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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-424

Filed 21 March 2023

Haywood County, Nos. 20 CRS 00577-580

STATE OF NORTH CAROLINA

v.

TIMOTHY DEWAYNE CONNOR

Appeal by Defendant from Judgments entered 8 October 2021 by Judge Athena Fox Brooks in Haywood County Superior Court. Heard in the Court of Appeals 19 October 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Colleen M. Crowley, for the State.

Sarah Holladay for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Timothy Dewayne Connor (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of two counts of Second-Degree Forcible Rape, First-Degree Kidnapping, and Second-Degree Kidnapping. The Record before us, including evidence presented at trial, tends to reflect the following:

On 5 October 2021, a Haywood County Grand Jury indicted Defendant for First-Degree Forcible Rape, First-Degree Kidnapping, Second-Degree Forcible Rape, and Second-Degree Kidnapping. Each indictment identified the same alleged victim (Victim). The offenses charged arose from two alleged incidents, the first in April 2020 (April Incident) and the second in July 2020 (July Incident).

The matter came on for trial on 4 October 2021. Victim testified she and Defendant were in a romantic relationship, describing “[t]here were some good times, but a lot of it was bad. He was extremely jealous and really controlling.” Regarding the April Incident, Victim testified to the following: on 6 April 2020, Defendant picked Victim up to cook dinner at Defendant’s house, where his minor son would be present. Shortly after arriving at Defendant’s house, a neighbor came over and told Defendant that Victim had been playing pool online with her ex-boyfriend. In response, Defendant called Victim derogatory names and would not allow her to leave his house. Victim yelled for help and was thrown to the ground by Defendant. Defendant assaulted and threatened Victim and forced her to have vaginal intercourse against her will. Victim suffered from numerous injuries as a result of the assault by Defendant. Defendant prevented Victim from leaving his house until her injuries healed and restricted access to her cellphone.

Victim and Defendant continued to date following the April Incident, and they saw each other multiple times a week. As to the July Incident, Victim testified to the following: Victim told Defendant she bumped into her ex-boyfriend at a mutual

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friend's house. As a result, Defendant and Victim argued, and Defendant accused Victim of intentionally meeting with her ex-boyfriend. Several days later, Victim and Defendant planned a fishing trip. However, when Defendant picked Victim up for the fishing trip, Defendant "wanted to go straight to his house." Victim testified she was afraid to go with Defendant, and eventually convinced Defendant to go to Defendant's cousin's (Witness Connor) house first. When they arrived at Witness Connor's house, Defendant called Victim derogatory names and accused Victim of lying and cheating on him. Victim and Defendant then both used drugs and began to argue. During the argument, Defendant picked up a gun that was lying on Witness Connor's bed but did not point it at Victim. Defendant then forced Victim out of Witness Connor's house and into Defendant's car. Defendant then drove Victim back to his house and forced Victim to have vaginal intercourse against her will. In August 2020, Victim contacted law enforcement regarding both the April and July Incidents.

Witness Connor was interviewed by law enforcement and was later subpoenaed to testify at trial. The prosecutor informed the trial court that after the subpoena was served, Witness Connor was personally instructed "he could be on standby" so long as he answered his phone and came to the courthouse when instructed. Witness Connor agreed to these instructions. The prosecutor stated she called Witness Connor multiple times during the trial, but Witness Connor did not answer. Further, the prosecutor stated Witness Connor sent Victim a text message saying he did not want to testify, and if he did, he would "plead the Fifth." The

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prosecutor further reported that on 6 October 2021, another prosecutor and a detective went to speak with Witness Connor in person. Witness Connor then agreed to be at the courthouse on 7 October 2021, but failed to appear. A detective called Witness Connor, but he again failed to answer. The same day, the State presented the trial court with a proposed Motion for a Material Witness Order pursuant to N.C. Gen. Stat. § 15A-803. The Motion stated in relevant part:

4. Mr. Conn[o]r is a material witness in this matter. Mr. Conn[o]r previously met with Detective Toon in December of 2020 about this case. Mr. Conn[o]r told Detective Toon that he had an opportunity to interact with the Defendant and the victim . . . during the incident that occurred on July 12, 2020. Mr. Conn[o]r's statement is substantially like the testimony of [the victim].

5. Mr. Conn[o]r's testimony is material in that Mr. Conn[o]r witnessed the events as to 20CRS580 – First degree kidnapping.

6. Mr. Conn[o]r advised the State and Detective Toon that he would be present to testify when needed. Mr. Conn[o]r suffers from severe anxiety and has not presented himself at the date and time agreed upon.

The Motion was heard before the trial court, and when given the opportunity to respond, Defendant's counsel did not oppose the Motion. The trial court signed the Material Witness Order, which directed Witness Connor to appear that same day. Law enforcement served the Order, and Witness Connor testified the same day, without objection.

On 8 October 2021, the jury returned verdicts finding Defendant guilty of two counts of Second-Degree Forcible Rape, one count of First-Degree Kidnapping, and

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one count of Second-Degree Kidnapping. At the sentencing hearing, Defendant entered a plea admitting to the existence of two aggravating factors: Defendant has been found in willful violation of probation within ten years prior to the commission of the instant offense; and Defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense. The trial court conducted a plea colloquy, which included the following exchange:

THE COURT: Do you understand you have the right to not admit to the aggravating factors, have a jury determine those, that you would have the right to have cross-examination of any witnesses, and by your admission, you're giving up these and other rights related to that jury trial determination?

THE DEFENDANT: I understand.

. . . .

THE COURT: And you . . . understand that you're admitting to the existence of aggravating factors . . . that the defendant violated a position of trust or confidence; you're agreeing that there's evidence to support this factor beyond a reasonable doubt, and you're agreeing the court may accept your admission to these factors, and you agree that the State has provided you with notice about these factors?

THE DEFENDANT: Yes, ma'am.

THE COURT: You understand that at a jury trial, you would have the right to have a jury determine the existence of those aggravating factors that may apply in your case beyond a reasonable doubt, and that by your plea, you're giving up this right to have a jury determine those?

THE DEFENDANT: Yes.

. . . .

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THE COURT: Do you agree that there are facts to support your plea admission to the aggravating factors and consent to the court hearing a summary of that evidence?

THE DEFENDANT: Yes.

The trial court then asked to hear from the State regarding the factual basis for the aggravating factors. The State responded:

As to the factual basis, . . . your Honor heard testimony in the trial. This was a couple that was involved in a relationship for a significant period of time. Actually, sounds like it was a pretty substantial relationship, in that the victim in the case had moved into the residence of the defendant for a period of time, ended up having to move out. My review of the case law, your Honor, shows that, just based on that alone, that would be enough to get us to abusing that position of trust or confidence. That is all to the factual basis.

The trial court then asked Defendant's counsel: "Anything about the factual basis for the aggravating factors?" Defendant's counsel responded: "No, your Honor." The trial court accepted Defendant's plea, stating:

Upon consideration of the record proper, evidence presented, factual basis offered, answers of the defendant, statements of the lawyers, the court would find there is a factual basis for the admission as to the aggravating factors. The defendant is satisfied with his lawyer. Defendant's competent to stand trial. The State's provided the defendant with notice about the aggravating factors. The admission is the informed choice of the defendant, is made freely, voluntarily, and understandingly, is therefore accepted and recorded.

The trial court consolidated the charges from the April Incident into one Judgment and imposed a sentence in the aggravated range, 120 to 204 months of

imprisonment. The charges from the July Incident were consolidated into a second Judgment, sentencing Defendant to a consecutive term in the presumptive range of 110 to 192 months of imprisonment.¹ Defendant gave Notice of Appeal in open court.

Issues

The relevant issues on appeal are whether: (I) the trial court abused its discretion in entering a Material Witness Order; and (II) the trial court erred in imposing a sentence based on the aggravating factor Defendant “took advantage of a position of trust or confidence” to commit the offense.

Analysis

I. Material Witness Order

First, Defendant contends the trial court abused its discretion in issuing a Material Witness Order, claiming the State had not made the requisite showing of materiality.

N.C. Gen. Stat. § 15A-803 authorizes a court to issue an order assuring the presence of a material witness and sets forth the procedure in doing so. N.C. Gen. Stat. § 15A-803(a) provides:

A judge may issue an order assuring the attendance of a material witness at a criminal proceeding. This material witness order may be issued when there are reasonable grounds to believe that the person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding and may not be

¹ We note Defendant admitted to the existence of both aggravating factors as to all charges; however, the trial court only imposed an aggravated sentence for the charges related to the April Incident.

amenable or responsive to a subpoena at a time when his attendance will be sought.

N.C. Gen. Stat. § 15A-803(a) (2021). “The use of the term ‘may’ suggests that the granting or denial of a motion for a material witness order is a matter committed largely to the discretion of the judge.” *State v. Tindall*, 294 N.C. 689, 698, 242 S.E.2d 806, 811 (1978). “[W]here matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). “A trial court abuses its discretion if its determination is ‘manifestly unsupported by reason’ and is ‘so arbitrary that it could not have been the result of a reasoned decision.’” *State v. Lasiter*, 361 N.C. 299, 301-02, 643 S.E.2d 909, 911 (2007) (quoting *White*, 312 N.C. at 777, 324 S.E.2d at 833).

Nevertheless, “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion and obtained a ruling upon the party’s request, objection, or motion[.]” N.C.R. App. P. 10(a)(1). “It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.” *Id.*

The Record before us is devoid of any request, objection, or motion by Defendant. When given the opportunity to be heard, Defendant did not oppose the State’s Motion for Material Witness Order. Moreover, Defendant failed to object to the trial court’s ultimate entry of the Material Witness Order, and Defendant failed

to object to Witness Connor's testimony. Thus, Defendant did not preserve this issue for appellate review pursuant to N.C.R. App. P. 10(a)(1). Therefore, the issue of whether the trial court abused its discretion in issuing a Material Witness Order is not properly before this Court. Consequently, we cannot conclude the trial court abused its discretion in issuing the Material Witness Order.

II. Aggravating Factors

Defendant next contends the trial court erred in its application of the aggravating factor Defendant "took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense."

A. Preservation for Appellate Review

As an initial matter, we address whether this issue is preserved for our review in light of Defendant's guilty plea to the aggravating factors. This Court has previously held a defendant's stipulation to an aggravating factor does not preclude the defendant from seeking appellate review of the alleged error. *State v. Bacon*, 228 N.C. App. 432, 434, 745 S.E.2d 905, 907 (2013).

Further, we are guided by our Supreme Court's decision in *State v. Meadows*, 371 N.C. 742, 821 S.E.2d 402 (2018). In *Meadows*, the Supreme Court clarified that while N.C.R. App. P 10(a)(1) applies to the preservation of alleged errors during a sentencing hearing, a formal objection is unnecessary to preserve a non-constitutional sentencing issue for appeal, as long as the issue was called to the sentencing court's attention in such a fashion that the trial court knew or should have

known the defendant's position. *Id.* at 747, 821 S.E.2d at 406. The Court in *Meadows* also recognized N.C. Gen. Stat. § 15A-1446(d)(18) provides an alternative and independent statutory basis for preserving non-constitutional sentencing issues even if those issues are not preserved in the trial court. *Id.*

Thus, in light of the Supreme Court's broad holding that non-constitutional sentencing issues are automatically preserved for appellate review by statute and our prior decision in *Bacon*, we conclude Defendant's argument here is preserved for appellate review. *See, e.g., State v. Khan*, 366 N.C. 448, 455-56, 738 S.E.2d 167, 172 (2013) (Our Supreme Court reviewed whether the evidence was sufficient to support an aggravating factor even though the defendant had stipulated to aggravating factors and the trial court met the statutory requirements for taking the plea). Accordingly, we address the merits of Defendant's argument on this issue.

B. Position of Trust or Confidence

N.C. Gen. Stat. § 15A-1022.1(c) provides: "Before accepting an admission to the existence of an aggravating factor . . . the court shall determine that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant." N.C. Gen. Stat. § 15A-1022.1(c) (2021). Further, "[t]he court may base its determination on the factors specified in G.S. 15A-1022(c), as well as any other appropriate information." *Id.* N.C. Gen. Stat. § 15A-1022(c) lists the following factors:

- (1) A statement of the facts by the prosecutor.

- (2) A written statement of the defendant.
- (3) An examination of the presentence report.
- (4) Sworn testimony, which may include reliable hearsay.
- (5) A statement of facts by the defense counsel.

N.C. Gen. Stat. § 15A-1022(c) (2021).

The trial court may impose an aggravated sentence during the sentencing phase of a trial if a jury finds the “defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.” N.C. Gen. Stat. § 15A-1340.16(d)(15) (2021). A finding of this aggravating factor depends on “the existence of a relationship between the defendant and victim generally conducive of reliance of one upon the other.” *State v. Daniel*, 319 N.C. 308, 311, 354 S.E.2d 216, 218 (1987) (citations omitted). Our Supreme Court has previously observed a finding of the “trust or confidence” factor is upheld in “very limited factual circumstances.” *State v. Mann*, 355 N.C. 294, 319, 560 S.E.2d 776, 791 (2002) (citations omitted). However, trial courts are given “wide latitude” in weighing the credibility of any evidence to prove the existence of aggravating factors. *State v. Smarr*, 146 N.C. App. 44, 53, 551 S.E.2d 881, 887 (2001), *disc. rev. denied*, 335 N.C. 291, 561 S.E.2d 500 (2002) (citing *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988)).

In the case *sub judice*, the trial court properly determined there is a factual basis for Defendant’s admission to the existence of the aggravating “trust or

confidence” factor. First, at sentencing, the trial court conducted a colloquy with Defendant concerning this aggravating factor, complying with N.C. Gen. Stat. § 15A-1022.1(b). *See* N.C. Gen. Stat. § 15A-1022.1(b) (2021). In support of the factual basis for the “trust or confidence” aggravating factor, the State relied on testimony presented at trial, specifically that Defendant and Victim were in a romantic relationship for a “significant period of time” and the relationship was “substantial.” Further, the State contended: “based on that alone, that would be enough to get us to abusing that position of trust or confidence.” We note that our Court has previously established a romantic relationship alone is not enough to support this aggravating factor. *See, e.g., State v. Myers*, 238 N.C. App. 133, 139, 766 S.E.2d 690, 693-94 (2014) (“in order for this aggravating factor to be supported by the evidence, a defendant spouse must utilize that position of trust or confidence with his or her spouse in some way to effectuate the offense.” (citation omitted)); *State v. Wiggins*, 159 N.C. App. 252, 269, 584 S.E.2d 303, 316 (2003) (“The relationship of husband and wife does not *per se* support a finding of trust or confidence[.]”). However, on the Record before us, there is evidence—in addition to Defendant and Victim’s romantic relationship—to support the trial court’s determination of a factual basis for the admission to the existence of the “trust or confidence” factor.

In making its determination, the trial court stated, on the record, it considered each of the factors listed in N.C. Gen. Stat. § 15A-1022(c). Additionally, the trial court stated it considered the evidence presented at trial. In so doing, the trial court

properly weighed the credibility of the evidence presented at trial to determine there is a factual basis for the admission. *See Smarr*, 146 N.C. App. at 53, 551 S.E.2d at 887 (“[T]he trial court has ‘wide latitude’ to weigh the credibility of the evidence in determining the existence of aggravating factors.”).

As to the April Incident, the State presented evidence Defendant invited Victim to his house for a family dinner. When Defendant picked Victim up, Victim was under the impression they were going to Defendant’s house, where his minor son would be present, to cook steaks for dinner. However, after they arrived at Defendant’s house, Defendant confronted Victim about interacting with her ex-boyfriend. Defendant called Victim derogatory names and would not allow her to leave his house. Defendant assaulted and threatened Victim and forced her to have vaginal intercourse against her will.

Further, as to the July Incident, the State presented evidence Defendant again confronted Victim about interacting with her ex-boyfriend. After this argument, Defendant and Victim did not speak for a couple of days, but shortly thereafter, Defendant and Victim planned a fishing trip. However, when Defendant picked Victim up for the fishing trip, Defendant “wanted to go straight to his house.” Victim testified she was afraid to go with Defendant, and eventually convinced Defendant to go to Witness Connor’s house first. When they arrived at Witness Connor’s house, Defendant called Victim derogatory names and accused Victim of lying and cheating on him. Defendant forced Victim out of Witness Connor’s house and into Defendant’s

car. Defendant then drove Victim back to his house and again forced Victim to have vaginal intercourse against her will.

In each incident, evidence tended to show Defendant used the position of trust or confidence created by the romantic relationship between himself and Victim to lure the Victim—both times under false pretenses—to effectuate the offenses. As such, the State presented evidence—at trial—as to both the April and July Incidents—to support the trial court’s determination there was a factual basis for the admission Defendant took advantage of a position of trust or confidence.

Thus, in considering each of the factors listed in N.C. Gen. Stat. § 15A-1022(c) and the evidence presented at trial, there is evidence to support the trial court’s determination there was a factual basis to support the aggravating factor. Therefore, the trial court did not err in finding a factual basis to support the aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(15). Consequently, in turn, the trial court did not err in imposing an aggravated sentence based on the “trust or confidence” aggravating factor.

Conclusion

Accordingly, for the foregoing reasons, there was no error at trial, and we affirm the trial court’s Judgments.

NO ERROR.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).