

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-316

Filed 5 November 2024

Wake County, No. 19CRS200588

STATE OF NORTH CAROLINA

v.

ROSIE MARIE HOPKINS, Defendant.

Appeal by defendant from judgment entered 27 April 2022 by Judge Winston M. Rozier Jr. in Superior Court, Wake County. Heard in the Court of Appeals 9 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State.

*Rosie Marie Hopkins, pro se, defendant-appellant.*¹

¹ On 17 April 2023, Assistant Appellate Defender Jillian C. Franke filed a “motion to withdraw as appointed counsel upon request of client”; this Court granted the motion on 1 May 2023 and instructed the Appellate Defender “to appoint substitute counsel[.]” Richard Croutharmel was court appointed by the North Carolina Appellate Defender and filed a “Notice of Appearance of Counsel for Appellant-Defendant” on 4 May 2023. On 24 July 2023, Defendant filed what this Court designated as “motion” wherein she requested to “terminate working with the appellate office/Rick Croutharmel and be appointed as Prose [sic] on this Appeal[.]” On 26 July 2023, Richard Croutharmel filed “Appellant-Defendant’s Attorney’s Motion to Withdraw”; On 2 August 2023, this Court allowed Richard Croutharmel to withdraw as Defendant’s attorney. Also on 2 August 2023, this Court entered an order in response to Defendant’s “motion[.]” which held that “Defendant-Appellant’s motion to proceed pro se is allowed. Defendant-Appellant’s motion to strike the 17 July 2023 Defendant-Appellant’s brief filed by attorney Richard Croutharmel is denied.”

STROUD, Judge.

Defendant appeals from a judgment entered following a jury verdict finding her guilty of assault on a disabled person. Defendant argues the trial court erred by making a competency determination without personally examining the witness and admitting inadmissible hearsay statements, sentencing Defendant outside the statutory mandate, and imposing a special condition of probation. We hold there was no error except as to Defendant being sentenced outside of the statutory mandate. As to that issue, we vacate the trial court's sentence and remand the matter to the trial court with instructions to enter the appropriate sentence.

I. Factual and Procedural Background

On 22 June 2020, Defendant was found guilty of assault on an individual with a disability in District Court, Wake County. Defendant was sentenced to 40 days' confinement, which was suspended for 18 months of unsupervised probation. Defendant appealed to Superior Court, Wake County, where she elected to proceed *pro se*.

At trial, the State's evidence tended to show that in January of 2019, Defendant was employed as a caregiver to Zeke,² a nineteen-year-old male with autism, attention-deficit/hyperactivity disorder, and intellectual developmental disorder. Zeke and his mother, Ms. B, lived in a house in a subdivision which had a

² We have used a pseudonym to protect the victim's identity.

STATE V. HOPKINS

Opinion of the Court

clubhouse (“the Clubhouse”) for use of its residents in Apex. On 2 January 2019, Defendant picked Zeke up at his home and drove him to the facility he regularly attended. Shortly after they left, Defendant called Ms. B and said Zeke was having a hard morning; Defendant asked permission to take Zeke to a Target retail store and the Clubhouse.

Later that afternoon, Defendant called Ms. B and asked her to come to the Clubhouse to help with Zeke. When Ms. B arrived at the Clubhouse’s parking lot, Zeke was in the backseat of Defendant’s car “screaming and yelling[.]” Ms. B tried to calm Zeke down and ultimately convinced him to return to their house to eat lunch. Ms. B expected Defendant to drive Zeke directly back to their house; however, Ms. B received what she assumed was an accidental phone call from Defendant wherein it sounded like Defendant was buying a cupcake for Zeke at the store. Defendant then drove Zeke back to his house and Defendant, Zeke, and Ms. B all ate lunch together. Later that day, Ms. B received a phone call from Anthony Sacco, the community manager of the Clubhouse. Mr. Sacco explained that “there was an incident that happened with [Zeke]” and asked Ms. B to come to the Clubhouse to “show her some things that happened[.]”

Mr. Sacco testified he was familiar with Zeke and Defendant and had seen them at the Clubhouse together on several occasions. On the morning of 2 January 2019, Mr. Sacco saw Defendant and Zeke enter the Clubhouse; about 2-5 minutes later, Defendant and Zeke walked out of the Clubhouse. As they exited, Mr. Sacco

noticed Zeke was “holding his head.” Mr. Sacco asked an employee why Zeke had left so quickly because “it was abnormal,” as “[t]ypically, [Defendant and Zeke] would come and eat lunch [and] go to the gym,” where Zeke “would watch videos and walk on the treadmill.” To make sure Zeke had not injured himself in the Clubhouse, Mr. Sacco viewed the security footage from different angles around the Clubhouse. Mr. Sacco testified that one surveillance video outside of the men’s bathroom showed Defendant “str[ike] Zeke on the arm/neck area” and Zeke “str[uck] her back.” Mr. Sacco immediately called Ms. B to report “[t]here was an incident that, obviously, nobody saw . . . the only thing that would have saw it was a camera” and asked her to come to the Clubhouse to view the surveillance video.

When Ms. B arrived at the Clubhouse, Mr. Sacco showed her the surveillance video in his office. Ms. B testified that the surveillance video showed: Zeke “standing in the front of the men’s room”; Zeke “tap” Defendant; and Defendant “slap [Zeke] and take him to the men’s bathroom.” According to Ms. B, Zeke did not require help in the bathroom; as a result, when Ms. B watched the video where Defendant and Zeke went into the bathroom together, Ms. B felt “[a]ngry and surprised and confused, wondering what’s going on. Why is she in a closed room with him?” After viewing the surveillance video with Mr. Sacco, Ms. B returned home and called Defendant’s employer to report the incident and requested Defendant no longer care for Zeke.

A few days later, Defendant came to the Clubhouse and demanded to see the surveillance videos. Mr. Sacco refused to show Defendant the videos because she was

STATE V. HOPKINS

Opinion of the Court

neither an employee nor a member of the homeowners' association. Defendant then contacted the homeowners' association's main office to request access to the surveillance videos; in response, the homeowners' association obtained an order from the Apex Police Department preventing Defendant from trespassing on the property. On 9 January 2019, Defendant contacted Officer Shawn Myers of the Apex Police Department and requested help in getting the surveillance videos from the homeowners association so she could "file a report for damage to her property" and report an assault against her. Officer Myers was dispatched to the Clubhouse, where an employee pulled up the surveillance videos from 2 January 2019. Defendant and Officer Myers watched the surveillance videos together.

At trial, Officer Myers referenced the report he had made regarding what he viewed on the surveillance videos. Officer Myers testified that on the videos, he saw: Zeke "tapping on [Defendant's] shoulder in what appears to be him trying to get [Defendant's] attention" in the Clubhouse parking lot; Defendant "walk[ing] through the building into the bathroom with [Zeke] tapping on her shoulder"; Defendant and Zeke "stop[ping] in the doorway of the men's restroom[,]" where Officer Myers observed "the motion of [Defendant] striking [Zeke] on his shoulder"; Defendant and Zeke entering the men's bathroom; approximately 15-20 seconds later, Defendant walking out of the bathroom, followed by Zeke, who was "rubbing the top of his head"; Defendant and Zeke walking outside; and Ms. B "arriv[ing] to pick [Zeke] up after [Defendant] called her." Officer Myers testified that there was no difference in the

videos he watched at the Clubhouse and the videos shown at trial. After watching the videos at the Clubhouse, Officer Myers informed Defendant that he “needed to investigate a possible assault on” Zeke.

After speaking with Mr. Sacco, Officer Myers went to speak with Zeke and Ms. B at their home. Officer Myers testified that Zeke explained that on 2 January, Defendant had “told him to be quiet in the car[,]” which Zeke “did not think . . . “was appropriate”; however, Zeke “wanted to get her attention, so he kept tapping her on her shoulder but she ignored him.” Zeke then explained to Officer Myers he and Defendant “went to the bathroom and when they went to the bathroom, she struck him in the head three times.”

A warrant for Defendant’s arrest was issued 9 January 2019. Defendant was found guilty of assault on an individual with a disability in District Court, Wake County on 22 June 2019. On 27 April 2022, a jury found Defendant guilty of assault on an individual with a disability in Superior Court, Wake County. Defendant was sentenced to 75 days’ confinement, suspended for 18 months of supervised probation. Defendant appeals.³

II. Incompetency Determination

Defendant argues that “[t]he trial court abused its discretion and reversibly

³ Defendant has also filed with this Court a “Motion to OverTurn/Reverse” her “Jury Trial Verdict of Guilty to Not Guilty Due to Obstruction [sic] of Justice and Manufactured State Video Evidence Missing Clips/Scenes/Altering Trial Transcript & Omitting [her] Objections, Miscarriage of Law, [t]he video was not sufficiently authenticated etc.” (Emphasis in original.) We deny Defendant’s motion.

erred in doing so when it ruled that [Zeke] was incompetent to testify without personally examining him and subsequently allowing the State to admit his incriminating out-of-court statements while simultaneously denying [Defendant]’s attempts to admit his exculpatory out-of-court statements.” We disagree.

On 19 April 2022, the State filed a notice of its intent to use six out-of-court statements made by Zeke to his mother and Officer Myers under North Carolina Rules of Evidence 804 and 807. At a hearing on the same day, the State approached the bench with “a letter of appointment showing that the mother is the guardian of [Zeke], who has been deemed incompetent by the Court in a previous hearing.” The State argued:

[T]his victim has been declared incompetent by the Court. He suffers from -- his mother will be present to testify more about his condition, but he suffers from an aggravated form of autism, which when triggered by certain events, he can revert to the mind of a two or three year old. And therefore, his testimony can range for someone of that age group. Therefore, I would argue . . . that his statements that he said to his mother and officers should be allowed to come in, given the fact that he would be unavailable and would not be present for trial.

Defendant stated she had just learned that Zeke was not going to appear as a witness; however, there was no further discussion about Zeke’s competency. The parties and judge then went through each of the six out-of-court statements the State intended to admit:

1. That the Defendant was his caretaker, and in the car she told him to be quiet and not to speak.

2. That they went into the “Clubhouse”, and he needed her attention.

3. That he felt it was wrong for her to tell him to be quiet and he wanted to talk to her.

4. That he started to tap on her shoulder repeatedly to get her attention.

5. That he continued to tap on her shoulder and they both went into the bathroom.

6. That while in the bathroom, the Defendant struck him three times in the head.

Defendant explicitly consented to the admissibility of statements one, four, five, and six; Defendant requested the court “strike” statements two and three. The judge reiterated that Defendant had consented to the admissibility of four of the statements; as to numbers two and three, the judge stated, “I’ll just wait and see what evidence is presented throughout the course of the trial and go from there.” Defendant explained that she wanted “to be careful” about what she was “accepting and what [she was] striking, because [she] would have to also utilize some of these statements, as well, for [her] arguments.”

A. Incompetency Determination

First, we address Defendant’s argument that the trial court abused its discretion when it ruled Zeke was incompetent to testify without personally examining him.

First, we must determine whether Defendant preserved her argument

regarding the trial judge not conducting an in-person hearing to determine Zeke's competency. When Defendant learned that Zeke was not on the witness list, she did not request that the judge personally examine Zeke, and she did not object to the court's determination that Zeke was incompetent. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Thereafter, Defendant did not object to the admission of the six out-of-court statements; instead, Defendant ultimately elicited on Officer Myers' cross-examination the six statements she now challenges on appeal. Defendant argues that although she did not lodge an objection, the trial court's failure to personally determine Zeke's competency is preserved for appellate review under *State v. Fearing*, 315 N.C. 167, 337 S.E.2d 551 (1985).

In *Fearing*, despite there being no objection at trial, the North Carolina Supreme Court reviewed the trial court's determination that a witness was not competent to testify:

Although the parties have not raised an issue before this Court concerning the trial judge's entry of the order declaring the child witness incompetent to testify without ever having examined or observed the examination of the child on *voir dire* to determine her competency, we find that the interests of justice require that we review this order for possible error because it formed the basis upon which highly prejudicial testimony was admitted and affects substantial rights of the defendant in this matter.

N.C.G.S. § 8C-1, Rule 103(d) (“Notwithstanding the requirements of subdivision (a) of this rule, an appellate court may review errors affecting substantial rights if it determines, in the interest of justice, it is appropriate to do so.”).

Id. at 172, 337 S.E.2d at 554. The Supreme Court held that the trial court erred by admitting a three-year-old child’s out-of-court statements without conducting a *voir dire* to determine the child’s competency “[b]ecause highly prejudicial testimony was erroneously admitted pursuant to Rule 803(24) and Rule 804(b)(5) on the basis of th[e] improperly based conclusion[.]” *Id.* at 174, 337 S.E.2d at 555. The Supreme Court noted that the admitted testimony “was extremely prejudicial to the defendant because it included statements in which the victim allegedly described the cause of her injuries and identified the defendant as the perpetrator.” *Id.* at 172, 337 S.E.2d at 554.

Indeed, one Justice wrote a separate concurring opinion “to expand on the reasons for concluding that admission of the hearsay evidence was highly prejudicial in th[e] case.” *Id.* at 174, 337 S.E.2d at 555 (Billings, J., concurring). The concurring opinion explained that the “reliability of the hearsay testimony” was “questionable” because there was conflicting evidence regarding the content of the child’s out-of-court statements. *Id.* at 175, 337 S.E.2d at 556 (Billings, J., concurring). Specifically, the concurring Justice pointed to the conflicting interpretations regarding the cause of the redness on the child’s genitalia, whether the child said she was hurt with a “stick” or a “dick,” and the child’s behavior when interacting with the anatomically

correct dolls. *Id.* at 174-75, 337 S.E.2d at 555-56 (Billings, J., concurring). In that particular case, the Supreme Court was “reluctant to rely on the evidence in cases where, as here, the actual content of the statement was subject to interpretation.” *Id.* at 175, 337 S.E.2d at 556 (Billings, J., concurring).

We disagree with Defendant’s contention that “the facts of her case are substantially similar to the facts in *Fearing* so as to require this Court to apply the same standard here.” Here, the out-of-court statements the State sought to introduce did not directly relate to Defendant’s actions in regard to the crime charged. Although the trial court admitted Zeke’s out-of-court statement that “while in the bathroom,” “Defendant struck [Zeke] three times in the head,” Defendant was not charged for an assault in the bathroom; Defendant was charged with the assault of Zeke outside the bathroom. In *Fearing*, the content of the child’s statements regarding the cause of her injuries was subject to interpretation; here, not one of Zeke’s six out-of-court statements described the cause of the injury or identified Defendant as the perpetrator *as to the crime charged*. *Cf. id.* at 172, 337 S.E.2d at 554. A video of the alleged assault was admitted and repeatedly played for the jury. The State argued the video showed Defendant striking Zeke and Defendant argued that the video created an “illusion” that she struck Zeke; the question for the jury was whether or not Defendant had hit Zeke outside of the bathroom. Thus, unlike in *Fearing*, the admission of Zeke’s out-of-court statements was not “highly prejudicial” such that it affected Defendant’s “substantial rights.” *See id.* We therefore reject Defendant’s

assertion the facts of her case are so “substantially similar to the facts in *Fearing*” that this Court must consider the issues preserved. Instead, we conclude that because Defendant failed to object at trial to the court’s determination of Zeke’s competency, she has not preserved this issue for appellate review. See N.C. R. App. P. 10(a)(1).

B. Admission of Out-of-Court Statements

Second, Defendant argues that the trial court erred “by allowing the State to admit [Zeke’s] incriminating out-of-court statements while simultaneously denying [Defendant]’s attempts to admit his exculpatory out-of-court statements.” The State contends that “[b]ecause Defendant here invited error, this Court should consider the issue waived[.]” We agree with the State.

A defendant is not prejudiced by error resulting from h[er] own conduct. N.C. Gen. Stat. § 15A-1443 (2018). Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review. *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001). Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law. *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) (citation omitted). Moreover, where a defendant h[er]self offered testimony that is similar to the testimony from the witness that defendant challenges on appeal, the defendant has waived h[er] right to appellate review of any error that may have resulted from the admission of the challenged testimony. *State v. Steen*, 226 N.C. App. 568, 576, 739 S.E.2d 869, 876 (2013).

State v. Crane, 269 N.C. App. 341, 343, 837 S.E.2d 607, 608-09 (2020) (quotation

marks and ellipses omitted).

Here, Defendant consented to the admissibility of four of the six statements the State had sought to introduce. Then, during cross-examination, Defendant asked Officer Myers to read from the following paragraph in his report:

I then asked [Zeke] what happened and he slowly began to try to explain what happened. He started getting really sad when trying to explain what happened in the bathroom, and I asked him to sit down to relax. I gave him a few minutes and asked him again. He then began to explain that [Defendant] was his caretaker and in the car she told him to be quiet and not to speak. Then they go to the clubhouse, and he needed her attention. He stated he felt it was wrong for her to tell him to be quiet, but wanted to talk to her. He stated he started to tap on her shoulder repeatedly to get her attention. He stated that he continued to tap on her shoulder, and then they both went into the bathroom. [Zeke] stated while in the bathroom, [Defendant] struck him three times on the head.

The paragraph from Officer Myers' report, elicited by Defendant, included all six out-of-court statements Defendant now challenges on appeal. Because Defendant invited the error she now challenges on appeal, Defendant has waived appellate review. *See State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) ("Thus, if the admission of such evidence to the jury was error, it was invited error, and defendant has therefore waived her right to appellate review of this issue."). Defendant's argument is overruled.

III. Sentencing

Defendant next argues that "[t]he trial court reversibly erred in sentencing

[Defendant] to 75 days in the county jail because the maximum jail sentence on a Prior Record Level I, Class A1 misdemeanor is 60 days in jail.” Defendant requests that this Court “vacate her sentence and remand this case to the trial court for resentencing.” The State concedes the 75-day sentence “appears to be error” because “the sentence does exceed the maximum potential punishment[,]” and asks this Court to “direct the trial court to correct the sentence to the allowed maximum instead of vacating the judgment and remanding for resentencing.”

Initially we note that although Defendant did not object to the sentence, an error during sentencing is preserved for appellate review. *See* N.C. Gen. Stat. § 15A-1446(d) (2023) (“Errors based upon any of the following grounds may be the subject of appellate review even though no objection or motion has been made in the trial division . . . (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.”). Defendant was convicted of misdemeanor assault upon an individual with a disability—a Class A1 misdemeanor—and was sentenced to 75 days imprisonment. *See* N.C. Gen. Stat. § 14-32.1(f) (2023) (“Any person who commits a simple assault or battery upon an individual with a disability is guilty of a Class A1 misdemeanor.”). At the time of sentencing, Defendant was a prior record level I. By statute, the maximum amount of jail time that can be imposed for a Class A1 offender with a prior record level I is 60 days. *See* N.C. Gen. Stat. § 15A-1340.23(c) (2023). Because the trial court’s sentence of 75 days violates the statutory mandate,

we vacate Defendant's sentence and remand to the trial court with instructions to enter the appropriate sentence. See N.C. Gen. Stat. § 15A-1447(f) (2021) ("If the appellate court finds that there is an error with regard to the sentence which may be corrected without returning the case to the trial division for that purpose, it may direct the entry of the appropriate sentence.").

IV. Conditions of Probation

Finally, Defendant argues that "[t]he trial court abused its discretion by ordering [Defendant] to refrain from working 'with any disabled person during the period of probation' because such a condition unduly restricts her ability to earn money to subsist as well as pay her court-ordered costs and fees." We disagree.

As noted above, an argument regarding sentencing is preserved for appellate review despite a defendant's failure to object. See N.C. Gen. Stat. § 15A-1446(d). "A trial court's decision to impose a condition of probation is reviewed on appeal for abuse of discretion." *State v. Medlin*, 278 N.C. App. 345, 349, 862 S.E.2d 401, 404 (2021) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

North Carolina General Statute Section 15A-1343 provides that "[t]he court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist h[er] to do so." N.C. Gen. Stat. § 15A-1343(a)

(2023) (“Conditions of Probation”). A trial court may require a defendant to comply with special conditions of probation including, *inter alia*, “any other conditions determined by the court to be *reasonably related to h[er] rehabilitation*.” N.C. Gen. Stat. § 15A-1343(b1)(10) (2023) (emphasis added). Although

[t]rial courts have wide discretion to formulate conditions under this provision[,] [t]he extent to which a condition of probation may be imposed under this provision hinges upon whether the challenged condition *bears a reasonable relationship to the offenses committed by the defendant, whether the condition tends to reduce the defendant’s exposure to crime, and whether the condition assists in the defendant’s rehabilitation*.

State v. Chadwick, 271 N.C. App. 88, 90, 843 S.E.2d 263, 265 (2020) (emphasis added) (citations and quotation marks omitted).

Here, Defendant’s illegal sentence of 75 days’ confinement was suspended for 18 months of supervised probation with a special condition to “not work with any disabled person during the period of probation[.]” The condition of probation prohibiting her from working with a disabled person is reasonably related to the offense Defendant was found guilty of assault on an individual with a disability. This prohibition also reduces Defendant’s exposure to crime, as she will not be in a position to potentially assault another person living with a disability and this may assist in Defendant’s rehabilitation. *See id.* As a result, we hold Defendant has failed to show the trial court’s decision to impose this condition was an abuse of discretion.

V. Conclusion

STATE V. HOPKINS

Opinion of the Court

We reject Defendant's contention that *State v. Fearing* requires automatic preservation of her argument regarding the trial court's ruling on Zeke's competency; as a result, we hold Defendant did not preserve this issue for appellate review. We also hold the trial court did not err in admitting Zeke's six out-of-court statements because Defendant invited the error she now complains about on appeal, and we hold the trial court did not err in imposing a condition that Defendant not work with any disabled person while on probation. Finally, we hold the trial court erred in sentencing Defendant and, therefore, we vacate her sentence and remand this matter for entry of a corrected sentence.

NO ERROR IN PART; SENTENCE VACATED AND REMANDED FOR ENTRY OF CORRECTED SENTENCE.

Judge TYSON and ZACHARY concur.

Report per Rule 30(e).