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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-620

Filed: 15 January 2019

Lincoln County, No. 16CRS053959

STATE OF NORTH CAROLINA

v.

CALEB LESLIE DISORDA, Defendant.

Appeal by Defendant from judgment entered 31 August 2017 by Judge Jesse B. Caldwell III in Lincoln County Superior Court. Heard in the Court of Appeals 27 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin O. Zellinger, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for the Defendant.

DILLON, Judge.

Defendant Caleb Leslie Disorda appeals a judgment finding him guilty of solicitation by computer and appearing at a location. For the reasons contained herein, we affirm.

I. Background

In 2016, Defendant posted an advertisement requesting specific sexual acts in the "Casual Encounters" section of Craigslist. A detective, posing as "Amy Brown," responded to Defendant. Over a span of twelve (12) days, the detective communicated with Defendant, exchanging messages and photographs. After several message exchanges, "Amy Brown" told Defendant that she was only fourteen (14) years-old. Upon learning this, Defendant messaged her that "hooking up would most certainly be illegal" and that he could not meet up with her as they had discussed but to get back in touch with him when she was older.

Nonetheless, Defendant continued to communicate with "Amy Brown," including a request by Defendant to send an updated photo holding up a piece of paper with a specific number written on it to prove she was who she said she was. After receiving the photo, Defendant arranged to meet with "Amy Brown" near her school. Accordingly, twelve (12) days after the initial contact, Defendant went to the agreed-upon meeting place and was apprehended by the detective and another officer.

Defendant was indicted for solicitation by computer and appearing at a location. Defendant was found guilty by a jury and sentenced to a term of eight to nineteen (19) months imprisonment, which was suspended for twenty-four (24) months of supervised probation. Defendant was also ordered to register as a sex-offender for thirty (30) years. Defendant timely appealed.

II. Analysis

Defendant makes three substantive arguments on appeal and also requests that a clerical error in the judgment be corrected. We address each issue in turn.

A. Entrapment

Defendant argues that the trial court erred in denying his motion to dismiss based on his contention that the evidence demonstrated the defense of entrapment as a matter of law. However, Defendant's motion to dismiss at the close of the State's evidence and at the close of all the evidence, was on the ground that the evidence was insufficient, not entrapment. Thus, Defendant asks our Court to invoke its discretionary Rule 2 powers to consider this unpreserved issue.

Rule 2 of our Rules of Appellate Procedure allows our Court to "suspend or vary the requirements of [appellate procedure]" for "exceptional circumstances" in which "significant issues of importance in the public interest" are at stake or when a party may experience manifest injustice. *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999); N.C. R. App. P. 2. Our Supreme Court has exercised its discretionary authority in the context of entrapment. *See State v. Stanley*, 288 N.C. 19, 26-33, 215 S.E.2d 589, 594-98 (1975) (granting certiorari and considering arguments that were not properly before the Court because of the exceptional circumstances surrounding defendant's entrapment).

Entrapment is "the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him." *Stanley*,

288 N.C. at 27, 215 S.E.2d at 594. Our Supreme Court has held that entrapment is a valid defense where "the criminal intent and design originates in the mind of one other than the defendant, and the defendant is, by persuasion, trickery or fraud, incited and induced to commit the crime charged in order to prosecute him for it, when he would not have committed the crime, except for such incitements and inducements." *State v. Burnette*, 242 N.C. 164, 169, 87 S.E.2d 191, 194 (1955).

We note that there appears to be evidence, taken in the light most favorable to Defendant, that tended to show that Defendant was entrapped. Based on this view of the evidence, Defendant was not seeking sexual contact with a fourteen (14) year-old, and "Amy Brown" did not tell Defendant her age until after he became "excited" by the idea that he had found someone to engage in his sexual fantasy. The jury, however, was instructed on the defense of entrapment and returned a guilty verdict, thereby rejecting the defense. Accordingly, we do not find that this case falls into the category of unusual and exceptional circumstances in which we may vacate and disregard a party's noncompliance with appellate procedure. Defendant did not experience manifest injustice nor is a significant issue of public interest at play. *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300. Therefore, in our discretion, we elect not to invoke Rule 2 to address this issue.

In the alternative, Defendant argues that his trial counsel was ineffective by failing to argue that the evidence demonstrated entrapment as a matter of law. As

we have dismissed this first argument, we also dismiss Defendant's alternative ineffective assistance of counsel claim without prejudice.

B. Jury Instruction

During his police interrogation, Defendant stated that he was being questioned because he "was emailing a girl." Defendant argues that the trial court erred in giving a jury instruction regarding confessions based on this statement.

We review a trial court's jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). When instructing the jury, the trial court is required to give instructions requested by a party "if it is a correct statement of the law and supported by the evidence." *State v. Corn*, 307 N.C. 79, 86, 296 S.E.2d 261, 266 (1982). A new trial is required "where jury instructions are given without supporting evidence[.]" *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

Our Supreme Court has stated that jury instructions regarding confessions should be used with great caution. *State v. Young*, 324 N.C. 489, 498, 380 S.E.2d 94, 99 (1989) ("The [pattern jury] instruction [concerning confessions] should not be given in cases in which the defendant has made a statement which is only of a generally inculpatory nature.").

Our court, in *State v. Bray*, held that by using the terms "confessed" and "confession" in its jury instructions, the trial court inadvertently expressed an opinion that the defendant had, in fact, confessed to the crime at issue. *State v. Bray*, 37 N.C.

App. 43, 46, 245 S.E.2d 190, 192 (1978). However, our Supreme Court has further opined that the use of these words does not *per se* amount to an expression of an opinion. *Young*, 324 N.C. at 498, 380 S.E.2d at 99 ("The trial court's statement that there was evidence tending to show that the defendant had confessed was followed immediately in this case by the trial court's instruction: 'Now, *if you find* that the defendant made that confession, *then* you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight which you will give to it.' ") (emphasis in original).

In the present case, the trial court gave the following instruction, despite Defendant's objection:

> Now regarding what the law calls a confession. Members of the jury, if you find that the defendant has confessed that the defendant committed the crime charged in this case, then you should consider all the circumstances under which it was made in determining whether or not it was a truthful confession and the weight that you will give to it.

This instruction was requested by the State as its position was that Defendant's statements in the recorded police interview amounted to a confession.

We hold that the trial court's instruction is similar to that given in *Young*, and, as such, did not amount to an impermissible opinion by the trial court. The trial court properly and clearly laid out the law regarding confessions to the jury and permitted them to decide whether Defendant had confessed and how much weight to afford it. *Young*, 324 N.C. at 498, 380 S.E.2d 94 at 99. And to the extent that the instruction

itself was error, we conclude that the error was not prejudicial. There was substantial evidence of Defendant's guilt, and the jury otherwise was able to watch a video of Defendant making the statement and evaluate it for what it was.

C. Closing Argument

Defendant argues that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. We review for whether the State's closing remarks "were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002).

Generally, counsel should be given wide latitude in closing arguments. *State v. Adcock*, 310 N.C. 1, 20, 310 S.E.2d 587, 598-99 (1984). However, "the permissible scope of counsel's argument to the jury is not unlimited." *State v. Whiteside*, 325 N.C. 389, 398, 383 S.E.2d 911, 916 (1989); N.C. Gen. Stat. § 15A-1230(a) (2017). It is within the trial court's discretion and duty to limit and intervene in counsel's arguments where they are abusive, irrelevant, or prejudicial. *Id.*

In the present case, the State's began its closing with the following:

> [T]here's an old saying it comes from World War II I think. It's from an economist named Edmund Burke, and it's paraphrased a lot. It basically says, "For evil to prevail, all it takes is for good people to do nothing."

Defendant argues that the use of this quote improperly branded him as "evil" and likened the detective to those heroes who tried to stop the Holocaust. In so

arguing, Defendant cites and likens this case to *State v. Jones* and *State v. Walters*, in which prosecutors referenced the Columbine school shootings and the Oklahoma City federal building bombing, and compared the defendant to Hitler. *State v. Jones*, 355 N.C. 117, 126-34, 558 S.E.2d 97, 103-08 (2002); *State v. Walters*, 357 N.C. 68, 102-05, 588 S.E.2d 344, 364-66 (2003). However, we do not find that the use of this popular quotation, which originated in the 18th century, was so egregious to warrant the trial court intervening *ex mero motu*.

Even assuming *arguendo* that the State's closing was improper, it does not rise to the level of plain error – the jury was presented with evidence of Defendant's messages to and from Amy, Defendant's knowledge of Amy's age, and Defendant's solicitation of Amy. Thus, it is unlikely that, but for the State's use of this quote, a different result would have been reached. The State's closing argument was not prejudicial.

D. Clerical Error

Lastly, Defendant asks our court to remand and direct the trial court to correct a clerical error in its judgment. Defendant contends that at the sentencing hearing the trial court orally found mitigating factors that Defendant had been a person of good character and had a good reputation and support system in the community. As a result, the trial court imposed a mitigated-range sentence of eight to nineteen (19) months in prison, suspended for twenty-four (24) months of probation. However, the

judgment does not include the findings made by the trial court in mitigating Defendant's sentence.

Defendant requests that the judgment be remanded for a correction of the clerical error, the inclusion of the trial court's mitigating factors. We acknowledge that the trial court made findings of mitigating factors from the bench. But since the judgment correctly sets out a proper sentence, we find that it is not necessary to remand.

III. Conclusion

We dismiss Defendant's first argument concerning entrapment as a matter of law as he failed to preserve this issue on appeal. Defendant's ineffective assistance of counsel claim is dismissed without prejudice and he may bring a subsequent motion for appropriate relief, if desired. We conclude that the trial court did not err in giving a jury instruction regarding confessions nor in failing to intervene *ex mero motu* during the State's closing argument. Lastly, we do not find it necessary to remand the judgment to the trial court for correction of a clerical error where the judgment correctly provides the mitigated sentence.

NO ERROR.

Judges Bryant and Zachary concur.

Report per Rule 30(e).