internal quotation marks and citation omitted), *aff'd,* 362 N.C. 81, 653 S.E.2d 144 (2007). "When the trial court instructs the jury not to consider incompetent evidence, any prejudice is ordinarily cured." *State v. Robinson*, 136 N.C. App. 520, 523, 524 S.E.2d 805, 807 (2000) (internal quotation marks and citations omitted).

Defendant relies upon *State v. Foster*, 27 N.C. App. 531, 219 S.E.2d 535 (1975), and *State v. Aycoth*, 270 N.C. 270, 154 S.E.2d 59 (1967), to support his argument. In *Foster*, the co-defendant's testimony that he and the defendant had previously been convicted of armed robbery was erroneously admitted at the defendant's trial for a separate armed robbery. 27 N.C. App. at 533, 219 S.E.2d at 537. On appeal, this Court ordered a new trial, because the trial court's improper curative instruction "did not effectively erase the prejudicial effect of the evidence." *Id*.

In *Aycoth*, the defendant moved for a mistrial based upon a sheriff deputy's nonresponsive testimony that the defendant previously had been indicted for murder. 270 N.C. at 272, 154 S.E.2d at 60. On appeal, the Supreme Court of North Carolina held that the defendant's motion for a mistrial should have been granted because the

incompetent evidence that the defendant had been indicted for murder "was of such serious nature that its prejudicial effect was not erased by the court's quoted instruction[.]" *Id*. at 273, 154 S.E.2d at 61.

This case is readily distinguishable from both *Foster* and *Aycoth* in that, here, no improper testimony was actually admitted. The State stopped Ms. P before she could complete her statement regarding what she had discovered about Defendant. Despite Defendant's claim to the contrary, the meaning of Ms. P's unfinished statement was not "plain," and did not "clearly" create an inference that Defendant was a registered sex offender.

The context of the statement and testimony did not provide any information indicating how Ms. P would have finished the sentence before she was interrupted and stopped by the State. There are an infinite number of possibilities of which Ms. P could have discovered about Defendant by looking him up on the computer. Defendant's presumption that Ms. P was going to testify that she had discovered Defendant was a registered sex offender, and that the jury had inferred this information from her incomplete statement, is purely speculative. As no improper testimony was admitted, there was no testimony for the trial court to strike or instruct the jury to disregard.

No improper evidence was admitted from Ms. P's incomplete statement. Defendant's assertion is pure speculation of what Ms. P would have testified to had

she not been interrupted. We hold the trial court did not abuse its discretion in denying Defendant's motion for mistrial. Defendant's arguments are overruled.

B. Jurisdiction for Resentencing

There is another issue of the trial court's subject matter jurisdiction in resentencing Defendant on 23 February 2017. We note Defendant has not raised the issue of jurisdiction. "A court must have subject matter jurisdiction in order to decide a case. Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act. As a result, subject matter jurisdiction may be raised at any time, whether at trial or on appeal, *ex mero motu*." *State v. Sellers*, ___ N.C. App. ___, ___789 S.E.2d 459, 465 (2016) (internal quotation marks and citations omitted).

The trial court in this case initially consolidated the offenses into one judgment and sentenced Defendant to a term of 176 to 224 months of imprisonment, a term not authorized under the appropriate sentencing guidelines for a level III offender, Class C felony. *See* N.C. Gen. Stat. § 15A-1340.17 (2017). Defendant gave oral notice of appeal after the court's oral rendering of his sentence.

On 31 January 2017, the North Carolina Department of Public Safety wrote to the Stanly County Clerk of Court regarding Defendant's sentence, noting issues with both the minimum and the maximum sentences. On 23 February 2017, the trial court resentenced Defendant, entering two judgments with consecutive sentences of 77 to

153 months and 77 to 105 months of imprisonment. The judgments are dated 11 January 2017, but assert that Defendant was "resentenced 2/23/2017[.]"

Pursuant to N.C. Gen. Stat. § 15A-1448, "[t]he jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period [for giving notice of appeal (fourteen days from entry of judgment in a criminal appeal)] has expired." N.C. Gen. Stat. § 15A-1448(a)(3) (2017). "At that point, the court is only authorized to make the record correspond to the actual facts and cannot, under the guise of an amendment of its records, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred." *State v. May*, ___ N.C. App. ___, ___, 804 S.E.2d 584, 587 (2017) (internal quotation marks and citation omitted).

Resentencing, even to correct an error after notice of appeal, is not an action authorized within N.C. Gen. Stat. § 15A-1453. Because Defendant gave immediate oral notice of appeal from the judgment at trial, the trial court was without subject matter jurisdiction to enter the corrected judgments sentencing Defendant to consecutive sentences of 77 to 153 months and 77 to 105 months of imprisonment in a belated attempt to comply with N.C. Gen. Stat. § 15A-1340.17. We vacate the corrected judgments. The trial court erred in the original judgment by sentencing Defendant to a term not authorized under the appropriate sentencing guidelines. We remand the case to the superior court for a new sentencing hearing.

VI. Conclusion

No improper evidence was admitted from Ms. P's incomplete statement. The trial court did not abuse its discretion in denying Defendant's motion for mistrial. The case is remanded solely for a new sentencing hearing. *It is so ordered.*

NO ERROR AT TRIAL; JUDGMENT VACATED AND REMANDED FOR RESENTENCING.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).