IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-80

No. COA20-394

Filed 16 March 2021

New Hanover County, Nos. 17 CRS 57366-68

STATE OF NORTH CAROLINA

v.

GEORGE TIMOTHY GREEN, Defendant.

Appeal by Defendant from judgment entered 12 July 2019 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 24 February 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamika L. Henderson, for the State.

Drew Nelson, for Defendant-Appellant.

INMAN, Judge.

¶ 1 George Timothy Green ("Defendant") appeals from jury verdicts finding him guilty of sexual battery and taking indecent liberties with three minors. Because Defendant's appeal challenges an aspect of the trial for which there is no record, review is not possible and we dismiss this appeal.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 Defendant was convicted of three counts of sexual battery and three counts of taking indecent liberties with three different minors. The evidence presented at trial tends to show the following:

¶ 3 Three minors, Meredith, Amiya, and Andy,[1] ranging in age from 12 to 14 at the time of the alleged offenses, were neighbors and friends of Defendant's daughter in Wilmington, North Carolina.

¶ 4 In early August 2017, Meredith went to Defendant's home alone to retrieve a bag she left after staying there overnight. Defendant confronted her and asked "can I do anything to you?" Meredith immediately left the home. Later that day, she met the two other girls, Andy and Amiya, at the neighborhood pool and told them what happened. The three girls realized Defendant had been doing the same thing to each of them.

¶ 5 Meredith testified that on numerous occasions in 2017 when she visited Defendant's daughter in his home, Defendant wrestled or tickled her and touched her breasts, her "butt," and "sometimes the vagina." Defendant also offered her foot massages and would then go up her legs and "in [her] shorts." Amiya then testified that on numerous occasions in 2017, Defendant touched her in "places [that] shouldn't be touched," including her breasts, buttocks, and vagina. Finally, Andy

[1] We use pseudonyms to protect the identity of the minor victims.

testified that in 2017, Defendant tickled her "upper thighs [and] vaginal area" and her breasts. She testified that his actions made her feel "weird."

¶ 6 Defendant's wife testified that she witnessed Defendant wrestling and tickling the girls and described that Meredith would often "get violent" and hit Defendant until he stopped touching her.

¶ 7 At the end of the trial, counsel for the State and Defendant presented closing arguments to the jury, but they were not recorded or transcribed.

¶ 8 While the jury deliberated, defense counsel sought to add certain statements and objections from the prosecutor's closing argument to the trial record:

> I do have one thing I need to put on the record, and that was [sic] during the arguments. We are not doing total recordation so I wanted to put that into the record. [The prosecutor] called [Defendant] a sexual predator. He continued in that part by saying—and telling the jury that they were the protector of the community. He placed a picture of the neighborhood—and I'm going to get the exhibit number—it's State's Exhibit 14. He placed that onto the illustrator to publish that to the jury, told the jury if they didn't find beyond a reasonable doubt that the defendant had committed the offenses, then find him not guilty and release him back into the community, in their community. I made an objection. The objection was sustained. There was no curative instruction, but the objection was sustained.

The trial court judge acknowledged she heard defense counsel say "something else" after the objection, but that she did not know or hear what defense counsel said. Defense counsel said that he had requested a curative instruction. The trial court

moved forward without further addressing defense counsel's request. Defense counsel did not ask the trial court to call jurors back into the courtroom to give a curative instruction at that time.

¶ 9 The jury found Defendant guilty on three counts of sexual battery and three counts of taking indecent liberties with a child, but not guilty as to an additional three counts of taking indecent liberties with a child. The trial court consolidated each count of sexual battery with one count of indecent liberties with a child and sentenced Defendant to three consecutive sentences. In each judgment, the trial court suspended the sentence, placing Defendant on supervised probation for 60 months and imposing a nine-month active term. The trial court also ordered that Defendant register as a sex offender for thirty years, undergo psychological evaluation and treatment, and avoid contact with the victims.

¶ 10 Defendant, through his counsel, gave oral notice of appeal.

II. ANALYSIS

¶ 11 Defendant's sole contention on appeal is that the trial court abused its discretion by failing to give a curative instruction after it sustained defense counsel's objection to the prosecutor's comments made during closing argument and after defense counsel requested a curative instruction. The record on appeal includes no transcript of the prosecutor's argument or defense counsel's contemporaneous objection and request for a curative instruction.

¶ 12 Appellate review is available "solely upon the record on appeal" and "the verbatim transcript of the proceedings." N.C. R. App. P. 9(a) (2021). When closing arguments of counsel are not transcribed or otherwise included in the record on appeal, we are precluded from addressing issues raised about the content of those arguments. *State v. Carver*, 221 N.C. App. 120, 125, 725 S.E.2d 902, 906 (2012) ("[B]ecause the closing arguments were not transcribed and are not before this Court on appeal, [the defendant] has failed to satisfy his burden of presenting an adequate record to support his contention."); *Heatherly v. Indus. Health Council*, 130 N.C. App. 616, 624, 504 S.E.2d 102, 108 (1998) (holding that "the closing arguments of counsel are not transcribed in the record before this Court, and we are thereby precluded from addressing plaintiff's contention").

¶ 13 The North Carolina Rules of Appellate Procedure provide that in the absence of a verbatim transcript, counsel can include a narrative summary in the appellate record, and opposing counsel can object to the narrative if there is disagreement about its content. N.C. R. App. P. 9(c)(1). The record before us contains no such narrative. Defendant did not satisfy his burden to present an adequate record on appeal and the record available in this case is not sufficient for our review.

¶ 14 Defendant asserts that a transcript of defense counsel's summary to the trial court of what occurred during closing arguments, presented just minutes after those arguments, provides a sufficient record for appellate review. We disagree.

¶ 15 Defendant cites this Court's holding in *State v. Moore*, 75 N.C. App. 543, 331 S.E.2d 251 (1985), that a reconstructed narrative of an unrecorded portion of a trial, made during a later hearing, constituted a sufficient record for appeal. *Moore* is distinguishable. In that case, the defendant explicitly requested that the trial court record the prosecution's argument, and the trial court failed to do so. 75 N.C. App. at 547-48, 331 S.E.2d at 254. At a later hearing, the trial court offered to reconstruct the record for appeal "using the court's notes and the remembrances of the opposing attorneys." *Id.* at 548, 331 S.E.2d at 254. The defendant declined the offer, and this Court held it was precluded from reviewing the argument on appeal. *Id.* Here, defense counsel never requested that the arguments be recorded. Nor did the trial court offer to reconstruct the arguments based on its notes or opposing counsel's recollection.

¶ 16 *Joines v. Moffit*, 226 N.C. App. 61, 739 S.E.2d 177 (2013), is also instructive. In that case, the trial court allowed each party to enter a statement regarding the use of a certain case at trial into the record on appeal, since that portion of the arguments had not been recorded. 226 N.C. App. at 67, 739 S.E.2d at 183. Nonetheless, this Court concluded that the plaintiff's statement was insufficient for appeal because "there [was] no evidence that the plaintiff's version of the argument 'accurately reflect[ed] the true sense of . . . the statements made.'" *Id.* (quoting N.C. R. App. P. 9(c)(1)).

¶ 17 In an attempt to distinguish this case from *Joines*, Defendant argues that defense counsel's summary of the prosecutor's comments during closing arguments after the trial should be accepted as accurate because his recitation was made directly after the trial had concluded and there was no objection from the prosecutor or the trial court. Defendant relies on no precedent for the assertion that these two factors should be dispositive over whether there is a sufficient record for review here.

¶ 18 We also note that although Defendant's trial counsel said, after the jury had started deliberating, that he had asked the trial court for a curative instruction contemporaneous with the objection to the prosecutor's improper statements, the trial court judge said she literally did not hear that request at the time it was made. Additionally, despite the trial court's failure to provide a curative instruction, defense counsel did not request that a curative instruction be added to the pattern instructions to jurors, which the trial court presented following closing arguments.

¶ 19 Since Defendant never requested that the arguments be recorded nor did he attempt to include a narrative in the record on appeal pursuant to Rule 9(c)(1), this Court is "precluded from addressing issues relating to the content of those arguments." *Joines*, 226 N.C. App. at 68, 739 S.E.2d at 183 (citations omitted). Accordingly, we dismiss Defendant's argument. *See id.*

III. CONCLUSION

¶ 20 For the reasons stated above, we dismiss Defendant's appeal.

DISMISSED.

Judges DILLON and JACKSON concur.

Report per Rule 30(e).