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NO. COA06-1693

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 05 CRS 24646
05 CRS 84003
05 CRS 84004

TERRY TAYLOR MANN,
Defendant.

Court of Appeals

Appeal by defendant from judgments entered 17 April 2006 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 20 September 2007.

Slip Opinion

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the State.

Nora Henry Hargrove for defendant-appellant.

GEER, Judge.

Defendant Terry Taylor Mann appeals from his convictions of two counts of indecent liberties with a child, two counts of first degree sex offense, and one count of crime against nature. Defendant primarily argues that the trial court committed plain error by admitting victim impact evidence at trial and by admitting evidence suggesting that defendant had harmed two other boys. As to the victim impact evidence, defendant cannot prove prejudice because he has not challenged the admission of other comparable evidence. As to the latter evidence of other conduct, defendant invited any error, thereby precluding appellate review. We agree

with defendant, however, that his sentences must be vacated because the written judgments are substantively different than the sentences imposed in open court.

Facts

The State presented evidence that tended to show the following facts. Defendant is a long distance truck driver and the step-uncle of "Charlie."[1] When Charlie was about 13 years old, defendant would frequently pick up Charlie and his stepbrother, who was 15 years old, to take them for rides in defendant's 18-wheeler truck. They would go out to eat, visit the mall, or park somewhere and wrestle in the truck and play video games.

In August or September 2003, when Charlie was 14 years old, defendant picked up Charlie one day after school as he normally did, except on this particular occasion, he did not also pick up Charlie's stepbrother. Defendant drove to a truck stop, told Charlie to get into the back of the truck, closed the privacy curtain across the windows, undressed Charlie, and performed oral sex on Charlie. Defendant instructed Charlie not to say anything or he would regret it.

From that date until February 2004, defendant did the same thing once a week, although at some point defendant also started masturbating while "playing" with Charlie's penis. On the last occasion, in February 2004 when Charlie was 15 years old, defendant straddled Charlie in such a way that Charlie's penis penetrated

[1]The pseudonym "Charlie" will be used throughout the opinion to protect the child's privacy and for ease of reading.

defendant's anus. Defendant again told Charlie that if he told anyone, he would regret it; defendant also threatened Charlie's grandmother.

Although Charlie did not, at first, tell anyone about what defendant had done to him, he would not have any more contact with defendant. One evening, however, when Charlie was home alone, defendant began banging on the door and yelling for Charlie to let him in the house. Charlie called his father at work, and his father instructed Charlie to call the police. Defendant left the house prior to the arrival of the police.

On 3 June 2005, Charlie and his stepmother met with a detective and told him everything that defendant had done. On 6 September 2005, defendant was indicted for (1) one count each of indecent liberties with a child and first degree sex offense with an offense date of February 2004, (2) one count each of indecent liberties with a child and first degree sex offense with an offense date of September 2003, and (3) one count of crime against nature. Defendant was tried on these offenses on 10 April 2006. At trial, defendant presented evidence that tended to show that he engaged in only innocent activities with Charlie, that he never performed oral sex, and that defendant could not have had anal sex because he had hemorrhoids at the time that the incident allegedly occurred. Defendant also testified that Charlie initiated contact with defendant multiple times after February 2004.

On 13 April 2006, the jury found defendant guilty of all the charges. The trial court consolidated the convictions of one count

of first degree sex offense, one count of indecent liberties with a child, and a crime against nature into one judgment and imposed a sentence of 213 to 265 months imprisonment. The trial court consolidated the remaining counts of first degree sex offense and indecent liberties with a child and imposed a second sentence of 213 to 265 months imprisonment. Although the trial court did not indicate in open court whether the sentences were concurrent or consecutive, the written judgment stated that they were to run consecutively. Defendant timely appealed to this Court.

I

Defendant contends that the trial court committed plain error by admitting Charlie's statements to his counselor regarding the impact of defendant's conduct on him. Defendant argues that the evidence constituted inadmissible victim impact testimony that went beyond corroboration and was highly prejudicial.

At trial, Charlie's counselor testified, without any objection, that Charlie stated: "I want him to go away for a very very very long time. I want him to pay for what he's put me through. He's done a whole lot to me, not just mentally but emotionally and everything, especially with me carrying this on my chest for a long time." In addition, the State introduced through the counselor three writing exercises completed by Charlie during his counseling sessions that described three different scenarios and Charlie's feelings resulting from those situations.

The first scenario addressed Charlie's feelings when someone he knows walks by him and doesn't say "hi." The second scenario

discussed how Charlie felt the first time he saw defendant after having disclosed to the detective what had happened. The third scenario dealt with Charlie's feelings during the last sexual encounter with defendant that involved anal penetration. Defense counsel did not object to the admission of any of this evidence at trial.

In criminal cases, an evidentiary question that was not properly preserved by objection at trial "may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(c)(4). "Under a plain error analysis, defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

Assuming, without deciding, that admission of the above evidence was error, defendant has failed to demonstrate that the jury would probably have reached a different result in the absence of the disputed evidence. This evidence paralleled testimony by Charlie himself regarding his feelings resulting from the sexual abuse. Defendant did not object at trial to Charlie's testimony and has not challenged that testimony on appeal. Defendant has not explained why, given Charlie's own testimony, the exclusion of the counselor's evidence would likely have led to a different verdict. *See State v. Trull*, 349 N.C. 428, 456, 509 S.E.2d 178, 197 (1998) ("Defendant can show no prejudice where evidence of a similar

import has also been admitted without objection and has not been made the subject of an assignment of error on appeal."), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80, 120 S. Ct. 95 (1999); *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 517 (1995) (declining to hold that trial court should have intervened *ex mero motu* in closing argument when defendant waived any objection by failing to object to the admission of evidence on the subject at issue when elicited during trial). Defendant has, therefore, failed to demonstrate plain error.

II

Defendant next contends that the trial court committed plain error in admitting evidence of statements made by Charlie that suggested defendant had harmed other boys. We hold that any error was invited and, therefore, cannot be a basis for setting aside defendant's convictions.

At the beginning of the trial, defendant made a motion in limine to exclude testimony relating to charges not involving sexual conduct that resulted from a criminal investigation in Alamance County. Officers had learned of Charlie's name in the course of that investigation — Charlie and his parents had not initiated contact with detectives, but rather had been contacted first by the detectives conducting the other investigation. The trial judge granted the motion although he indicated that he would allow the State to elicit testimony that the detective first came to speak with Charlie as a result of an investigation.

During the trial, the State introduced the recording of an interview that Charlie had with his counselor. While playing the tape for the jury, the State stopped just before Charlie made the statements that were subject to the court's ruling on the motion in limine. Following an unrecorded bench conference, the trial judge described the substance of the bench conference for the record:

> Let the record reflect, please, that all the jurors have left the courtroom. The Court has earlier ruled that there would be no reference to how Detective Palmer [sic] first came to speak with [Charlie] except that he was in an investigation. And I understand from the transcript of [sic] interview that the State has now — the recording of the interview that the State is now playing, and by looking at the transcript of that recording, that on page 2 of the transcript something is said by [Charlie], who is being interviewed, about — the sentence as I read it is [Charlie's] response to how is it that Detective Baldwin came to question [Charlie], but [Charlie] responds, "Hmm. My cousin . . . and some guy . . . had said something about [defendant] was choking them and stuff so I guess they said my name. That's how he came and questioned me." And as I understand it from our bench conference, Mr. Baucino, [defendant] does not object to the jury hearing that part of the recorded interview. He does not withdraw his objection to any further detail about the other investigation.

In response to the trial judge's question whether his description of the conference was correct, defendant's counsel, Mr. Baucino, stated: "That is a correct assessment; yes, sir."

The trial judge then asked whether the State wished to be heard further. The prosecutor indicated that she thought the statement just discussed was the only reference to the cases in

Alamance County, but that she was "trying to keep [her] eyes open." Defense counsel then added:

> [DEFENSE COUNSEL]: Your Honor, there is another section, I can't find it either but I've read it where [Charlie] says something that refers to [his cousin]. Says something to the effect of well, it happened to me, it also happened to him.
>
> [PROSECUTOR]: I do recall reading that.
>
> [DEFENSE COUNSEL]: And if that's the other thing that Mrs. Crump is referring to, I don't have any objection to that.
>
> THE COURT: You don't have any objection to that either?
>
> [DEFENSE COUNSEL]: No, sir.

Defense counsel also stated that he was in agreement with allowing the jury to have a written transcript of the entire recorded interview to read as the tape was played.

We need not address whether the admission of this evidence was plain error because "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2007). It is well established that "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) (holding error was invited error and defendant waived right to appellate review when defendant failed to object to admission of evidence at trial and defendant requested exhibit be published to jury despite court's warning that part of

statement had not been properly redacted), *disc. review denied*, 355 N.C. 216, 560 S.E.2d 141 (2002).

In this case, defendant not only expressly withdrew his objection to the reference to the other boys' being choked, but he also called to the court's attention the comment relating to Charlie's cousin and specifically withdrew as well any objection to the admission of that statement. Then, defense counsel agreed to allow the jury to have a written transcript of the interview that included those statements. Consequently, any error was invited, and defendant is precluded from appellate review regarding the admission of the statements contained in the recording.

III

With respect to each of the previous arguments, defendant alternatively contends that he was deprived of effective assistance of counsel in violation of the Sixth Amendment. The United States Supreme Court has held that ineffective assistance of counsel ("IAC") claims should rarely be raised on direct appeal because

> [i]f the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse.

Massaro v. United States, 538 U.S. 500, 505, 155 L. Ed. 2d 714, 720, 123 S. Ct. 1690, 1694 (2003).

Our Supreme Court, in a decision prior to *Massaro*, held that IAC claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is

required . . . ." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002). If, however, "the reviewing court determine[s] that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.* at 167, 557 S.E.2d at 525.

Here, we cannot determine from the record whether defense counsel had a strategic reason in not objecting to the evidence of the effect of the alleged abuse on Charlie and in withdrawing any objection to statements regarding other boys. Particularly with respect to the tape recording, the record indicates that counsel was fully familiar with the recording and made a conscious decision to withdraw his objections to portions of that recording. We cannot determine whether that decision constituted IAC without knowing the trial counsel's reasoning. We, therefore, conclude that defendant's IAC claim cannot be decided on the existing record, and we dismiss this assignment of error without prejudice to defendant's right to reassert his claims in a motion for appropriate relief.

IV

Lastly, defendant contends the trial court erred by imposing consecutive sentences in its written judgments. The trial court consolidated defendant's offenses into two judgments. The court then determined that defendant had no prior points for purposes of

calculating his prior record level and announced, in open court, that defendant was being sentenced in the presumptive range of 213 to 265 months imprisonment for each judgment. In the sentencing hearing, while defendant was present, the court did not specify whether these sentences were to run concurrently or consecutively. The court's written judgment, however, indicated that defendant's sentences would run consecutively.

The State concedes that this appeal is indistinguishable from *State v. Crumbley,* 135 N.C. App. 59, 519 S.E.2d 94 (1999). In *Crumbley*, as in this case, the trial court imposed multiple sentences on the defendant, but in open court did not indicate whether those sentences should run concurrently or consecutively. *Id.* at 61, 519 S.E.2d at 96. Subsequently, a written judgment was entered stating that the sentences would run consecutively. *Id.* This Court observed that the legal effect of the oral judgment was that the prison sentences should run concurrently. *Id.* at 67, 519 S.E.2d at 99. *See* N.C. Gen. Stat. § 15A-1354(a) (2007) ("If not specified or not required by statute to run consecutively, sentences shall run concurrently.").

According to *Crumbley*, the written judgment's "substantive change in the sentence [to consecutive sentences] could only be made in the Defendant's presence, where he and/or his attorney would have an opportunity to be heard." 135 N.C. App. at 67, 519 S.E.2d at 99. *Crumbley* directs that "[b]ecause there is no indication in this record that Defendant was present at the time the written judgment was entered, the sentence must be vacated and

this matter remanded for the entry of a new sentencing judgment." *Id.* at 66, 519 S.E.2d at 99. In this case, we must, therefore, vacate the sentences and remand for resentencing.

No Error; sentence vacated and remanded.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).