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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-702

Filed: 7 April 2020

Cabarrus County, No. 17CRS051177

STATE OF NORTH CAROLINA

v.

RODERICK JERMAINE HOUSE, Defendant.

Appeal by Defendant from judgment entered 12 March 2019 by Judge Joseph N. Crosswhite in Cabarrus County Superior Court. Heard in the Court of Appeals 22 January 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. Mosteller, for State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for Defendant-Appellant.

COLLINS, Judge.

Defendant Roderick Jermaine House appeals from judgment entered upon a jury verdict of guilty of willfully failing to comply with the sex offender registration law, in violation of N.C. Gen. Stat. § 14-208.11, and having attained habitual felon

status, in violation of N.C. Gen. Stat. § 14-7.1. Defendant argues that the trial court (1) plainly erred by allowing testimony that was irrelevant and prejudicial; (2) erred by failing to grant Defendant's motion to dismiss; and (3) erred by failing to intervene *ex mero motu* during the prosecutor's closing argument. We discern no error.

I. Background

On 17 April 1995, Defendant was convicted of taking indecent liberties with a child, an offense obligating Defendant to register as a sex offender.

In July 2009, Defendant completed a series of forms entitled "OFFENDER ACKNOWLEDGEMENT NOTICE: Duty to Register." These forms required Defendant to list his full name, telephone number, physical address, and vehicle information. The forms also required Defendant to sign his initials next to 22 separate provisions, affirming his understanding of each provision. One of the provisions, entitled Change of Address, states that when the offender "required to register changes addresses, they must appear IN-PERSON and provide written notification of this address change" It further provides, "This IN-PERSON notification must be made to the county sheriff within three (3) business days of the address change." Defendant also signed his initials next to a provision stating that a person is guilty of a Class F felony if he "fails to notify the . . . sheriff of a change of address."

On 19 October 2016, following Defendant's release from prison, Defendant enrolled in post-release supervision. That same day, Defendant met with a probation and parole officer and signed his post-release paperwork.

On 20 October 2016, Defendant moved into the home of his cousin, Melvin Forrest ("Forrest"), located at 274 Melrose Drive. Defendant had a private bedroom in the home, and shared the rest of the home with Forrest and another roommate.

In January 2017, Probation and Parole Officer Kathryn Tobias ("Tobias") began supervising Defendant. Tobias first met with Defendant on 4 January 2017 at Tobias' office. Defendant verified his address, provided Tobias with a pay stub from his employment, and discussed his job situation. The following day, Tobias made her first visit to Defendant's home at 274 Melrose Drive; Defendant was visiting his mother when Tobias stopped by. Tobias visited 274 Melrose Drive nine times between 5 January 2017 and 15-16 March 2017, but Defendant was not home during any of her visits.

During visits on 5 and 8 February 2017, Tobias left door tags indicating that she had visited the home at 274 Melrose Drive. During one of these visits, Tobias spoke with Forrest, who told her that Defendant "stays there sometimes, but he'll go days without coming home. . . . [Defendant] has gone four or five days before without coming home."

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On 9 February 2017, Defendant attended a mandatory appointment with Tobias at her office. Tobias went over her concerns with Defendant, letting him know that he “cannot be staying anywhere but his home for more than three days in a row” and asked Defendant if he needed to register as homeless; Defendant stated that he understood the registration requirements and maintained that he lived at 274 Melrose Drive.

On 23 February 2017, Tobias informed Deputy Jason Thomas (“Thomas”) of the Cabarrus County Sheriff’s Department of her concerns that Defendant was no longer living at his registered address. Thomas contacted other officers and asked them to “swing by” Defendant’s address in the “evening hours and see if you can make contact with [Defendant.]” On 26 February 2017, one of the officers was able to make contact with Defendant. On 4 March 2017, Thomas asked another officer to swing by Defendant’s home, but the officer reported that “nobody was at the house and there was no working vehicles in the driveway.” On 7 March 2017, Thomas personally went to 274 Melrose Drive to make contact with Defendant, but Defendant was not at the home. Forrest was at the home, and permitted Thomas to look inside the home and Defendant’s bedroom. Thomas did not find any of Defendant’s personal items in his bedroom.

On 9 March 2017, Defendant attended an appointment with Tobias and Thomas. Defendant denied that he moved and said that he was still staying at the

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location. However, Defendant later admitted that he was “going and staying at his mom’s house, a brother’s house. He would go and visit girlfriend. He was away from the place more than he should be.” When asked where his clothes were, Defendant stated that they were at his mom’s house. Thomas testified that from 26 February until 9 March, the sheriff’s department did not know where Defendant was living. When Thomas asked Defendant about not being at his registered address for ten days, Defendant admitted that was true and that he understood he was not in compliance with the requirements.

On 17 April 2017, a grand jury indicted Defendant for one felony count of willfully failing to comply with the sex offender registration law, in violation of N.C. Gen. Stat. § 14-208, and for attaining habitual felon status, in violation of N.C. Gen. Stat. § 14-7.1. On 27 November 2017, a grand jury returned a superseding indictment, charging Defendant with one felony count of willfully failing to comply with the sex offender registration law, in violation of N.C. Gen. Stat. § 14-208.11.

On 11 March 2019, Defendant’s case came on for a jury trial. On 12 March 2019, the jury found Defendant guilty of failing to report a new address, in violation of N.C. Gen. Stat. § 208.11(a)(2). Defendant then entered a plea of no contest to having attained habitual felon status, specifically preserving his right to appeal his conviction for failing to report a new address.

The trial court sentenced Defendant to a term of 144-185 months' imprisonment. Defendant gave oral notice of appeal in open court.

II. Discussion

Defendant argues that the trial court (1) plainly erred by allowing testimony that was irrelevant and prejudicial; (2) erred by failing to grant Defendant's motion to dismiss, as N.C. Gen. Stat. §§ 14-208.9(A) and 208.11(a)(2) are void for vagueness under the North Carolina and United States constitutions, because they failed to put Defendant on notice of what constituted a change of address; and (3) erred by failing to intervene *ex mero motu* during the prosecutor's closing argument.

1. Tobias' Testimony

Defendant first argues that the trial court plainly erred by allowing Tobias to testify about the persons she supervised as follows: "I have rapists, I have murderers. I have people who hit women. I have people that have shot people. I have people who have molested children. You name it, that's what I have[.]" Defendant argues this testimony was irrelevant under North Carolina Rule of Evidence 401 and unfairly prejudicial under North Carolina Rule of Evidence 403.

Defendant concedes that his trial counsel did not object to Tobias' testimony but Defendant specifically argues plain error on appeal. N.C. R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723

S.E.2d 326, 334 (2012) (citation omitted). Accordingly, under plain error review, a defendant must show that, “absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

A. Rule 401 Relevancy

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2019). “If the proffered evidence has no tendency to prove a fact in issue in the case, the evidence is irrelevant and must be excluded.” *State v. Coen*, 78 N.C. App. 778, 780-81, 338 S.E.2d 784, 786 (1986) (citation omitted).

Here, Defendant was charged with willful failure to report an address change in violation of N.C. Gen. Stat. §14-208.11. Despite the State’s argument to the contrary, there is nothing in the challenged testimony that makes it more or less likely that Defendant willfully failed to report an address change. Accordingly, Tobias’ testimony was irrelevant under Rule 401 and thus inadmissible.

Nonetheless, under plain error review, Defendant must also show that absent the admission of this testimony, the jury probably would have reached a different verdict. *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. Defendant relies on *State v. Hinton*, 226 N.C. App. 108, 738 S.E.2d 241 (2013), to support his claim that Tobias’

testimony constituted plain error. In *Hinton*, a law enforcement officer's testimony regarding gang activity constituted plain error and entitled defendant to a new trial on two felony assault charges. *Id.* The officer's "testimony in front of the jury spanned twenty-nine pages of trial transcript, fifteen of which referenced gangs or gang-related activity. The words "gang," "gangster," "Bloods," and "Crypts [sic]" were used a combined total of ninety-one times." *Id.* at 113-14, 738 S.E.2d at 246. This Court determined the testimony was irrelevant and prejudicial and thus erroneously admitted.

"[H]owever, only one eyewitness, Mr. Lindsey, implicated defendant in the commission of the crime. Mr. Lindsey's testimony was halting, awkward, and incomprehensible at times" *Id.* at 114, 738 S.E.2d at 247. "Additionally, no evidence apart from Mr. Lindsey's testimony was introduced linking defendant to the scene of either crime. No evidence was introduced linking defendant to a nine-millimeter firearm or even linking the two nine-millimeter shell casings to the same firearm. And no evidence was introduced linking defendant to the red bandana found at the scene." *Id.* at 115, 738 S.E.2d at 247. In view of the entire record, this Court held that "the admission of extensive gang-related testimony 'had a probable impact on the jury's finding that defendant was guilty,' and thus constitute[d] plain error." *Id.* at 115-16, 738 S.E.2d at 248 (citation omitted).

Hinton is distinguishable from the present case. Here, Tobias' testimony spanned a total of 68 pages of trial transcript, while the disputed portion of the testimony spanned only one paragraph. Moreover, Thomas testified that Defendant admitted that he stayed away from his home for more than 10 days, Forrest testified that Defendant had packed up his things and left 274 Melrose Drive, and the State introduced copies of the "OFFENDER ACKNOWLEDGEMENT NOTICE: Duty to Register" forms which were signed by Defendant.

In view of the entire record, we conclude that the erroneously admitted testimony did not have a probable impact on the jury's finding that Defendant was guilty and thus did not constitute plain error.

B. Rule 403 Prejudice

Defendant next argues that Tobias' testimony was unfairly prejudicial under Rule 403. However, this discretionary ruling is not subject to plain error review under N.C. R. App. P. 10(a)(4) and the issue is thus not properly before this Court. *See State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) ("The North Carolina Supreme Court has specifically refused to apply the plain error standard of review to issues which fall within the realm of the trial court's discretion.") (internal quotation marks, brackets, and citation omitted).

2. Motion to Dismiss

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Defendant next argues that the trial court erred by failing to grant Defendant's motion to dismiss, as N.C. Gen. Stat. §§ 14-208.9(A) and 208.11(a)(2) are "void for vagueness under the North Carolina and United States constitutions, because they failed to put Defendant on notice of what constituted a change of address."

This Court reviews "the denial of a motion to dismiss premised on the alleged unconstitutionality of the criminal statute . . . *de novo*." *State v. McFarland*, 234 N.C. App. 274, 277, 758 S.E.2d 457, 460 (2014) (citations omitted). Under *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted).

To satisfy due process, a criminal statute must "define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement. The void-for-vagueness doctrine embraces these requirements." *McFarland*, 234 N.C. App. at 278, 758 S.E.2d at 461 (citation omitted). "[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute[.] *U.S. v. Lanier*, 520 U.S. 259, 266 (1997) (citations omitted). "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267.

While there is no statutory definition of the word “address,” our Supreme Court has defined address as a person’s “residence, meaning the actual place of abode where he or she lives, whether permanent or temporary.” *State v. Abshire*, 363 N.C. 322, 331, 677 S.E.2d 444, 451 (2009) (superseded on other grounds by statute). An address is where “certain activities of life occur at the particular location.” *Id.* at 332, 677 S.E.2d at 451. In *McFarland*, this Court addressed the defendant’s arguments that the statute was void-for-vagueness and that the language of the statute was ambiguous; it determined that even if the “address language” of the statute *was* ambiguous, “defendant had full notice of what was required of him, given the judicial gloss that [our] appellate courts have put on it.” *McFarland*, 234 N.C. App. at 279, 758 S.E.2d at 462 (citation omitted). The Court further explained that the defendant’s act of signing his name on the notice provided to him by the county sheriff reflected an understanding of his obligation to report a change of address within three business days of the change. *Id.* at 280, 758 S.E.2d at 462.

In keeping with *McFarland*, we conclude that Defendant was aware of the requirement to notify the sheriff’s department within three days of changing his address. Our appellate courts have clearly and unambiguously defined the term “address,” providing a judicial gloss to the statute which allows Defendant to “understand what was required of him.” *Id.* Defendant signed and initialed the 14-page “OFFENDER ACKNOWLEDGEMENT NOTICE: Duty to Register” form which

outlined his responsibilities, duties, and any prohibitions. The form states that Defendant has an obligation to “report the address or a detailed description of every location [he] reside[s] or live[s] at . . . even if it does not have a street address.” Defendant’s signature further confirms that Defendant understood what was required of him. Moreover, Defendant admitted that he never—at any point—informed the sheriff in writing of his change of address.

Defendant argues that he understood the law to mean that he could not “be away from his registered address for more than three days” and maintains that he did not change his address. However, by Defendant’s own admission, he did not return to 274 Melrose Drive for more than 10 days. Moreover, record evidence shows that when Thomas searched Defendant’s bedroom at 274 Melrose Drive, Thomas did not find anything to indicate that Defendant lived at the home; Thomas specifically explained that he did not see any “clothes . . . toiletries . . . [or] personal stuff.” Thomas testified that “the only thing that was there on the bed was two pieces of - - two [unopened] letters that was addressed to [Defendant]” Defendant admitted that he moved his clothes to his mother’s home, and Forrest stated that he watched Defendant take “basically everything he had” and leave the home on 27 February 2017. This evidence shows that Defendant no longer conducted the “certain activities of life [that] occur at the particular location” that Defendant registered as his home address. *Abshire*, 363 N.C. at 332, 677 S.E.2d at 451.

In light of *McFarland* and Defendant's own admissions, we determine that Defendant understood what was required of him under N.C. Gen. Stat. §§ 14-208.9(A) and 208.11(a)(2), and we thus find Defendant's argument that the sex offender registration statutes must be void-for-vagueness without merit.

3. Failure to Intervene

Defendant finally argues that the trial court erred by failing to intervene *ex mero motu* during the prosecutor's closing argument where the prosecutor argued that this was "one of the only opportunities as a jury . . . where you get the chance to prevent something before it happens." Defendant argues that the prosecutor's statement went beyond the record and impermissibly argued for general deterrence, as well as associated Defendant with violent crimes he was not accused of committing. The State argues that the closing was an appropriate reference to the purpose of the sex offender registration laws.

Defendant concedes that he did not object to the State's closing argument at trial. "[W]hen defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (citations omitted). Only where this Court "finds both an improper argument and prejudice

will this Court conclude that the error merits appropriate relief.” *Id.* (citation omitted). These standards impose a heavy burden on defendants. *State v. Tart*, 372 N.C. 73, 81, 824 S.E.2d 837, 843 (2019). “[T]he impropriety . . . must be gross indeed in order for this court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.” *State v. Abraham*, 338 N.C. 315, 338, 451 S.E.2d 131, 143 (1994) (citations omitted).

“The law regarding arguments of counsel is well established: Counsel must be allowed wide latitude in arguing hotly contested cases. Counsel may argue the facts in evidence together with all reasonable inferences that may be drawn therefrom in presenting counsel’s side of the case.” *Id.* (citations omitted). “While the prosecution may not argue the effect of defendant’s conviction on others, i.e., general deterrence, the prosecution may argue specific deterrence, that is, the effect of conviction on defendant himself.” *Id.* at 339, 451 S.E.2d at 143 (citations omitted).

During its closing argument, the State properly explained the purpose of the law and the importance of Defendant registering his change of address:

Why is this really that important? It is important and here’s a couple reasons why. Number one, if something were to happen to a child and we go looking for where this defendant is, I couldn’t tell you where he was. I couldn’t tell you if he was at home. I couldn’t tell you he was at his brother’s, sister’s, hotel, aunt, uncle. I couldn’t tell you. When they go looking for this man if they needed to, they should be able to find him where he is registered. That is

the point. That is why it's important. That is why it was created. It's created so members of our public, of our county, know where these people are, where a potential threat may be, and that you can make the decision based on where they are where you want to be. That is your right.

Immediately following its explanation of the purpose and importance of the address change statute, the State argued to the jury:

It's important because this is one of the only opportunities as a jury and even really as a prosecutor, too, where you get the chance to prevent something before it happens. Usually, when I bring something to a jury, it's something that – something horrible that's already happened. Whether it be a murder, whether it be a rape or robbery, something bad's already happened, okay? But in this situation we get an opportunity to prevent that for once, to prevent something bad from happening by saying it is not okay if you're not where you say you are, that you need to be there because it is important, because this is preventing something from happening or this is from helping someone later that something could potentially happen to. This is something where you get an opportunity for once to do something ahead of time before something bad happens. That's why it's important. Don't let her brush it under the rug because it is important.

Upon review of the State's closing argument, we determine that the State did not impermissibly argue for general deterrence. Instead, the State specifically implored the jury to “prevent something bad from happening by saying it is not okay if [Defendant is] not where [he] says [he is], that [Defendant] need[s] to be there because it is important” As the purpose of the sex offender registration statutes is to “prevent recidivism because sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration . . . and [because] protection

of the public from sex offenders is of paramount governmental interest[.]” *State v. Sakobie*, 165 N.C. App. 447, 450, 598 S.E.2d 615, 617 (2004) (internal quotation marks and citation omitted), the State’s closing argument appropriately asked the jury to keep in mind the purpose of preventing recidivism and to convict Defendant accordingly. In telling the jury that it had “the chance to prevent something before it happened[.]” and to “help[] someone later that something could potentially happen to[.]” the State reminded the jury that preventing recidivism and protecting the public were key aims of the law that Defendant violated. The State’s appeal to specific deterrence emphasized the “effect of conviction on defendant himself[.]” and was thus an appropriate closing argument. *Abraham*, 338 N.C. at 339, 451 S.E.2d at 143 (citations omitted).

As Defendant cannot satisfy the first prong of the analytical inquiry—that the challenged portion of the State’s closing argument was improper—we need not determine whether the challenged portion “was so grossly improper as to impede the defendant’s right to a fair trial.” *Huey*, 370 N.C. at 179, 804 S.E.2d at 469 (citations omitted).

III. Conclusion

While the challenged portion of Tobias’ testimony was clearly irrelevant, the trial court did not plainly err when it admitted the testimony as there was other, overwhelming evidence of Defendant’s guilt. As there was overwhelming evidence of

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Defendant's guilt, the trial court did not err in denying Defendant's motion to dismiss. Moreover, as the State's closing argument was not improper, the trial court did not err by allowing the argument.

NO PLAIN ERROR; NO ERROR.

Judge HAMPSON concurs in the result only.

Judge ARROWOOD fully concurs in part and concurs in the result only in part per separate opinion.

Report per Rule 30(e).

ARROWOOD, Judge, concurring.

I fully concur in those portions of the majority opinion which hold that the trial court's admission of Tobias' testimony did not rise to the level of plain error and the trial court did not err in the denial of the motion to dismiss.

With respect to the issue related to the State's closing argument, I would find that the argument complained of on appeal was improper. However, I do not believe that the defendant has met his burden of showing prejudice such that it would impede his right to a fair trial as mandated by *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). Therefore I concur in the result only with respect to that portion of the opinion.