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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-248

Filed: 4 February 2020

Durham County, No. 17 CRS 53079

STATE OF NORTH CAROLINA

v.

HAROLD DAESHAUN SANDERS

Appeal by defendant from judgment entered 15 May 2018 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Creecy C. Johnson, for the State.

Charlotte Gail Blake for defendant-appellant.

ZACHARY, Judge.

Defendant Harold Daeshaun Sanders appeals from the judgment entered upon his guilty plea to (i) two counts of felony child abuse inflicting serious bodily injury, and (ii) one count of felony child abuse inflicting serious bodily injury by a willful act and gross negligence. Defendant argues that the trial court erred in failing to find the existence of the mitigating factor asserted by Defendant, and instead, sentencing

Defendant within the aggravated range. After careful review, we affirm the trial court's judgment.

Background

In 2015, Defendant moved from Connecticut to Durham, North Carolina. That same year, Toni Barr, Defendant's former girlfriend, moved to Durham with her children, 3-year-old Janie and 5-year-old Sam, and their father.¹ Soon thereafter, Barr contacted Defendant over Facebook, and they renewed their relationship.

Barr asked Defendant to quit his job and watch her children while she worked. She also asked Defendant to discipline her children, and gave him permission to "pop" them on the hand. On 25 April 2017, Defendant watched Sam and Janie while Barr worked. In an attempt to help Sam practice counting, Defendant told Sam to count aloud; however, when Sam "did not get his numbers right," Defendant disciplined Sam by "popping" him. Defendant used his phone to videotape his discipline of Sam. The video showed Sam "frozen . . . trembling [in] fear and wide-eyed . . . decomposing medically."

Sam began to vomit, and Defendant told Barr to come home. When she returned, Sam was "on the floor, actively vomiting red blood" with "white and crusted" lips, struggling to stay awake. Barr took Sam to the emergency room, where "a Level II trauma was activated based on his mental status and apparent bruising." Sam

¹ We adopt pseudonyms in order to protect the identities of the minor children.

was hospitalized for “extensive physical abuse” from 25 April 2017 to 4 May 2017. Medical staff alerted the Department of Social Services (“DSS”), and DSS called the police.

When approached by law enforcement officers, Defendant “offered everything including his phone[.]” Defendant showed law enforcement officers the video of him disciplining Sam, in an effort to “safeguard himself” by showing “exactly what happened[.]” Defendant also gave a statement.² Defendant noted that he “popped” Sam “at least 15 times” with the back of his hand, and “probably 8-10 times with a belt.” He shared that Barr gave him permission to “pop” her children, but that he tried to avoid doing so. Defendant stressed that he only hit Sam to teach the child, and because of a request by Barr. Defendant also emphasized that he is “not an abusive person” and that “this thing is kind of crazy.”

The State obtained a warrant for Defendant’s arrest on 26 April 2017, and a warrant to search his phone on 1 May 2017. On 15 May 2017, a grand jury returned an indictment charging Defendant with two counts of felony child abuse inflicting serious bodily injury, and one count of felony child abuse inflicting serious bodily injury by a willful act and gross negligence. On 31 January 2018, Defendant pleaded guilty to all three charges and conceded the existence of an aggravating factor—that

² Law enforcement officers interviewed Defendant on 26 April 2017 and 1 May 2017. We are unable to ascertain when Defendant was arrested in relation to the 26 April interview, or distinguish statements that Defendant provided pre- and post-arrest.

the victim was very young and physically infirm. The terms of Defendant's plea arrangement specifically left his sentence open to the trial court's discretion.

On 15 May 2018, the case came on for sentencing. Defendant asked the trial court to find as "an extraordinary mitigating factor" that Defendant "voluntarily acknowledged wrongdoing."³ Defendant also requested a term of imprisonment within the mitigated range of 125 to 160 months. The State disputed that Defendant acknowledged wrongdoing, and requested that the trial court find the aggravating factor and sentence Defendant to a term of imprisonment within the aggravated range of 196 to 248 months.

The trial court consolidated the offenses for judgment, made no findings of mitigating factors, and found that the State had proven the aggravating factor that the victim was very young and physically infirm. The trial court entered judgment sentencing Defendant to a term of 196 to 248 months in the custody of the North Carolina Department of Adult Correction—a term within the aggravated range. Defendant timely filed written notice of appeal.

Discussion

On appeal, Defendant argues that the trial court erred in sentencing him within the aggravated range because it failed to find an uncontroverted and credible mitigating factor: that "[p]rior to arrest or at an early stage of the criminal process,

³ Defendant asked the trial court to find four additional mitigating factors; however, the trial court's failure to do so is not challenged on appeal.

[he] voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.” N.C. Gen. Stat. § 15A-1340.16(e)(11) (2017). We disagree.

We review the trial court’s sentencing determination for abuse of discretion. *See State v. Rogers*, 157 N.C. App. 127, 129, 577 S.E.2d 666, 668 (2003) (“A trial court’s weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that there was an abuse of discretion.”).

A defendant who pleads guilty has a very limited right of appeal. *See* N.C. Gen. Stat. § 15A-1444. In particular, a defendant who pleads guilty is entitled to appeal as a matter of right, *inter alia*, “the issue of whether his . . . sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant’s prior record or conviction level and class of offense.” *Id.* § 15A-1444(a1).

The presence of aggravating or mitigating factors may impact a trial court’s sentencing determination. To establish these factors, “[t]he State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.” N.C. Gen. Stat. § 15A-1340.16(a).

A trial court “may not find an aggravating factor where the only evidence to support it is the [State’s] mere assertion that the factor exists[,]” and “statements

made by defense counsel during argument at the sentencing hearing do not constitute evidence in support of statutory mitigating factors.” *State v. Swimm*, 316 N.C. 24, 32, 340 S.E.2d 65, 70-71 (1986) (internal citations omitted). However, “[s]uch statements may . . . constitute adequate evidence of the existence of aggravating or mitigating factors if the opposing party so stipulates.” *Id.*

I. Mitigating Factor

A trial court “is allowed wide latitude in determining the existence of mitigating factors.” *State v. Davis*, 206 N.C. App. 545, 550, 696 S.E.2d 917, 920 (2010) (internal quotation marks omitted). To establish mitigating factors, a defendant “bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.” N.C. Gen. Stat. § 15A-1340.16(a). A trial court errs in failing to find a mitigating factor “only when no other reasonable inferences can be drawn from the evidence.” *Davis*, 206 N.C. App. at 550, 696 S.E.2d at 920-21 (internal quotation marks omitted). As such, “[a]n appellate court may reverse a trial court for failing to find a mitigating factor only when the evidence offered in support of that factor is both uncontradicted and manifestly credible.” *State v. Mabry*, 217 N.C. App. 465, 471, 720 S.E.2d 697, 702 (2011).

In the instant case, Defendant argues that the trial court erred in failing to find as a mitigating factor that “[p]rior to arrest or at an early stage,” Defendant “voluntarily acknowledged wrongdoing in connection with the offense to a law

enforcement officer.” N.C. Gen. Stat. § 15A-1340.16(e)(11). Specifically, Defendant contends that the trial court failed to find this mitigating factor “when the State conceded [its] existence . . . and [it] was otherwise uncontroverted and credible[.]”

“A defendant acknowledges wrongdoing when he admits culpability, responsibility or remorse, as well as guilt.” *State v. Godley*, 140 N.C. App. 15, 28, 535 S.E.2d 566, 575 (2000) (internal quotation marks omitted), *disc. review denied*, 353 N.C. 387, 547 S.E.2d 25, *cert. denied*, 532 U.S. 964, 149 L. Ed. 2d 384 (2001). Where a defendant “admits committing certain acts, *but does not acknowledge wrongdoing or culpability*, the trial court does not err by failing to find this mitigating factor.” *State v. Shelton*, 167 N.C. App. 225, 231, 605 S.E.2d 228, 232 (2004) (emphasis added); *accord State v. Clark*, 314 N.C. 638, 643, 336 S.E.2d 83, 86 (1985) (holding that the defendant denied culpability by claiming self-defense despite admitting to killing the victim); *State v. Michael*, 311 N.C. 214, 221, 316 S.E.2d 276, 280 (1984) (holding that the defendant did not acknowledge wrongdoing where he admitted to killing his father, but “steadfastly maintained” that it was an accident).

The facts of the present case are similar to those of *State v. Brewington*, 343 N.C. 448, 471 S.E.2d 398 (1996). In *Brewington*, the defendant argued that the trial court erred in failing to find as a mitigating factor, supported by “uncontradicted and manifestly credible” evidence, that the defendant voluntarily acknowledged wrongdoing. 343 N.C. at 456, 471 S.E.2d at 403. The defendant told law enforcement

officers that “upon entering the pawn shop the first time, he ‘was kind of shaky’ and ‘did not want to do it at all.’ ” *Id.* at 457, 471 S.E.2d at 403. He also told law enforcement officers that “after the first failed attempt to rob the pawn shop, he did not want to make a second attempt, he told [his co-conspirator] ‘this ain’t gonna work,’ and [his co-conspirator] then urged [him] to go ahead with the robbery.” *Id.* These statements, the defendant argued, amounted to an acknowledgement of wrongdoing. However, our Supreme Court determined that the defendant’s statements shifted responsibility and denied culpability, which, in effect, contradicted the defendant’s argument. *Id.* at 458, 471 S.E.2d at 404. Thus, the trial court did not err in failing to find that the defendant acknowledged wrongdoing. *Id.*

At sentencing in the present case, defense counsel argued that Defendant admitted to law enforcement officers that he hit Sam because

at no point in any stage of th[e] investigation was [he] dishonest. He told the police, he told DSS, he told whoever he spoke to exactly what happened. [Defendant told them] [He] was watching the children. [He] was disciplining the children. [He] punished the children. His words were “pop,” he used the back of his hand on the children.

During the investigation of Sam’s injuries, when asked about disciplining the children, Defendant told law enforcement officers that he “did not want to do it.” Defendant also explained to law enforcement officers that when he informed Barr that “he did not feel comfortable hitting or popping the children, . . . Barr stated she did not mind [because] he was around the children more than their father [was].”

Defendant maintained that he spoke with Barr “on two additional occasions because he felt uncomfortable with discipline.” Defendant further stated that Barr “gave him the responsibility to discipline her kids even though he told her [he] did not want to, but she said she wanted him as a father figure,” thus encouraging Defendant to “pop” them.

Furthermore, Defendant made additional statements that, in effect, denied his culpability. During initial interviews with officers, he stated that he is “not an abusive person . . . this thing is kind of crazy[,]” and stressed that he “loved kids to death.” Even after he pleaded guilty, as he awaited sentencing, Defendant maintained that “the fact I’m in jail is a very big misunderstanding[,]” and that his “current predicament” was “an unfortunate misunderstanding.”

Defendant misconstrues “admitting to the commission of an act” as being equivalent to “acknowledging wrongdoing.” “Owning up” to the commission of an act, without more, does not constitute an acknowledgment of wrongdoing and is insufficient to entitle Defendant to such a finding. *Shelton*, 167 N.C. App. at 231, 605 S.E.2d at 232.

In sum, Defendant’s statements contradict the argument that he acknowledged wrongdoing. Consequently, in that the State contested that Defendant acknowledged wrongdoing, and Defendant’s own statements contradicted his contention, Defendant’s argument that the evidence supporting the existence of this

mitigating factor was uncontradicted and credible fails. Accordingly, the trial court did not err in failing to find the mitigating factor.

II. Aggravating Factor

The trial court must “consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court.” N.C. Gen. Stat. § 15A-1340.16(a). “If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it *may* impose a sentence that is permitted by the aggravated range [.]” *Id.* § 15A-1340.16(b) (emphasis added).

In the instant case, Defendant admitted to the existence of an aggravating factor: that the victim was very young and physically infirm. He also admitted that there was evidence to support the aggravating factor. Defendant’s concession constituted adequate evidence of its existence. *See Swimm*, 316 N.C. at 32, 340 S.E.2d at 70-71. The trial court found that the State had proven that the aggravating factor was present, and determined that no mitigating factors were present. Thus, it was within the trial court’s discretion to impose a sentence within the aggravated range.

Conclusion

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Opinion of the Court

The trial court did not err in failing to find the mitigating factor at issue or in sentencing Defendant to a term of imprisonment within the aggravated range. Therefore, we affirm the judgment entered upon Defendant's guilty plea.

AFFIRMED.

Judges STROUD and MURPHY concur.

Report per Rule 30(e).