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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-740

Filed: 15 January 2019

Burke County, Nos. 16 CRS 50291, 17 CRS 1114

STATE OF NORTH CAROLINA

v.

MICHAEL CHRISTOPHER WEAVER, Defendant.

Appeal by defendant from judgments and order entered 6 September 2017 by Judge Nathaniel J. Poovey in Burke County Superior Court. Heard in the Court of Appeals 29 November 2018.

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

Meghan Adelle Jones for defendant-appellant.

ARROWOOD, Judge.

Michael Christopher Weaver ("defendant") appeals from judgments entered on his convictions of first degree forcible rape, first degree sexual offense, assault with a deadly weapon inflicting serious injury, communicating threats, and four counts of intimidating a witness, and from the trial court's order requiring defendant to

register as a sex offender and enroll in satellite-based monitoring. For the reasons stated herein, we find no error in part, vacate defendant's sentence, and remand for resentencing.

I. Background

On 3 October 2016, a Burke County Grand Jury indicted defendant for first degree forcible rape, first degree sexual offense, assault with a deadly weapon inflicting serious injury, and communicating threats. The grand jury returned a superseding indictment on 3 April 2017, charging defendant with first degree forcible rape, first degree sexual offense, assault with a deadly weapon inflicting serious injury, communicating threats, and five aggravating factors: (1) defendant was armed with or used a deadly weapon at the time of the crime, (2) the offense was committed while defendant was on pre-trial release for another charge, (3) the serious injury inflicted on the victim is permanent and debilitating, (4) the offense was especially heinous, atrocious, or cruel, and (5) defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense. On 5 June 2017, defendant was indicted for five counts of intimidating a witness, and one aggravating factor, defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense. Prior to trial, the State dismissed one count of intimidating a witness.

The matter came on for trial on 28 August 2017 in Burke County Superior Court, the Honorable Nathaniel J. Poovey presiding. The State's evidence tended to show that defendant and the victim were engaged in a relationship, and that, in January 2016, he had vaginal intercourse with the victim without her consent, hit her with a baseball bat, and inserted the bat into her anus. The victim's injuries were extensive and required emergency surgery.

The jury returned guilty verdicts on all charges and found all five aggravating factors beyond a reasonable doubt. The trial court sentenced defendant to 456 to 608 months imprisonment for the offenses of first degree forcible rape and first degree sex offense, 48 to 70 months imprisonment for the offenses of assault with a deadly weapon inflicting serious injury and communicating threats, and 24 to 38 months of imprisonment for the four counts of intimidating a witness. The trial court ordered that each sentence be served consecutively.

Additionally, the trial court rendered judgment in open court requiring defendant register as a sex offender for 30 years, and not requiring defendant to enroll in satellite-based monitoring. However, the written judgment entered by the trial court indicates defendant must maintain registration as a sex offender and enroll in satellite-based monitoring for life.

Defendant appeals.

II. Discussion

Defendant raises two arguments on appeal: (1) the trial court erred in failing to remove a juror from the jury panel for improper communication with a witness, or, if this issue is unpreserved under Rule 10 of the North Carolina Rules of Appellate Procedure, defendant was denied his right to effective assistance of counsel because of his attorney's failure to raise this argument; and (2) the trial court's written judgment contains clerical errors or, in the alternative, defendant's Fourth Amendment rights were violated when the trial court required defendant to enroll in satellite-based monitoring without making a reasonableness determination. We address each argument in turn.

A. Communication with a Juror

Defendant first argues the trial court erred by failing to remove a juror, Juror #2, from the jury panel after she communicated with a witness for the State during trial.

In the event that a witness has contact with a juror, "it is the duty of the trial judge to determine whether such contact resulted in substantial and irreparable prejudice to the defendant. The scope of the inquiry is within the trial judge's discretion." *State v. Garner*, 340 N.C. 573, 601, 459 S.E.2d 718, 733 (1995) (citations and internal quotation marks omitted).

During defendant's trial, the bailiff informed the trial court that Juror #2's employer requested that she return to work. The trial court informed Juror #2 that

she could not be excused from jury service, and offered to call the employer. When the courtroom's phone would not work, the trial judge left the courtroom to find a phone. Eventually, the trial judge returned with his cellphone, which he used to contact Juror #2's employer to explain that Juror #2 could not be excused from jury service.

Immediately thereafter, the court reporter informed the trial judge that, after he left the courtroom, a witness for the State, Detective Melanie Robinson of the Burke County Sheriff's Office ("Detective Robinson") spoke to the court reporter in the presence of Juror #2. The court reporter alleged that Detective Robinson said something to the effect of " 'Gosh, I was hoping that we could get this done today. I don't think Wayne's going to put on any evidence,' et cetera, et cetera[,]" which caused Juror #2 to whisper "back, 'Sorry', for bringing up an issue that delayed the trial further."[1] Neither the prosecutor nor the defense counsel heard the exchange.

When the trial court asked the parties whether they would like to address the exchange, defense counsel stated:

> The only comment that I'd ever make is I don't want that issue to become blown out of proportion. I think the context is -- and I've known Detective Robinson for a long time and she's a very honest, upright detective. That's, that's the least statement. The other statements would just go -- would rise in, in her integrity.
>
> She probably meant to appease the lady who's afraid,

[1] "Wayne" is the first name of defendant's trial attorney.

> fearful of losing her job, to give some consolation to one who might be fretting about a job loss.

In response, the trial court asked how the parties would like him to remedy the issue. Defense counsel answered: "Let it go."

Nonetheless, the trial court investigated further, and requested the court reporter clarify what he heard. Because the court reporter's backup microphone was running during the exchange, he was able to specify:

> [COURT REPORTER]: The witness said, "I was hoping this would get done today. But it's not looking like it. We were on a roll. I'm the last witness for the State."
>
> And I don't think this backup mic picked it up. But this one may have, but I couldn't listen to this one right now. But I remember -- I thought I remember the witness saying -- whispering back, "Sorry". And then --
>
> THE COURT: You mean the juror?
>
> [COURT REPORTER]: The juror, the juror witnessed "Sorry" -- or whispered "Sorry".
>
> And then the witness said, "We're close. We can finish me after lunch," and then, "I don't think Wayne has anyone." It kind of trailed off there at -- but --
>
> THE COURT: Do, do you -- Did you take it that the . . . juror was responding to the witness, that the -- that the witness and the juror were having a conversation? Or was the witness talking to you?
>
> . . . .
>
> [COURT REPORTER]: [Detective Robinson] was talking to me. But the juror could hear it. And I'm, I'm afraid she

> was saying "Sorry" in response to not being able to get done today, for bringing up another -- a delay.
>
> THE COURT: The juror was then responding to [Detective Robinson], not to you.
>
> [COURT REPORTER]: That's what I'm afraid of.
>
> THE COURT: So [Detective Robinson] was talking to you, not the juror.
>
> [COURT REPORTER]: Witness was talking to me, yeah.
>
> THE COURT: But the juror responded to [Detective Robinson].
>
> [COURT REPORTER]: Right.

The trial court then spoke to Juror #2, who confirmed that the communication occurred as described by the court reporter and that she did not overhear anything that would cause her to be any less fair. The trial court explained that Juror #2 did not need to apologize to the State's witness, and reminded Juror #2 that she was not to communicate whatsoever with any of the individuals involved in the case. Thereafter, the trial resumed, and Juror #2's jury service continued.

Throughout the trial court's inquiry into the matter, defense counsel never objected to Juror #2's continued service as a juror, or to the trial court's efforts to ameliorate any prejudice that may have occurred. Instead, he urged the trial court to "[l]et it go." Additionally, both defendant and defendant's counsel signed a stipulation providing that defendant did not wish to have Juror #2 replaced with an

alternate, and that the trial court cured any possible prejudice stemming from the communication between Juror #2 and the witness. Therefore, pursuant to Rule 10 of the North Carolina Rules of Appellate Procedure, defendant did not preserve the issue of whether the trial court abused its discretion by failing to remove Juror #2 from the jury panel for appeal. *See* N.C.R. App. Pro 10(a)(1) (2018) ("[T]o preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). As such, it is unnecessary for our Court to determine whether the trial court abused its discretion when it did not remove Juror #2 from the jury panel.

Because defendant's first argument was unpreserved, we must address defendant's alterative argument, that defendant was denied the right to effective assistance of counsel when his attorney failed to request that Juror #2 be removed from the jury. We disagree.

To successfully assert an ineffective assistance of counsel claim, defendant must satisfy the two-prong test set out in *Strickland v. Washington,* 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984): (1) "he must show that counsel's performance fell below an objective standard of reasonableness" and (2) "once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different." *State v. Gainey*,

355 N.C. 73, 112, 558 S.E.2d 463, 488 (2002) (citing *State v. Braswell,* 312 N.C. 553, 561-63, 324 S.E.2d 241, 248 (1985)).

In evaluating whether defendant received effective assistance of counsel, we must presume "trial counsel acted in the exercise of reasonable professional judgment" and "avoid the temptation to second-guess the actions of trial counsel[.]" *Id.* at 112-13, 558 S.E.2d at 488 (citations omitted); *see State v. Milano*, 297 N.C. 485, 495, 256 S.E.2d 154, 160 (1979), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983), (explaining that trial counsel are given wide latitude on questions of basic strategy). "[A] defendant must also show that he was prejudiced by his trial counsel's deficient performance to such a degree that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (citation and internal quotation marks omitted).

Defendant has not overcome the presumption that trial counsel acted in the exercise of reasonable professional judgment, as there are apparent trial strategies for his failure to preserve the issue. It is reasonably possible that defendant's counsel determined that urging the court to remove the juror might prejudice Juror #2 against defendant. Alternatively, trial counsel may have reasonably believed that Juror #2's value as a juror outweighed any potential prejudice. Therefore, we decline defendant's invitation to second-guess his trial counsel's actions, and hold defendant received effective assistance of counsel.

B. Sentencing

Defendant argues the trial court committed clerical error by entering a written judgment that defendant must register as a sex offender and submit to satellite-based monitoring for life even though the trial court announced in open court that defendant only had to register as a sex offender for 30 years, and did not have to submit to satellite-based monitoring. The State concedes that the written judgment does not match the trial court's oral rendering of judgment, but argues that the written judgment does not contain clerical errors because the oral ruling was not consistent with statutory requirements.

Pursuant to statute, our State designed its satellite-based monitoring program to monitor three categories of individuals. *See* N.C. Gen. Stat. § 14-208.40(a)(1)-(3) (2017). When a trial court concludes an offender falls within one of the three categories of offenders, the trial court *must* conduct a hearing to determine the constitutionality of ordering the individual to enroll in the satellite-based monitoring program. *See* N.C. Gen. Stat. § 14-208.40A; *Grady v. N. Carolina*, 575 U.S. __, __, 191 L. Ed. 2d 459, 462 (2015); *State v. Blue*, 246 N.C. App. 259, 264, 783 S.E.2d 524, 527 (2016). Similarly, under N.C. Gen. Stat. § 14-208.23 (2017), certain categories of persons, including those convicted of an aggravated sexual offense, must register as a sex offender for the remainder of their natural lives. *Id.*

Because defendant committed an aggravated offense, he fell within one of the three categories of offenders the satellite-based monitoring program is designed to monitor. *See* N.C. Gen. Stat. § 14-208.40(a)(1). Therefore, the trial court was required to make this determination, and to conduct a hearing to determine the constitutionality of ordering defendant to enroll in the satellite-based monitoring program. *See id.*; *see also Grady*, 575 U.S. at __, 191 L. Ed. 2d at 462; *Blue*, 246 N.C. App. at 264, 783 S.E.2d at 527. The trial court was also required to order defendant to register as a sex offender for the remainder of his natural life. N.C. Gen. Stat. § 14-208.23. Despite this controlling legislation, the trial court did not follow the legislature's statutory directives. Instead, it rendered judgment in open court that defendant should register as a sex offender for 30 years and "shall not be required to enroll in satellite-based monitoring."

However, on the written judgment, the trial court selected "Box 4" of the "Judicial Findings and Order for Sex Offenders-Active Punishment, AOC-CR-615 Form[,]" which must be selected when the trial court finds an "aggravated offense." Consistent with N.C. Gen. Stat. §§ 14-208.40(a)(1) and 14-208.23, selection of "Box 4" also requires that the offender be sentenced to register as a sex offender and enroll in satellite-based monitoring for his natural life. As a result, the trial court's written judgment is inconsistent with the oral judgment it rendered that defendant only

needed to register as a sex offender for 30 years, and did not need to enroll in satellite-based monitoring.

In light of N.C. Gen. Stat. § 14-208.40 *et seq.*, we are unable to agree with defendant that the written judgment's inconsistencies with the oral rendering of judgment are clerical errors. A "[c]lerical error has been defined as an error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117-18 (2003) (citations, internal quotation marks, and alteration omitted). Here, the trial court did not have the discretion to render judgment inconsistent with N.C. Gen. Stat. § 14-208.40 *et seq*. because defendant committed an aggravated offense. Therefore, we hold that the record and the totality of the circumstances reflect that the written judgment is based on judicial reasoning, specifically, the finding of an aggravating offense, and the need to bring the judgment in line with statutory requirements. As a result, we do not consider these alleged errors clerical.

We note that the circumstances here are distinguishable from *State v. Sellers*, 155 N.C. App. 51, 574 S.E.2d 101 (2002), a case relied on by defendant in support of his argument that the inconsistencies in the written judgment are clerical errors. In *Sellers*, our Court held that the oral ruling controlled where there was a discrepancy between the oral rendering of judgment and the subsequent written judgment. *Id.* at

58-59, 574 S.E.2d at 106-107. However, the facts in *Sellers* are distinguishable from the instant case because, in *Sellers*, it was clear from the transcript and the aggravated sentence imposed that the trial court committed a clerical error when it failed to check the box on the judgment that indicated the court found "that the factors, factors in aggravation outweigh the factors in mitigation, and that an aggravated sentence is justified in the judgments to be entered." *Id.* at 59, 574 S.E.2d at 106. In contrast, here, the finding of an aggravating sentence and controlling legislation demonstrate that the written judgment does not contain clerical errors as alleged by defendant. Absent a clerical error, it is well established that "[t]he sentence contained in the written judgment is the actual entry of judgment and the sentence imposed." *State v. Fleming*, __ N.C. App. __, __, 786 S.E.2d 760, 767-68 (2016) (citation omitted).

Although the inconsistencies between the written judgment and the oral rendering of judgment are not clerical errors, the trial court's actions violated defendant's constitutional rights. As discussed in defendant's alternative argument, defendant's Fourth Amendment rights were violated when the trial court required defendant to enroll in satellite-based monitoring without making a reasonableness determination. *Grady*, 575 U.S. at __, 191 L. Ed. 2d at 462; *Blue*, 246 N.C. App. at 264, 783 S.E.2d at 527. Therefore, we reverse the trial court's order and remand for

a new hearing in which the trial court shall determine if the satellite-based monitoring program is reasonable under defendant's circumstances.

III. Conclusion

For the forgoing reasons, the trial court did not err when it did not remove Juror #2 from the jury panel, and defendant's attorney did not provide ineffective assistance of counsel for failing to object thereto. Although we hold the totality of the circumstances show that the trial court did not commit clerical error by bringing its judgment in line with statute, we reverse the trial court's satellite-based monitoring order and remand for a new sentencing hearing in which the trial court shall determine if the satellite-based monitoring program is reasonable as applied to defendant.

NO ERROR IN PART; REVERSED IN PART AND REMANDED; NEW SENTENCING HEARING.

Judges TYSON and INMAN concur.

Report per Rule 30(e).