IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-241

Filed: 20 November 2018

Cabarrus County, No. 16 CRS 55394

STATE OF NORTH CAROLINA

v.

RON CORNELIUS JOHNSON

Appeal by defendant from order entered 18 September 2017 and judgment entered 19 September 2017 by Judge Julia Lynn Gullett in Cabarrus County Superior Court. Heard in the Court of Appeals 1 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tiffany Y. Lucas, for the State.

Richard Croutharmel for defendant.

ARROWOOD, Judge.

Ron Cornelius Johnson ("defendant") appeals from judgment entered on his conviction for assault with deadly weapon inflicting serious injury ("AWDWISI") and from order entered for direct criminal contempt. For the following reasons, we hold no error in part, and reverse in part.

I. Background

Defendant was arrested on a warrant charging him with felonious AWDWISI on 3 December 2016. Defendant was appointed trial counsel at the time of his first appearance on 5 December 2016. On 12 December 2016, a Cabarrus County Grand Jury indicted defendant on one count of AWDWISI.

Defendant complained about his appointed counsel at pretrial hearings and, on 12 May 2017, requested that his appointed counsel be fired. The court agreed to release defendant's appointed counsel and offered to appoint different counsel. Defendant, however, insisted that he wanted to represent himself. Upon further questioning of defendant, the trial court allowed defendant to waive his right to counsel and proceed *pro se*. The trial court completed, and defendant signed, a waiver of counsel that same day. Defendant then rejected the State's plea offer.

The case came back on for a pretrial hearing on 23 August 2017 after two trial dates passed without the case being called for trial. At that hearing, the case was scheduled for trial on 18 September 2017. A last pretrial hearing was held on 12 September 2017. During the course of the pretrial hearings, the court denied defendant's petitions for *habeas corpus* and motions to dismiss. Defendant also turned down the trial court's offers to allow him to wear normal clothes during his trial, instead opting to wear his prison jumpsuit.

Defendant's case came on for trial in Cabarrus County Superior Court before the Honorable Julia Lynn Gullett on 18 September 2017.

The issue of counsel reemerged when defendant requested stand-by counsel. At that time, the court informed defendant he had already waived counsel. Nevertheless, the court sought to find stand-by counsel for defendant even though any appointed stand-by counsel would not be prepared. As the trial court queried potential stand-by counsel, defendant requested a "Mr. Walker" and someone stepped out of the courtroom to look for him. At the suggestion of the State, the court also sought out defendant's original appointed counsel because he was already familiar with the case. Mr. Walker appeared and addressed the court to inform it that his schedule would not allow him to serve as stand-by counsel. Mr. Walker, however, did confer with defendant for several minutes. After a brief delay, defendant's original appointed counsel appeared and agreed to serve as stand-by counsel. Defendant, however, rejected his original appointed counsel. The court made findings in the record about pretrial matters, including the following findings concerning defendant's waiver of counsel and the court's efforts to assist defendant in finding stand-by counsel:

> Court finds that [defendant] has specifically rejected [his original appointed counsel] as standby counsel and the Court does find that every right that the defendant has has been explained to him and has been exhausted by each court prior to today. At this point the Court finds that the defendant has rejected the only possible standby attorney available that would know anything about the case, and so the Court at this time finds that he has waived that right as well.

Immediately after the trial court's findings, defendant requested a continuance to allow Mr. Walker to serve as stand-by counsel. The trial court denied defendant a continuance and the matter proceeded.

The State's evidence at trial tended to show that defendant and the victim, who were engaged, were traveling from Florida to Maryland together and stopped at defendant's brother's house in Kannapolis. A mutual friend was traveling with them. Defendant and the mutual friend had been drinking alcohol for much of the day and defendant had been angry at the victim for getting lost. Defendant continued to drink at his brother's house and decided to leave his brother's house at approximately three o'clock in the morning. Defendant told the victim that she was not going with him and told her to get her belongings out of the vehicle. As the victim was retrieving her belongings, she leaned over the center console and began to hit defendant in the back of his head with her fist. Defendant then got out of the vehicle and stabbed the victim in the back, kicked and stomped on her, stabbed her again in the thigh, kicked and stomped on her some more, and then got into the vehicle and drove away.

Based on the State's evidence, the jury returned a guilty verdict for AWDWISI on 19 September 2017 and the trial court entered judgment sentencing defendant to a term of 33 to 52 months' imprisonment. The sentence was to run consecutive to a 30-day term imposed in a separate order entered by the trial court on

18 September 2017 holding defendant in direct criminal contempt. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant raises challenges to his being held in direct criminal contempt and to his conviction by the jury for AWDWISI.

1. Contempt

Defendant first argues the trial court erred by summarily holding him in direct criminal contempt without following the mandatory statutory procedures.

"Criminal contempt is imposed in order to preserve the court's authority and to punish disobedience of its orders." *Watson v. Watson*, 187 N.C. App. 55, 61, 652 S.E.2d 310, 315 (2007), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008). Criminal contempt is considered "direct" when the contemptuous act is committed within the sight or hearing of the judge and in or in the immediate proximity to where the proceedings are taking place; the act must also be likely to interrupt or interfere with the proceedings. N.C. Gen. Stat. § 5A-13(a) (2017). Direct criminal contempt may be punished summarily or in separate plenary proceedings. *Id.*

In the present case, the contempt issue arose during jury selection when defendant became aggravated at the State's questioning and dismissal of potential jurors. Defendant expressed his frustration with the proceedings and the court's handling of his complaints in open court, stating at different points, "[s]hit, man[,]"

"[o]h, my God, come on, man[,]" "I'm not going to get a fair trial here[,]" and "[s]hit, come on, man." The court warned defendant as follows: "All right, sir, I'm going to warn you right now you are not going to be allowed to cuss in the courtroom." As defendant continued to express his frustration, the following exchange occurred out of the presence of the jury:

> THE COURT: You're not going to be allowed to act out --
>
> [DEFENDANT]: You can do --
>
> THE COURT: -- in the courtroom.
>
> [DEFENDANT]: -- whatever you want to to do. You can do whatever you want to do. Because right now basically what you're sitting up there telling me is that this man is allowed to do whatever he wants to do in this courtroom and I'm not.
>
> THE COURT: That is what you perceive and that's not accurate.
>
> [DEFENDANT]: What do you mean perceive? I just told these people about who I am and that I've never been in North Carolina before and he objected to it.
>
> THE COURT: Well --
>
> [DEFENDANT]: He didn't tell them --
>
> THE COURT: -- you can't testify.
>
> [DEFENDANT]: -- people that. Excuse me?
>
> THE COURT: You're not allowed to testify.
>
> [DEFENDANT]: That's not a -- how am I testifying?

THE COURT: All right. Are you telling me that you're not going to cooperate and follow the rules and procedures?

[DEFENDANT]: What do you mean cooperate? You're not allowing me to cooperate.

THE COURT: Are you not going to follow the rules and procedures?

[DEFENDANT]: I don't have no rules.

THE COURT: Well, I have rules.

[DEFENDANT]: That's basically what you're telling me --

THE COURT: We have rules in the courtroom.

[DEFENDANT]: -- I have no rules. And you're telling me I have no rules. This man is able to reject jurors, question them -- he said he had four questions. Four questions took two hours and he rephrased those four questions 16 different ways right here in front of us. Am I the only person that sat here and saw this?

THE COURT: Sir, you didn't object to anything.

[DEFENDANT]: Because you didn't tell me I could.

THE COURT: I'm not allowed to give you.

[DEFENDANT]: So then why --

THE COURT: -- advice.

[DEFENDANT]: -- am I not allowed assistant counsel that I asked for?

THE COURT: Because you turned it down.

[DEFENDANT]: And now I want it.

THE COURT: It's too late.

[DEFENDANT]: Well, hey, and you can convict me of a crime because of what he's saying he has.

THE COURT: At this point I'm going to ask that you take the defendant back into the holding cell and let him calm down a little bit.

[DEFENDANT]: Shit.

THE BAILIFF: Right this way, sir.

[DEFENDANT]: That's shit, man.

THE COURT: All right. That's one.

[DEFENDANT]: Man, contempt of court, whatever you like.

THE COURT: Okay.

[DEFENDANT]: Goddamn, man. Sit here and tell me this man can do what he want to do but I can't? Shit. Tell him to go to trial by theirself. They don't need me.

THE COURT: Sir, be quiet.

[DEFENDANT]: You must ain't hear what I said. Since -- since he's allowed to do what he want, you can go to trial without me, convict me of a crime like you already got in your mind to do.

THE COURT: That's not my job.

[DEFENDANT]: Shit, what you gonna have to do.

Once defendant was removed from the courtroom, the court indicated it would take a recess for lunch. However, before the recess, the State attempted to clarify what had just happened. The following exchange took place:

> [DISTRICT ATTORNEY]: I'm afraid we're going to be at this all day. You did -- I want to make sure I understood what you just said. Did you just say 20 days when he said you can give me --
>
> THE COURT: I gave him 30 days.
>
> [DISTRICT ATTORNEY]: Thirty, I'm sorry. Do we have to do -- and we can do this when he comes back or doesn't, but is there any specific notice or requirements? I mean, obviously, it's direct --
>
> THE COURT: I'd already given him a warning.
>
> [DISTRICT ATTORNEY]: Okay. So we don't have to do any findings on the record then?
>
> THE COURT: No.
>
> [DISTRICT ATTORNEY]: Okay, perfect. I just wanted to make sure.
>
> THE COURT: I had already given him a warning about ten minutes before that that he wasn't going to be allowed to curse.

The trial court resumed the proceedings with defendant present following the recess. Nothing else was said about contempt.

The contempt order entered by the trial court indicates that defendant was held in direct contempt based on the trial court's finding that defendant "willfully behaved in a contemptuous manner, in that [defendant] did repeatedly curse during

open court after being warned by the court that such behavior was inappropriate." The trial court further found in the standard form contempt order that "[the trial court] gave a clear warning that the contemnor's conduct was improper. In addition, the contemnor was given summary notice of the charges and summary opportunity to respond."

Summary notice and summary opportunity to respond are required by N.C. Gen. Stat. § 5A-14, which governs summary proceedings for contempt. In full, the statute provides as follows:

> (a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.
>
> (b) Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt.

N.C. Gen. Stat. § 5A-14 (2017). "This Court has previously noted that 'the requirements of [N.C. Gen. Stat. § 5A-14] are meant to ensure that the individual has an opportunity to present reasons not to impose a sanction.' " *In re Korfmann*, __ N.C. App. __, __, 786 S.E.2d 768, 771 (2016) (quoting *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 594 (1998)).

There is no dispute that defendant's behavior was contemptuous. *See* N.C. Gen. Stat. §§ 5A-11 and -13 (2017). Defendant's argument on appeal is that the trial court violated the mandate in N.C. Gen. Stat. § 5A-14(b) by failing to give him an opportunity to explain why sanctions for criminal contempt should not be imposed. Defendant relies on this Court's decisions in *Peaches v. Payne*, 139 N.C. App. 580, 533 S.E.2d 851 (2000), and *State v. Randell*, 152 N.C. App. 469, 567 S.E.2d 814 (2002). We agree the trial court erred.

In both *Peaches* and *Randell*, this Court reversed the trial court's findings of contempt because the trial court failed to give the contemnors a "summary opportunity to respond," as required by N.C. Gen. Stat. § 15A-14(b). *Peaches*, 139 N.C. App. at 587, 533 S.E.2d at 855 ("the trial court failed to follow the procedure mandated by N.C. Gen. Stat. § 5A-14(b)"); *Randell*, 152 N.C. App. at 472, 567 S.E.2d at 817 ("defendant was not accorded the summary hearing before being found guilty of contempt"). In *Peaches*, an attorney in a civil suit was held in contempt for disrespecting the court's rulings. In reversing the contempt, this Court explained that "[t]he transcript reveals that the court advised [the] contemnor that, because he had questioned the rulings of the court and shown disrespect for the court, he was in the bailiff's custody. Court was immediately recessed without contemnor having been given an opportunity to present reasons not to impose a sanction." *Peaches*, 139 N.C. App. at 587, 533 S.E.2d at 855 (internal quotation marks and citation omitted). In

Randell, the contemnor was held in contempt for failing to stand up when instructed to do so and for failing to give his name when asked by the trial court. 152 N.C. App at 470-71, 567 S.E.2d at 815-16. The contemnor was immediately taken into custody by the sheriff, but was given an opportunity to be heard later that same day before being taken back into custody. *Id*. at 471, 567 S.E.2d at 816. In reversing the contempt, this Court explained that "[t]he record shows that defendant was not accorded the summary hearing before being found guilty of contempt. Although the trial court did give defendant ample opportunity to explain himself after the fact, such does not serve to correct the previous error." *Id*. at 472, 567 S.E.2d at 817.

In this case, like in *Peaches* and *Randell*, defendant was taken into custody without an opportunity to explain why sanctions should not be imposed. In fact, as the State acknowledges in a footnote in its brief, it is unclear from the record when exactly the trial court gave defendant notice of the contempt charge and communicated the sentence to defendant. It was not until after defendant was removed from the courtroom and the State attempted to clarify what happened that the trial court explained defendant was held in contempt and sentenced to 30 days.

The State does not even argue that the trial court gave defendant an opportunity to respond to the contempt before sanctions were imposed. Instead, the State asserts that "[e]ach time the court warned [defendant] about the impropriety of his conduct, [defendant] had an opportunity to address the court about why he should

not be punished . . . ." The State further asserts that "[e]ach time, [defendant] squandered that opportunity." We are not convinced defendant's opportunity to respond to the trial court's warnings is equivalent to an opportunity to respond to a contempt charge. The requirement that the trial court warn defendant of his improper conduct, *see* N.C. Gen. Stat. § 5A-12(b)(2) (2017), is separate from the summary notice of charges and the summary opportunity to respond requirements in N.C. Gen. Stat. § 5A-14(b). N.C. Gen. Stat. § 5A-14(b) requires that defendant have a summary opportunity to respond to the charge, not to the warning the court is required to give prior to the charge.

We note further that the record tends to show that the State questioned whether further notice of the contempt to defendant was necessary. The trial court, however, dismissed the State's inquiry by explaining that defendant had already been warned. As explained above, the requirement that the trial court warn defendant in N.C. Gen. Stat. § 5A-12(b)(2) does not take the place of the requirements in N.C. Gen. Stat. § 5A-14(b). In *Peaches*, this Court noted that "judges must . . . be punctilious about following statutory requirements." 139 N.C. App. at 587, 533 S.E.2d at 855. Because the record in this case does not show that the trial court followed the procedural requirements in N.C. Gen. Stat. § 5-14(b) for summarily holding defendant in direct criminal contempt, we must reverse the contempt order despite defendant's contemptuous conduct.

2. Witness Testimony

Defendant next argues that the trial court erred in allowing lay opinion testimony regarding the seriousness of the victim's injuries.

Generally, "[w]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). "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).

When there is no objection to the testimony below, this Court's review is limited to plain error. *See* N.C.R. App. P. 10(a)(4) (2018) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."); *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve . . . rulings on the admissibility of evidence.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because

> plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

Here, defendant first challenges the testimony of the alleged victim concerning her injuries. Specifically, the victim testified that the stab wound to her lower back "was like inches away from my spine. Any closer I would have been paralyzed or perhaps dead." Thereafter, over defendant's objection, the trial court allowed the victim to testify that the stab wound to her back was "close to my kidneys." In response to the State's question whether she still had concerns from her injuries, the trial court overruled defendant's objection and allowed the victim to testify that "I'm not sure if he punctured a -- one of my kidneys or not because my back's been hurting a lot." Defendant now asserts the trial court "should have sustained [his] objections and excluded [the victim's] testimony concerning the nature of the stab wound to her lower back[]" because "[the victim] could not have known the stab wound was inches from her spine and could have resulted in paralysis or death or that it may have punctured a kidney."

Defendant also challenges the testimony of Officer Jeff Harrison who testified that he observed the victim's stab wounds at the hospital. The officer opined that the stab wounds were serious, "especially the one just left of the spine[.]" Defendant was

not present in court during Officer Harrison's testimony and, thus, did not object to preserve the issue for appeal. Defendant, however, now contends Officer Harrison's opinion testimony was improper because it "was based on nothing more than his personal experience."

Upon review, we hold the trial court did not abuse its discretion in allowing either witnesses' testimony under Rule 701 of the North Carolina Rules of Evidence.

Rule 701 governs opinion testimony by a lay witness. It provides that a lay witness testifying "in the form of opinions or inferences is limited to those opinions and inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2017). The commentary to Rule 701 explains that limitation (a) requires the lay opinion to be based on firsthand knowledge or observation, and limitation (b) does not bar evidence that is known as a "shorthand statement of fact." *Id.*, Commentary.

> [Our courts have] long held that a witness may state the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time. Such statements are usually referred to as shorthand statements of facts.

State v. Brown, 350 N.C. 193, 203, 513 S.E.2d 57, 64 (1999) (internal quotation marks and citations omitted).

> Allowance of opinions in the form of a "shorthand

> statement of fact" is premised upon the notion that a description of all the underlying detailed facts that helped to form the witness' opinion may be possible, but is not practical due to the inherent difficulties in articulating one's analytical thought processes.

State v. Lesane, 137 N.C. App. 234, 244, 528 S.E.2d 37, 44, *appeal dismissed and disc. review denied*, 352 N.C. 154, 544 S.E.2d 236 (2000). "[A] lay witness may testify in the form of an opinion, despite the fact that his opinion may embrace an ultimate issue to be decided by the jury." *State v. Owen*, 130 N.C. App. 505, 515, 503 S.E.2d 426, 432 (citing N.C. Gen. Stat. § 8C-1, Rule 704 ("Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.")), *appeal dismissed and disc. review denied*, 349 N.C. 372, 525 S.E.2d 188 (1998).

"As long as the lay witness has a basis of personal knowledge for his opinion, the evidence is admissible." *State v. Bunch*, 104 N.C. App. 106, 110, 408 S.E.2d 191 194 (1991). "[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." *State v. Wright*, 151 N.C. App. 493, 495, 566 S.E.2d 151, 153 (2002). Here, the challenged testimony was based on the personal knowledge or perception of the testifying witnesses. Furthermore, the testimony is properly characterized as shorthand statements of fact, which are admissible under Rule 701. *See State v. Braxton*, 352 N.C. 158, 187, 531 S.E.2d 428, 445 (2000) ("[Rule 701] permits evidence which can be characterized as a 'shorthand statement of fact.' "). Because the challenged testimony was based on the perception

of the testifying witnesses and was helpful to the jury as shorthand statements of fact, the trial court did not abuse its discretion in allowing the testimony into evidence.

Nevertheless, even if any of the challenged testimony was improper lay opinion testimony, defendant has not established prejudice, *see State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 ("Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial."), *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001), much less plain error, *see Lawrence,* 365 N.C. at 518, 723 S.E.2d at 334. Defendant asserts "[t]he State's case for felony assault turned exclusively on whether [the victim's] injuries were serious" and contends the challenged testimony was "important and likely carried great weight with the jury" because, absent the testimony, "the jury likely would have voted not to convict on felony assault due to insufficient evidence that [the victim's] injuries were serious." Again, we disagree.

A serious injury is an essential element of AWDWISI, *see State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990), and insufficient evidence of a serious injury would be grounds for reversal. In this case, however, there was ample evidence that the victim was seriously injured without consideration of the challenged testimony. Evidence was presented that defendant stabbed the victim twice with a knife, once in the lower back and once in the upper thigh. The victim testified that

there was "a whole lot of blood" and her pain was "[a] ten" in a scale of one to ten with "ten being the worst pain I felt before." Officers who responded to the scene also testified that there was a significant amount of blood on the porch and on the victim, who was described as crying, shaking, and "fairly hysterical." Responding officers called EMS who treated the victim at the scene and then took the victim to the hospital where a CT scan was performed and the victim received thirteen stitches. Moreover, in addition to the challenged testimony, Officer Joseph Galyan, who was one of the first to arrive on the scene in response to the emergency call, testified that the victim appeared to have a serious injury. Defendant does not challenge Officer Galyan's testimony as improper lay witness opinion testimony on appeal.

The trial court did not abuse its discretion in allowing the testimony into evidence. But even if the trial court erred, defendant was not prejudiced because there was ample other evidence that the victim's injury was serious.

3. Charge Conference

Defendant's last argument on appeal is that the trial court erred by not allowing him to participate in the jury charge conference. Defendant contends that because of this error, he was deprived his statutory right to object to the proposed jury instructions or to propose his own instructions.

A charge conference is required by N.C. Gen. Stat. § 15A-1231(b), which provides as follows:

> Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

N.C. Gen. Stat. § 15A-1231(b) (2017).

Defendant contends it was error for the trial court to conduct the charge conference in this case without him being present because the statute requires him to be present and because the trial court did not provide him a chance to affirmatively waive his statutory right to attend the charge conference. We disagree.

"It is the right of an accused in every criminal prosecution to be present at each stage of his trial. However, that right may be lost by the consent or misconduct of the defendant." *State v. Sweezy*, 291 N.C. 366, 381, 230 S.E.2d 524, 534 (1976) (internal citation omitted). We hold defendant waived the right in this case by choosing not to be present during his trial.

As discussed above, defendant was initially removed from the courtroom during jury selection in accordance with N.C. Gen. Stat. § 15A-1032 for being disruptive. Following a recess in the proceedings for lunch, defendant was allowed to return to the courtroom. During a conversation with the trial judge, defendant

stated that he understood he would not be allowed to be a disruption and that he could proceed without disrupting the courtroom. Defendant was present for the rest of the first day of the trial, during which defendant participated in jury selection, made an opening statement to the jury, and cross-examined the State's first witness, the victim. At the conclusion of his cross-examination of the victim, defendant indicated he had "[n]o further questions at this time[,]" the State indicated there would be no re-direct, and the victim was dismissed from the witness stand. However, when the State attempted to call its next witness after a brief recess, defendant interrupted by stating that he wanted to recross-examine the victim. The trial court disallowed the defendant from questioning the victim any further at that time and the State proceeded to call its next witness. Despite defendant's disagreements with the trial court, defendant was present in the courtroom for the State's direct examination of its next witness, which was completed before court was recessed for the day.

When the proceedings resumed the following morning, defendant again asked to recross-examine the victim, explaining that he had questions he did not ask that were very important to his case. The trial court denied defendant the opportunity to further question the victim and defendant became upset. Defendant expressed his frustration that he did not have counsel, that he was not allowed a continuance, and

that he was not being given a fair trial. Defendant's frustration led to the following exchange:

> THE COURT: I just want you to follow the rules, that's all.
>
> [DEFENDANT]: The rules? The rules I'm asking you to cross-examine a witness that I did not get to ask the proper questions to that are detrimental to my case.
>
> THE COURT: All right.
>
> [DEFENDANT]: So if you're saying I can't help myself, then there's no need for me to be in this courtroom. That's exactly how I feel. That's the bottom line. If you can do this case without me, be -- be more than grateful. Because I'm not going to sit here and let you disrespect me like you're doing. In your eyes you're not because you're the judge, and in everybody else's eyes, which he could object to everything that I said yesterday and it was fine, but every time I object to something you sustained it.
>
> And now that I'm asking you to redirect some questions to a very important witness, you're telling me I don't have the right. I didn't do it the proper channels, okay, because I didn't and it wasn't done by the proper channels is because I do not and I am not an attorney. I'm not a lawyer. I chose to represent myself because I was given an attorney that was not doing his job. And you, yet again, on the record try to give me the same attorney that I fired. Now, if that doesn't look like to me discrimination, maybe racial discrimination because I'm Black, I'm not from North Carolina, or whatever your circumstances may be, but as far as I'm concerned, being an African-American, I feel as though you're showing me racial discrimination because I'm not a licensed Florida -- or North Carolina State Bar associate and because you know I do not have the proper representation and you are the one that told me everything has to be said on record.

So I want it to be noted on record that you're not giving me the opportunity to defend myself properly. And I feel as though, like you said numerous times, you would like for me to be in the courtroom, but there is no need for me to be here if I cannot do what I need to do to represent myself. So in saying --

THE COURT: So are you saying that you don't want to be in the courtroom for your trial, sir?

[DEFENDANT]: There's no need, that's what I'm saying, because you're not allowing me to represent myself the way I need to. And I need to --

THE COURT: All right. So --

[DEFENDANT]: -- redirect questions to [the victim]. That's the --

THE COURT: Are you choosing to not be present for your trial?

[DEFENDANT]: I'm choosing to not be in this courtroom when I'm not going to be able to address the issues that I need to to defend myself. That's what I'm doing.

THE COURT: All right. The Court is giving you an opportunity to --

[DEFENDANT]: No, no. No, no. The Court has already done that.

THE COURT: I'm sorry, I'm not interrupting you. Don't interrupt me.

[DEFENDANT]: Hey, look, this kangaroo court is ridiculous.

THE COURT: All right.

[DEFENDANT]: Okay.

THE COURT: So are you choosing to not be in the courtroom while your case is being heard?

[DEFENDANT]: You're choosing to not let me defend myself. Yes. Yes, that's what I'm doing then.

THE COURT: Okay. Very well.

[DEFENDANT]: If that's what you want to say.

THE COURT: Let the record reflect that the defendant has chosen --

[DEFENDANT]: You can sentence me right now and put an appeal and everything. Shit.

THE COURT: -- not to be present in the courtroom while his trial is being conducted. The Court --

[DEFENDANT]: Shh, aw, man.

THE COURT: -- further finds that he has been warned several times not to be belligerent, not to disrupt the Court. So at this time --

[DEFENDANT]: You know that's ridiculous, man --

THE COURT: -- the Court will ask the bailiffs --

[DEFENDANT]: Shit.

THE COURT: -- to take him out.

[DEFENDANT]: That's shit.

Immediately after defendant left the courtroom, the trial court indicated that "at such time as [defendant] indicates that he's willing to have a good attitude, he's welcome to come back." The court then made findings in the record.

Before the trial resumed, the bailiff indicated that he told defendant that he's allowed to come back and defendant "said he's not coming back." The trial court then stated that "[w]e do need to give him the opportunity to change his mind. So if he changes his mind, the Court is more than happy for him to come back if he can behave himself." When the jury returned and the proceedings resumed, the trial court instructed the jury on defendant's absence. The State then presented the rest of its evidence without defendant present.

At the end of the State's case, the trial court put into the record that the bailiff had informed defendant that "at any time he decided he wanted to come back to the courtroom we would come and get him. Defendant advised the only way he would come back is if he could cross-examine the [victim,]" who already testified and who defendant already cross-examined. The trial court began to go through the jury instructions immediately thereafter. Before addressing the instructions for the substantive offense, the trial court took a recess. Upon resuming the charge conference, the State indicated that it wished for defendant to be updated in accordance with N.C. Gen. Stat. § 15A-1032. The trial court agreed and provided a note from the State to defendant indicating that the State had finished its case,

defendant can move to dismiss, defendant can put on evidence, jury instructions would be addressed, and closing arguments would be given. The bailiff delivered and explained the note to defendant, who responded with a note stating, "[y]ou have done what you wanted. I told you, if I cannot cross [the victim] again, do as you wish, I will appeal, and you didn't call all the witnesses." The bailiff reiterated that defendant was not coming back and the charge conference continued. At the urging of the State, the trial court made a motion to dismiss on behalf of defendant, which the trial court denied.

We hold that it is clear from the circumstances in this case that defendant waived his right to be present at trial. Defendant indicated he did not want to be present and the trial court had him removed. Defendant was given various opportunities to return to the courtroom and was updated on the status of his case. Defendant, however, made it clear that he would not return unless he was allowed to recross-examine the victim. Defendant cannot now claim the trial court erred by proceeding in his absence when he waived his right to be present.

III. Conclusion

For the reasons stated above, the trial court erred in sentencing defendant to a term of 30 days for direct criminal contempt without providing defendant a summary opportunity to explain why sanctions should not be imposed. The trial

court did not err by allowing the challenged testimony regarding the victim's injuries into evidence or by proceeding with the charge conference in defendant's absence.

NO ERROR IN PART, REVERSED IN PART.

Chief Judge McGEE and Judge ELMORE concur.

Report per Rule 30(e).