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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-908

Filed 18 July 2023

Anson County, Nos. 17CRS000923, 17CRS051639, 17CRS051642

STATE OF NORTH CAROLINA

v.

CEAZAR RASAY

Appeal by Defendant from judgments entered 22 February 2022 by Judge Stephan R. Futrell in Anson County Superior Court. Heard in the Court of Appeals 7 June 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lauren M. Clemmons, for the State-Appellee.

Charles B. Brooks II, Attorney at Law, by Charles B. Brooks III, for Defendant-Appellant.

COLLINS, Judge.

Defendant Ceazar Rasay appeals judgments entered upon guilty verdicts of several sex offenses involving a minor child. Defendant argues that the trial court committed structural constitutional errors by closing the courtroom without justification and by improperly questioning a prospective juror in the presence of the

entire jury pool, that the trial court violated a statutory mandate by expressing its opinions as to facts to be decided by the jury while the jury was present, and that the trial court committed sentencing error by entering judgments and commitments imposing sentences that were substantively different from the sentences announced at trial. Because Defendant failed to preserve his constitutional arguments for appellate review, those issues are waived and not considered on appeal. Additionally, the trial court did not express an opinion as to an issue of fact to be decided by the jury while the jury was present, and thus did not violate its statutory mandate. However, the trial court entered judgments and commitments that were substantively different from the sentences announced at trial. Accordingly, Defendant's convictions are affirmed, his sentences are vacated, and the matter is remanded for resentencing.

I. Background

Defendant was indicted on 1 November 2021 for several sex offenses involving a minor child, including a statutory sex offense with a child who is 15 years old or younger; a second degree sexual offense; first, second, and third degree sexual exploitation of a minor; and two counts of indecent liberties with a child.

Defendant was tried beginning 17 February 2022. At trial, the State presented evidence that included photographs and videos allegedly depicting the minor victim in a pornographic manner. The trial court closed the court room each time these exhibits were displayed.

On 21 February 2022, the State voluntarily dismissed one count of indecent liberties with a child, and on 22 February 2022, the jury returned guilty verdicts for all remaining charges. Defendant gave notice of appeal in open court.¹ Additional facts pertinent to the issues raised on appeal are included in the discussion below.

II. Discussion

A. Constitutional Claims

Defendant argues that the trial court erred by closing the court room on multiple occasions during Defendant's trial without sufficient justification in violation of Defendant's constitutional right to a public trial. Defendant also argues that the trial court violated Defendant's constitutional right to due process when it questioned a prospective juror's religious beliefs during jury selection. Defendant asserts that these were structural errors and are thus reversible per se.

"It is well settled that constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (quotation marks and citations omitted). "Structural error, no less than other constitutional error, should be preserved at trial." *Id.* (citations omitted). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" N.C. R. App. P. 10(a)(1).

¹ Defendant's notice of appeal is not reflected in the transcript. However, the parties stipulate that notice of appeal was given in open court.

Defendant concedes that he did not preserve his constitutional arguments and asks this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to prevent manifest injustice to Defendant. Pursuant to Rule 2, this Court may suspend or vary the requirements of the Rules of Appellate procedure “[t]o prevent manifest injustice to a party[.]” N.C. R. App. P. 2. In our discretion, we decline to invoke Rule 2.

B. N.C. Gen. Stat. § 15A-1222

Defendant argues that the trial court violated N.C. Gen. Stat. § 15A-1222 by expressing its opinions as to facts in issue in the presence of the jury on two occasions.

N.C. Gen. Stat. § 15A-1222 states, “The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury.” N.C. Gen. Stat. § 15A-1222 (2022). “Although not every improper remark will require a new trial, a new trial may be awarded if the remarks go to the heart of the case.” *State v. Springs*, 200 N.C. App. 288, 294, 683 S.E.2d 432, 436 (2009) (quotation marks and citation omitted). “Whether a trial court violated a statutory mandate is a question of law, subject to de novo review on appeal. *State v. Hood*, 273 N.C. App. 348, 351, 848 S.E.2d 515, 518 (2020).

Defendant first argues that the trial court “essentially told the jury, and made a finding of fact before the jury, that [a State’s exhibit] was in fact child pornography” when it stated:

Yes. And for the record, the Court finds that the matters

depicted in the photographs may constitute disturbing or matters that are unlawful for viewing by persons who are not directly involved in the proceeding at issue, and therefore it's reasonably necessary in the interest of the administration of justice to clear the courtroom.

This statement did not constitute a finding of fact that the State's exhibit was in fact child pornography as Defendant asserts. Furthermore, Defendant was not charged with an offense involving child pornography. Thus, even if a juror had interpreted the trial court's statement as Defendant suggests, the statement did not "go to the heart of the case." *Springs*, 200 N.C. App. at 294, 683 S.E.2d at 436.

Defendant also argues that the trial court violated N.C. Gen. Stat. § 15A-1222 when it questioned a prospective juror's religious beliefs during jury selection, where the following exchange took place:

[JUROR]: I am asking kindly for a religious deferral.

. . . .

THE COURT: Okay. Would your service constitute a great compelling personal hardship?

[JUROR]: Yes.

THE COURT: How so?

[JUROR]: Well, I would feel I was going against my belief and our church doctrines, if that makes any sense.

THE COURT: Not a whole lot. You're a participant in a civil society, are you not?

[JUROR]: Yes.

. . . .

THE COURT: So in other words, you obey the laws of someone other than those set out by the church?

[JUROR]: Oh, yeah. We definitely -- and we enjoy living

in Anson County. Anson County has been a very good county for us to live in for 20 years. I've been called in before and we went through this already a few times.

THE COURT: If your child were murdered, would you expect the State to prosecute the murderer of -- your child's murderer?

[JUROR]: I don't know of -- we don't usually go to law about stuff. Like I don't sue anybody. I've never been in a lawsuit against anybody.

THE COURT: Okay. I'll let the lawyers talk to you about that. All right. If you'll wait. Thank you, ma'am. All right. Anybody else?

The challenged exchange contained no reference to any facts to be decided by the jury in Defendant's trial and thus did not constitute a violation of N.C. Gen. Stat. § 15A-1222.

C. Sentencing

Defendant argues that the trial court erred by imposing sentences on Defendant in his absence. Specifically, Defendant argues that the trial court announced sentences in open court that were substantively different from those the trial court entered in its written judgments and commitments, and that there is no evidence Defendant was present when the written judgments were entered.

"A defendant has a right to be present at the time a sentence is imposed." *State v. Mims*, 180 N.C. App. 403, 413, 637 S.E.2d 244, 250 (2006) (citations omitted). "The written judgment entered by a trial court constitutes the actual sentence imposed on a criminal defendant; the announcement of a judgment in open court is merely the rendering of judgment." *Id.* (citation omitted). Thus, "[w]here the written judgment

represents a substantive change from the sentence pronounced by the trial court, and the defendant was not present at the time the written judgment was entered, the sentence should be vacated and the matter remanded for entry of a new sentencing judgment.” *Id.* (quotation marks and citation omitted).

Here, the trial court announced that it would sentence Defendant as follows:

THE COURT: All right. This matter has come before the Court and the Court sentences the defendant on the statutory sex offense with a child to a minimum of 216 and maximum of 320 [months]. On the second-degree forceable (sic) sex offense to a minimum of 65 and maximum of 138 months. Those will be consecutive. On the first-degree sex offense, [the] Court sentences the defendant to a minimum of 65, a maximum of 138. On the second-degree sex exploitation of a minor, [the] Court sentences the defendant to a minimum of 22, a maximum of 87 months. On the third-degree sex offense exploitation of a minor, the Court sentences the defendant to a minimum of . . . 5, maximum of 15, as the State requested. The exploitation of minor charges, first, second, and third degrees will be consecutive. They’ll run concurrently with . . . the statutory sex offense with the child and the second-degree forceable (sic) sex offense.

Separately, the Court sentences the defendant to a minimum of 15, a maximum of 27 months on each of the two indecent liberties with a child, which will run consecutively with one another.

[DEFENSE COUNSEL]: Judge, I hate to interrupt you, but one of those indecent liberties was dismissed.

. . . .

THE COURT: Okay. That’s right. That was dismissed, so it would be just one. All right.

And that will run consecutively at the end of the sentence for the sex exploitation of a minor offenses.

(emphasis added).

The State then sought clarification:

[STATE]: For the statutory sex offense it was 216 to 320.

THE COURT: Right.

[STATE]: To run consecutive with the second-degree sex offense, 65 to 138.

. . . .

THE COURT: Correct. That's what I said, right.

[STATE]: And then you're going to consolidate the first, second, and third-degree sex exploitation. Did you mean to run that consecutive or concurrent?

THE COURT: Concurrently.

[STATE]: So, Your Honor, that concurrently with the statutory sex offense?

THE COURT: Correct.

[STATE]: And then indecent liberties is 15 to 27 months *and that's to run consecutive to the statutory sex offense --*

THE COURT: Correct, correct.

(emphasis added).

The written judgments imposed sentences with durations matching the trial court's announcements. However, the written judgments indicated that the sentence for indecent liberties with a child would run consecutive to the second-degree forcible sex offense, which marks a substantive change from both the trial court's initial announcement and its later clarification. Had the judgments reflected the trial court's initial announcement, Defendant would complete his sentence for indecent liberties with a child before completing his sentence for the second-degree forcible sex

offense. As the judgments were entered, Defendant would not even begin his sentence for indecent liberties with a child until completing his sentence for the second-degree forcible sex offense. Additionally, there is no evidence that Defendant was present when the judgments were entered. Accordingly, Defendant's sentences are vacated, and the matter is remanded for resentencing.

III. Conclusion

For the foregoing reasons, Defendant's convictions are affirmed, his sentences are vacated, and the matter is remanded for resentencing.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).