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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-288

Filed: 7 November 2017

Forsyth County, No. 13 CRS 53133; 61214

STATE OF NORTH CAROLINA

v.

HENRY CLIFFORD BYRD, SR.

Appeal by defendant from judgments entered 4 November 2015 by Judge Reuben F. Young in Forsyth County Superior Court. Heard in the Court of Appeals 4 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri H. Lawrence, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

TYSON, Judge.

Henry Clifford Byrd, Sr. (“Defendant”) appeals from judgments entered after return of a jury’s verdict convicting him of first degree rape of a child, first degree sexual offense with a child, and indecent liberties with a child. We find no error in the jury’s verdict or in the judgments entered thereon.

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I. Factual History

On 23 March 2013, ten-year-old J.M. was at New Bethel Baptist Church in Winston-Salem, readying for her role in the Easter play. J.M. was accompanied by multiple family members, including her great-grandmother, her mother, her grandfather, and J.P., her ten-year-old cousin. Defendant was also a member of this church.

J.M. was wearing a dress, a sweater, tights, and a belt. Before the play, J.M. went to the kitchen downstairs to look for a knife to add another hole in her belt. When the play was about to start, J.P. went to go look for J.M. Unable to find her, J.P. informed their great-grandmother, Ruby Cain, about J.M.'s absence. Ms. Cain and J.P. went downstairs to the church's fellowship area, where there is a kitchen, a dining area, and men's and ladies' restrooms. At the bottom of the stairs, there is a door to the kitchen and a hallway leading to the restrooms and dining area. Ms. Cain noticed the kitchen lights were off, and the door was locked. As she moved around toward the other entrance of the kitchen, a set of double doors, she heard movement inside.

Though the statements of J.P. and Ms. Cain differ to some degree, both stated that the kitchen lights were turned off, Defendant was adjusting his zipper and/or belt, Defendant stated he "didn't do anything to her [J.M.]," and J.M.'s clothing was disheveled, with her dress tucked up in her belt or tights.

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J.M. was upset, crying and screaming that the Defendant had raped her. Defendant followed Ms. Cain and J.M. up the stairs, and asserted that he had not hurt J.M. or done anything to her. Defendant was separated from J.M. and the police were called. J.M.'s grandfather, Gregory Cain, assaulted Defendant and chased him out of the church.

J.M. told both her mother and the paramedics that she was experiencing pain in her vaginal area. The responding officer overheard J.M. say, "He raped me." J.M. described to the officer how Defendant had followed her into the kitchen, pulled down her tights, pulled her onto the floor, "pulled his thing out" and "put it in [her] private." Then Defendant got up and told J.M. not to tell anyone what happened, as Ms. Cain and J.P. arrived. J.M. later complained that Defendant had previously raped her multiple times, perhaps every Sunday, and had forced her to perform oral sex one time in the bathroom downstairs. J.M. had never told anyone about these other, earlier instances because Defendant had threatened to kill her if she told.

Defendant voluntarily went to the police department and submitted to an interview on the evening of the incident. He stated that he was in the downstairs bathroom at the church, and J.M. was standing outside the door when he stepped out. She asked to see his phone. Once he handed her the phone, she ran with it into the kitchen. The kitchen was dark, and he heard his phone drop and break. When

Defendant turned the lights on, he saw J.M. with her tights pulled down, touching herself.

In an interview after his arrest, Defendant expanded on his memory of events on 23 March 2013, adding that J.M. had called him “Jake” as she was touching herself in the kitchen. As Defendant tried to leave the kitchen, J.M. grabbed his crotch.

J.M. was examined by a sexual assault nurse examiner (SANE). The rape kit did not produce any hair or DNA identified with Defendant. J.M. was more withdrawn at her later interview with a forensic social worker than during the interviews on the day of the incident, but re-stated that Defendant “put his private in [her] private.” J.M.’s mother told the social worker that J.M. was in special classes, due to cognitive deficits. The social worker noted that J.M. was emotionally and cognitively on the level of a four- or five-year-old. J.M.’s mother also indicated behavioral problems had worsened after the incident, and J.M. was now too fearful to return to church.

II. Procedural History

On 2 April 2013, Defendant was arrested on charges of first degree rape and taking indecent liberties with a child. He was appointed counsel on 4 April 2013. Defendant filed four *pro se habeas corpus* petitions, all of which were denied. Defendant was indicted by the grand jury on 24 June 2013.

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On 6 November 2013, Defendant appeared with his appointed counsel, Jason Crump, for a hearing on fourteen additional *pro se* motions, including one to dismiss counsel for conflict of interest. Defendant asserted he had waived counsel at his first appearance. The court allowed attorney Crump to withdraw and appointed David Botchin as Defendant's new counsel on 8 November 2013. On 18 November 2013, the State obtained a superseding indictment alleging rape of a child by an adult and a new indictment for sex offense against a child.

Defendant continued to file *pro se* motions, some of which were voluntarily dismissed by his counsel and some of which he attempted to have heard on 31 January 2014. Mr. Botchin declined to adopt Defendant's *pro se* motions. The court informed Defendant his arguments lacked legal merit.

Defendant was instructed to choose between being represented or proceeding through trial on his own. He chose to continue with counsel, though also insisted on arguing his *pro se* motions. On 18 February 2014, Defendant again appeared for a hearing to again request substitute counsel, claiming Mr. Botchin was conspiring with the District Attorney. The court allowed this request and appointed Daniel Anthony.

On 1 May 2014, Defendant appeared with counsel for a hearing on more *pro se* motions. Mr. Anthony sought clarification from the court on how he was to represent

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Defendant. The court found that Defendant was competent, had him sign a waiver of counsel form, and instructed Mr. Anthony to serve as stand-by counsel.

Defendant continued to file *pro se* motions and appeared to have difficulty navigating the proper trial procedures. The court granted the State's motion for Defendant to be evaluated by a certified forensic evaluator. The evaluator found that Defendant was competent to proceed with trial.

Between August 2014 and October 2014, Defendant continued to file numerous *pro se* motions. Some were heard, and the court either denied or deferred ruling. At the hearing on 6 October 2014, the court again expressed concern about Defendant's ability to represent himself, and encouraged Defendant to consider his understanding of law. On 27 October 2014, Defendant filed a document, outlining his competence to represent himself.

Additional *pro se* motions were heard 16 February 2015, many of which attempted to resurrect previously denied motions. Defendant continued to argue his claims, even though he apparently had lost track of which of those had already been adjudicated. He complained again about the level of assistance he had received from his stand-by counsel and sought to have Mr. Anthony dismissed. The court attempted to clarify the role of his stand-by counsel.

On 18-19 March 2015, Defendant was provided requested discovery detailing the other rape allegations made by J.M. The court again offered Defendant the

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opportunity to have counsel and had Defendant execute another waiver of counsel. In July 2015, Mr. Anthony was directed to assist Defendant in identifying and organizing his pending motions. After reviewing over 1,500 pages of *pro se* motions, Mr. Anthony provided the court with a chronological list. The court proceeded through the list, ruling on many motions, but deferring some to trial.

On 26 October 2015, the case was called for trial. Defendant appeared *pro se*, and after questioning by the court, was permitted to continue representing himself. On 4 November 2015, Defendant was convicted as charged, with the court imposing three consecutive sentences: 300 to 420 months each for rape of a child and sex offense with a child, and 33 to 49 months for indecent liberties with a child. Defendant gave oral notice of appeal.

III. Statement of Jurisdiction

Jurisdiction lies in this Court as an appeal of a final judgment of a superior court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

IV. Anders Brief

Counsel appointed to represent Defendant on appeal asserts after review, he is unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal. He requests this Court to conduct its own review of the record for possible prejudicial errors. Counsel has shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, 386 U.S. 738

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(1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising Defendant of his right to file written arguments with this Court and providing him with the documents necessary for him to do so.

V. Issues

Defendant filed a *pro se* brief presenting twelve issues. Though his arguments are difficult to follow, it appears Defendant's arguments are either based on misunderstandings of law or are conclusory statements. After review, Defendant appears to raise the following issues: (1) whether the filing of an *Anders* brief is a conflict of interest to the Defendant's right to appellate review; (2) whether it was plain error to admit the testimony of the victim, J.M.; (3) whether it was plain error to admit the testimony of Cynthia Stewart; (4) whether the State knowingly used perjured statements of J.M.; (5) whether the Defendant's 6th and 14th Amendment rights to an indictment by an impartial grand jury were violated; (6) whether Rev. Jones reading the letter, and the subsequent publishing of the letter un-redacted to the jury was plain error; (7) whether it was plain error for the court to deny Defendant from introducing his theory that the police report was fabricated; (8) whether it was plain error to allow the SANE to testify, and whether her testimony was misleading; (9) whether the trial court erred in sentencing; (10) whether the video interview of J.M. was hearsay and whether it was plain error to admit the video; (11) whether the testimony of J.P., Ms. Cain, Rev. Jones, Gregory Cain, J.M., and Cynthia Stewart was

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hearsay, and whether it was error to admit it; and (12) whether the State knowingly used perjured testimony from J.M., J.P., and Joyce Hylton, and whether such use was prosecutorial misconduct.

VI. Analysis

A. Witness Testimony

The majority of Defendant's issues concern the veracity or admissibility of the testimonial evidence and statements. "The party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001) (citation and quotation marks omitted). Under plain error review, prejudice is shown if "absent the error a different result would have been reached at trial." *Id.* Defendant appears to argue against the admissibility of the majority, if not all, the witnesses' testimony for the State. When his arguments on appeal fail to contain any plausible legal support, Defendant cannot prove any prejudice. *See id.*

B. Prosecutorial Misconduct

Defendant offers no evidence of prosecutorial misconduct. Defendant appears to assert any testimony that is inconsistent with his statements was false or perjured, but offers no proof beyond the apparent inconsistencies in the statements. "Where the evidence is found to be inconsistent or contradictory, rather than a knowing falsehood, such contradictions in the State's evidence are for the jury to consider and

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resolve.” *State v. Pallas*, 144 N.C. App. 277, 280, 548 S.E.2d 773, 777 (2001) (citation and quotation marks omitted). In this case, as in most cases, inconsistencies may be shown in the witnesses’ testimonies and statements. After all the evidence was presented, the jury resolved all inconsistencies in the evidence, reached a unanimous verdict, and convicted Defendant on all charges.

C. Grand Jury

Defendant purports to assign error to the impartiality of the grand jury. It appears the only basis for Defendant’s claim is the returned indictments and conjecture concerning what evidence was given at the grand jury. Grand jury proceedings are, by law, secret. N.C. Gen. Stat. § 15A-623(e) (2015). At his motion hearings, Defendant did not present any evidence to justify piercing this veil of secrecy, nor any legal argument to show the grand jury was not impartial. It appears that Defendant is misinformed of the role of the grand jury and the burden of proof required for an indictment. Further, Defendant failed to raise any of his constitutional arguments before the trial court, and “constitutional issues cannot be raised for the first time on appeal.” *State v. Wright*, 200 N.C. App. 578, 584, 685 S.E.2d 109, 114 (2009), *appeal dismissed* 363 N.C. 812, 693 S.E.2d 142 (2010). We dismiss Defendant’s challenge to the grand jury, and do not consider the merits of any arguments which are not preserved, and are not properly before us. *See id.*

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We reject Defendant's remaining issues, as they are wholly unfounded arguments, unsupported by legal precedents or conclusions. As stated above, appellate counsel has fully complied with the mandate of *Anders*, having provided Defendant with the documents he needed to submit his own brief. No conflict of interest has been shown. We have thoroughly reviewed the record and Defendant's challenges to provide an independent appellate review.

Defendant presents no evidence to support his argument of being denied the right to present his defense. Due Process demands "every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony." *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 562, 531 (1970). However, Due Process does not permit a fishing expedition for immaterial evidence. *Id.* at 700, 174 S.E.2d at 533. Defendant had three appointed counsels and over two years to request, gather, and present any evidence supporting his claims of fabricated police reports. Defendant's brief demonstrates nothing beyond his assertion that witnesses' testimony that is contrary to his version of events was patently false.

Finally, Defendant has not shown any error in his sentencing. The trial judge properly calculated Defendant's prior record, in accordance with N.C. Gen. Stat. § 15A-1340.14. Defendant was sentenced to the statutory minimum required under

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N.C. Gen. Stat. § 14-27.23, rape of a child, and N.C. Gen Stat. § 14-27.28, sexual offense with a child. The State requested the minimum sentence for the indecent liberties charge be imposed at the high end of the presumptive range, due to Defendant's previous conviction of indecent liberties with a child. Defendant was sentenced for all convictions within the presumptive ranges accordingly.

VII. Conclusion

In accordance with *Anders*, we have fully examined the record and Defendant's claims and arguments to determine whether any issues of arguable merit appear therefrom. We have reviewed the record for possible prejudicial errors and have found none. Defendant's purported issues are without merit.

We find no error in this jury's verdict or in the judgements entered thereon. *It is so ordered.*

NO ERROR.

Judges STROUD and HUNTER concur.

Report per Rule 30(e).