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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-815

No. COA22-197

Filed 6 December 2022

Davidson County, No. 18 CRS 53488

STATE OF NORTH CAROLINA

v.

JASON WAYNE CATES

Appeal by defendant from judgment entered 24 August 2021 by Judge Stanley L. Allen in Davidson County Superior Court. Heard in the Court of Appeals 5 October 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Colin Justice, for the State.

Sean P. Vitrano for defendant.

DIETZ, Judge.

¶ 1 Defendant Jason Wayne Cates appeals his conviction for misdemeanor stalking. As explained below, we reject Cates's evidentiary argument because Cates did not make an adequate offer of proof concerning the excluded testimony and, thus, we are unable to assess whether the challenged rulings were prejudicial.

¶ 2 With respect to Cates's sentence, we agree that the trial court's judgment

imposed a period of probation not authorized by law. We also hold that Cates was not provided adequate notice and opportunity to be heard before the entry of the civil judgment for attorneys' fees. We therefore vacate those portions of the judgment and remand for further proceedings.

Facts and Procedural History

¶ 3 On 24 August 2021, Jason Wayne Cates was found guilty of misdemeanor stalking in violation of N.C. Gen. Stat. § 14-277.3A(c). This conviction was the result of a series of incidents that took place between Cates and Brittany Blakely in June 2018. Cates and Blakely had known each other for many years, and Blakely considered them to be friends.

¶ 4 Over the years, the two lost touch before seeing each other at a cookout hosted by Blakely in 2012. At the time, Blakely was in a relationship with her current spouse, Graylyn Smith. Blakely stated that after the cookout, Cates made two unannounced visits to her home between 2012 and early 2018. She alleges that he wanted a romantic relationship with her, but that she was not interested. Then, in June 2018, Blakely had three encounters with Cates that gave rise to the stalking charge in this case. These incidents involved Cates approaching Blakely or her family members at her home and other public places, attempting to kiss or hug Blakely without permission, following her in a manner that intimidated her, and using offensive language directed at Blakely or her family members.

¶ 5 The State charged Cates with misdemeanor stalking in violation of N.C. Gen. Stat. § 14-277.3A(c). Cates represented himself at trial with court-appointed standby counsel. The jury found Cates guilty, and the trial court sentenced him to a term of 60 days in jail, suspended for 24 months of supervised probation. The trial court also entered a civil judgment for $900 for the fees of Cates's court-appointed standby counsel.

¶ 6 Cates gave timely notice of appeal from the criminal judgment in open court, but he did not file a written notice of appeal from the civil judgment for attorneys' fees. Cates later petitioned for a writ of certiorari to review the civil judgment. Because, as explained below, Cates raises a potentially meritorious issue with respect to that civil judgment, we exercise our discretion to issue a writ of certiorari. N.C. R. App. P. 21(a)(1).

Analysis

I. Exclusion of testimony at trial

¶ 7 Cates first argues that the trial court improperly excluded testimony that purportedly would have established his prior relationship with Brittany Blakely. Cates contends that this testimony was admissible because the trial court permitted Blakely to testify that she was never in a romantic relationship with Cates and that the two were just friends. Cates sought to introduce testimony about their purported previous relationship to impeach Blakely's testimony and show that he had a

legitimate purpose for his encounters with Blakely.

¶ 8 We reject Cates's argument because he failed to adequately preserve it for appellate review. When challenging an evidentiary ruling by the trial court, the defendant must show that the ruling was prejudicial, meaning that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." *State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017).

¶ 9 Because this Court must assess whether the exclusion of witness testimony in a criminal trial was prejudicial, we cannot find reversible error "where the record fails to show what the witness's testimony would have been had he been permitted to testify." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). Thus, to "preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010). The offer of proof, or other showing in the record, must establish "the essential content or substance of the witness' testimony." *Id.* "Absent an adequate offer of proof, we can only speculate as to what a witness's testimony might have been." *Id.* at 818, 689 S.E.2d at 861–62.

¶ 10 Here, Cates repeatedly attempted to question Blakely about their purported romantic relationship in years past. The following are several representative

exchanges between Cates, Blakely, and the trial court:

> [CATES:] In 2013 at Christmas-time, did you not come to my house and I gave you money for your kids, and also . . . in 2014 and 2015 and offered intercourse in 2014?
>
> [PROSECUTOR]: Objection, Your Honor.
>
> THE COURT: Sustained. Mr. Cates, you can't testify now. Put your hand down now. Listen to me.
>
> [CATES]: That was a question.
>
> THE COURT: Listen to me. You did not ask a question. The question – the State objected to the question. The objection is sustained, because we are talking about the period between June 13 of 2018 and June 17 of 2018.
>
> . . .
>
> [CATES:] Did you not just show up in my driveway on July – in July in 2017?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained. Sustained.
>
> [CATES]: Why?
>
> THE COURT: Ask your next question. June 13 of 2018 to June 17, 2018.
>
> . . .
>
> [CATES:] Have – the three days that you was at my house in 2017 –
>
> [PROSECUTOR]: Objection.

> THE COURT: Sustained.
>
> [CATES:] – did you not –
>
> THE COURT: That's not relevant, sir.
>
> [CATES]: That's 2017.
>
> THE COURT: No, sir. We're talking about June 3 of 2018 to June 17 of 2018.
>
> [CATES]: Can I ask you a question?
>
> THE COURT: No, sir.
>
> [CATES]: How come she gets to tell the back story and I don't?

¶ 11 Cates also sought to question his mother about the history of his relationship with Blakely, and also to provide his own testimony about that relationship, but each time he did so, the trial court sustained an objection before the witness provided sufficient detail to assess "the essential content or substance" of that testimony. *Jacobs*, 363 N.C. at 818, 689 S.E.2d at 861.

¶ 12 Because Cates did not make an offer of proof concerning this testimony, and because the record is insufficient for this Court to otherwise discern its content or substance, we can only speculate about what these witnesses would have said had their testimony been admitted. Thus, we are unable to engage in meaningful appellate review of whether the alleged evidentiary errors were prejudicial and must reject this argument as unpreserved for appellate review.

II. Challenge to probationary sentence

¶ 13 Cates next argues that the trial court exceeded its statutory authority at sentencing when it imposed 24 months of probation without making the required findings.

¶ 14 The State concedes that, under the applicable statutory law, the trial court was not authorized to impose a period of probation of "more than 18 months" unless "the court makes specific findings" of fact that a longer period of probation was necessary. N.C. Gen. Stat. § 15A-1343.2(d).

¶ 15 The trial court did not make any specific findings of fact justifying the longer period of probation. Moreover, the judgment form includes a section with a check box in which the court could record that it found a longer period of probation "is necessary than that which is specified in G.S. § 15A-1343.2(d)." The trial court did not check that box. Accordingly, we hold that the trial court's probationary sentence exceeded the period authorized by law and we vacate the sentence and remand for further proceedings.

III. Civil judgment for attorneys' fees

¶ 16 Finally, Cates argues that he was denied an opportunity to be heard on the issue of the civil judgment which required him to pay attorneys' fees.

¶ 17 Before entering a money judgment against a defendant for the fees incurred by their court-appointed counsel, the trial court must provide the defendant with an

adequate opportunity to be heard on the issue. *State v. Friend*, 257 N.C. App. 516, 522–23, 809 S.E.2d 902, 906–07 (2018). This requires the trial court to "ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.* at 523, 809 S.E.2d at 907.

¶ 18 Here, at the close of sentencing, the trial court asked Cates's standby counsel about his fees:

> THE COURT: Mr. Michael, do you know about how many hours you have after sitting here now?
>
> MR. MICHAEL: I'll be honest with you, Judge, I hadn't really thought about it. So it would be my guess I've got somewhere around 15 hours.
>
> THE COURT: Okay. I'll let the – I am going to order you to reimburse the State of North Carolina for your court-appointed lawyer, Mr. Cates. You said about 15 hours, more or less?
>
> MR. MICHAEL: Yes, sir.
>
> THE COURT: That would be at $60 an hour. So, Mr. Cates, you will pay that, but I'll let the probation officer determine the final amount based on the hours submitted by Mr. Michael. And that can be paid on a schedule to be established by the probation officer.

¶ 19 Because the trial court did not inform Cates of the actual hours and amount of attorneys' fees that would constitute the civil judgment, Cates did not have adequate notice and an opportunity to challenge those fees before entry of the civil judgment. We therefore vacate the civil judgment and remand for further proceedings under *Friend*.

Conclusion

¶ 20 We find no error in the criminal conviction but vacate Cates's probationary sentence, and the civil judgment for attorneys' fees, and remand for further proceedings on those matters.

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).