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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-856

Filed: 18 June 2019

Wake County, Nos. 13CRS207134-135; 13CRS207221-222

STATE OF NORTH CAROLINA

v.

HENRY ARNALDO PADILLA-AMAYA, Defendant.

Appeal by Defendant from judgments and orders entered 6 March 2018 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 8 May 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya M. Calloway-Durham, for the State.

Daniel M. Blau Attorney at Law, P.C., by Daniel M. Blau for the Defendant.

DILLON, Judge.

Defendant Henry Arnaldo Padilla-Amaya appeals from judgments finding him guilty of various sex offenses, an order subjecting him to lifetime enrollment as a sex-offender and in satellite-based monitoring ("SBM"), and an order awarding $3,000 in restitution to SAFEchild Advocacy Center ("SAFEchild").

I. Background

In 2013, Defendant was accused of sexually abusing three of his nieces. SAFEchild commenced an investigation. Defendant was subsequently charged with multiple counts of rape, sex offense, and taking indecent liberties with the three minors.

A jury trial was held in Wake County. At the close of the State's evidence the charge regarding one of the minors was dismissed. Defendant was found guilty of the remaining charges and sentenced in the presumptive range. Defendant was also ordered to register as a sex-offender and to submit to satellite-based monitoring for the rest of his natural life. SAFEchild was awarded $3,000 in restitution.

Defendant timely appealed.

II. Analysis

Defendant makes several arguments on appeal, which we address in turn.

A. Closing Argument

Defendant first argues that the trial court erred in failing to intervene *ex mero motu* during the State's closing argument, which Defendant contends involved uncomplimentary remarks about Defendant's counsel.

We review closing arguments for "whether the remarks were so grossly improper that the trial court committed reversible error[.]" *State v. Waring*, 364 N.C. 443, 499, 701 S.E.2d 615, 650 (2010) (internal citations omitted). In alleging such an error, a defendant "must show that the prosecutor's comments so infected the trial

with unfairness that they rendered the conviction fundamentally unfair." *Id.* at 499-500, 701 S.E.2d at 650 (quoting *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998)).

In the present case, the State argued and Defendant complains of the following closing argument:

> One of the things that's the most frustrating is the victim blaming, especially when it's a child. And you heard that from the stand. You heard him ask her, "Did you do anything to protect other children?" She was a child. She was a child. How can you ask her that? Did you not see how she reacted when she found out that her sister had been touched? The guilt she felt, she probably carries to this day. And then you ask her that on the stand in front of strangers?
>
> "Why did you keep going over to their house?" Why? Because these kids had a choice? They didn't get in their cars and drive over there. They're seven. They're eight. They're nine. They didn't have a choice. How can you do that? How do you blame them?
>
> "Why did you keep going into his room?" Why are you keeping -- asking questions of the victim? Why don't you turn around and ask your client why he kept abusing them?
>
> "Why didn't you leave?" This is what we hear people normally say to domestic violence victims when they're blaming them. To say it to children?
>
> They want to blame anybody else. And this is why they're doing that: Anyone else other than the [D]efendant.

Our Supreme Court has stated that "a trial attorney may not make uncomplimentary comments about opposing counsel, and should 'refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives.' " *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994) (quoting *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967)). We conclude that these statements, while uncomplimentary, do not rise to the level of "grossly improper." *Waring*, 364 N.C. at 499, 701 S.E.2d at 650. Rather, the statements that Defendant complains of "are more properly viewed as shorthand commentary on the arguments presented by defense counsel[.]" *State v. Roache*, 358 N.C. 243, 301, 595 S.E.2d 381, 418 (2004). Thus, the trial court was not required to intervene *ex mero motu* during the State's closing.

Defendant also argues that his trial counsel was ineffective in failing to object to the State's closing.

"To establish a claim of ineffective assistance of counsel, a defendant must show [(1)] that counsel's performance was deficient and [(2)] that the deficient performance prejudiced the defense." *State v. McDonald*, 191 N.C. App. 782, 787, 663 S.E.2d 462, 466 (2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In proving the second element of ineffective assistance of counsel, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

We conclude that the failure by Defendant's counsel to object during the State's closing did not constitute deficient performance. But even assuming *arguendo* that counsel's failure to object was defective, this failure did not prejudice Defendant. As we concluded that the State's closing argument did not render the trial fundamentally unfair, any failure to object to the closing did not prejudice Defendant. *See Waring*, 364 N.C. at 502, 701 S.E.2d at 652; *see also State v. Campbell*, 359 N.C. 644, 697-98, 617 S.E.2d 1, 91-92 (2005).

B. Exclusion of Evidence Regarding Another Perpetrator

Defendant contends that the trial court erred in preventing him from offering evidence that another individual abused the victims. We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Meekins*, 326 N.C. 689, 696, 392 S.E.2d 346, 350 (1990).

Whether evidence of another's guilt is admissible at trial is governed "by the general principle of relevancy." *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 280 (1987) (citing N.C. Gen. Stat. § 8C-1, Rule 401 (1986)). Generally, "[e]vidence that another committed the crime for which the defendant is charged is relevant and admissible as long as it does more than create an inference or conjecture in this regard." *Id.* at 667, 351 S.E.2d at 279; *State v. Brewer*, 325 N.C. 550, 564, 386 S.E.2d

569, 576 (1989) ("Evidence which tends to show nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded.").

For instance, our Court has reasoned that "even assuming *arguendo* that the evidence in question established that [two others] were involved in the [crime], such evidence would not establish that defendant did not commit the [crime], since it is perfectly conceivable that defendant and [the others] were, together, responsible for the [crime]." *State v. Floyd*, 143 N.C. App. 128, 134, 545 S.E.2d 238, 242 (2001). Indeed, such evidence is not relevant if it "neither inculpate[s the other] . . . , nor serve[s] to exculpate defendant." *Id.*

In the present case, on cross-examination of the three alleged victims, Defendant sought to introduce evidence that another individual had abused them. Specifically, on cross-examination, defense counsel asked: "[Y]ou accused another gentleman of raping you on Christmas 2012; is that not the case?" and "Have any other relatives in [Defendant's] family molested or abused you?" The State objected to and the trial court struck such questions. Defendant contends that the State opened the door to this line of questioning by introducing prior recorded interviews with the alleged victims regarding Defendant and another perpetrator. However, this evidence is still inadmissible under Rule of Evidence 401 as it is similar to that

in *Floyd* – it did "not establish that [D]efendant did not commit the [crime.]" *Floyd*, 143 N.C. App. at 134, 545 S.E.2d at 242; N.C. Gen. Stat. § 8C-1, Rule 401 (2018). Thus, the trial court did not err in sustaining the State's objections to this evidence.

C. Multiple Judgments

Next, Defendant argues that the trial court erred in entering multiple judgments for overlapping offenses, thereby violating his constitutional protections against double jeopardy. Defendant did not preserve this issue for our review; thus, Defendant has asked that we invoke Rule 2 to review this alleged error.

Rule 2 of our North Carolina Rules of Appellate Procedure permits us to "waive compliance with the appellate rules" in order to "prevent manifest injustice to a party" or "to expedite decision in the public interest." *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 205 (2007) (citing N.C. R. App. P. 2). For example, our Court has invoked Rule 2 in cases "when leaving the error in question unaddressed has double jeopardy implications." *State v. Gayton-Barbosa*, 197 N.C. App. 129, 135, 676 S.E.2d 586, 590 (2009).

We decline to invoke Rule 2 in this case. In *State v Ware*, 188 N.C. App. 790, 656 S.E.2d 662 (2008), our Court addressed a similar situation and dismissed the defendant's argument that he was subjected to double jeopardy when there was evidence of "two separate instances of [the crime] occurring contemporaneously to the charged dates[.]" *Ware*, 188 N.C. App. at 797, 656 S.E.2d at 666; *accord State v.*

Murray, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984) ("[E]ven where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical."). Here, Defendant was charged with multiple counts of sexual offenses with three minors and all three minors testified to different occasions, varying in location, time of year, and age at which Defendant allegedly assaulted them. Thus, we conclude that there was no manifest injustice to warrant the invocation of Rule 2 in this case. *See Gayton-Barbosa*, 197 N.C. App. at 135, 676 S.E.2d at 590.

D. Restitution Award

Defendant also appeals the $3,000 in restitution awarded to SAFEchild. We review the trial court's restitution order *de novo*. *See* N.C. Gen. Stat. § 15A-1446(d)(18) (2018).

"It is well settled that for an order of restitution to be valid it 'must be related to the criminal act for which defendant was convicted, else the provision may run afoul of the constitutional provision prohibiting imprisonment for debt.' " *State v. Froneberger*, 81 N.C. App. 398, 404, 344 S.E.2d 344, 348 (quoting *State v. Bass*, 53 N.C. App. 40, 42, 280 S.E.2d 7, 9 (1981)). Moreover, "the amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995).

Here, during the sentencing phase, the State provided the trial court with a request from SAFEchild for $3,000 in restitution for the work conducted. However, this request is not included in our record. In fact, the only evidence regarding SAFEchild's request for restitution is the State's statement that there is "a request for $3,000 of restitution for SAFEchild for the interviews."

While SAFEchild did assist in interviewing the three victims and testify at Defendant's trial, "[t]he unsworn statement of the [State] is insufficient to support *the amount* of restitution ordered." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (emphasis added) (vacating a restitution order where the record did "not include any evidence supporting the [State's] statement during sentencing as to the amount charged [and awarded as restitution.]"); *see also State v. Buchanan*, 108 N.C. App. 338, 341-42, 423 S.E.2d 819, 821-22 (1992).

Thus, the evidence, or lack thereof, before the trial court and in the record on appeal is insufficient to support the trial court's restitution order. We, therefore, vacate and remand the restitution order. Upon remand, the trial court in its discretion may accept and consider evidence in relation to this issue.

III. Conclusion

We conclude that Defendant had a fair trial, free from reversible error, as the trial court did not err in not intervening *ex mero motu* during the State's closing argument nor in preventing Defendant from eliciting testimony regarding another

perpetrator. Thus, we affirm the judgments entered against him.[1] Moreover, we conclude that these judgments do not threaten Defendant's protections against double jeopardy.

Nevertheless, we do vacate the restitution order and remand for further proceedings regarding SAFEchild's request for $3,000 in restitution. On remand, the trial court, in its discretion, may take additional evidence on this issue.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges ZACHARY and BERGER concur.

Report per Rule 30(e).

[1] Defendant has also argued that should our Court reverse his convictions, there is no longer a basis to warrant his registration as a sex-offender and submission in satellite-based monitoring. However, as we do not reverse his convictions, but rather affirm the judgments against him, we do not address this argument.