NO. COA06-840

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

STATE OF NORTH CAROLINA

v. Craven County
No. 05 CRS 52657
05 CRS 52658

ROBERT W. DENNIS

Appeal by defendant from judgment entered 19 September 2005 by Judge Paul L. Jones in Craven County Superior Court. Heard in the Court of Appeals 22 January 2007.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State.

Anthony M. Brannon for defendant-appellant.

MARTIN, Chief Judge.

Defendant pled guilty on 19 September 2005 to two counts of first degree sex offense with a child. The plea agreement provided that the two counts be consolidated for judgment into one, that sentencing be in the Court's discretion and that defendant will pay for victim's uninsured medical and psychological expenses related to the crime from his military retirement.

Defendant waived formal presentation of the evidence and stipulated to a factual basis for the plea. The prosecutor summarized the evidence as follows. On 11 May 2005 the prosecuting witness, an eleven-year-old girl, complained to her mother that

pain in her vaginal area prevented her from sleeping the previous night. The mother took the child to a gynecologist, who diagnosed the child as having an outbreak of genital herpes. The child told her mother that defendant, who was the mother's live-in boyfriend, had been "touching her." The mother took the child to the police department, where the child told a police officer that defendant had been performing oral sex on her for years. She related that the sexual activity would occur when her mother traveled out of town and that defendant would have her come into the bedroom, remove her clothing, and lie on the bed. Defendant would then remove his clothing, lick her vagina and breasts, and masturbate himself. One time she performed oral sex on defendant. The police officer then interviewed defendant, who confessed to having performed oral sex on the victim six or seven times over a two-year period of time. The child's mother also related that she had been out of town three times during the month of April. The mother also subsequently tested positive for the presence of the herpes virus. Defendant did not object to the prosecutor's summary of the evidence.

Judge Paul Jones consolidated the offenses and entered an active sentence within the presumptive range. The court also ordered restitution for the use and benefit of the victim in the amount of $954.88 and any reoccurring medical expenses not covered by insurance.

On 29 September 2005 defendant filed a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1414(b)(4) contending the

trial court improperly found as an aggravating factor that defendant inflicted a serious, permanent and debilitating injury to the victim by transmitting the herpes virus to her. He alleged there was no competent evidence to support a finding that he infected the victim with the herpes virus. He also sought to be tested for the herpes virus.

Judge Benjamin Alford conducted a hearing on the motion on 2 February 2006. Judge Alford found that although Judge Jones may have articulated findings of factors in aggravation in open court, Judge Jones stated in the written judgment that he found no factors in mitigation or aggravation because the sentence imposed is within the presumptive range. Stating the oral statement was surplusage, Judge Alford accordingly denied the motion. Judge Alford also ruled that he did not have the authority to order the Department of Correction to test defendant for herpes. Defendant gave notice of appeal in open court from the order denying the motion and the judgment.

By the sole assignment of error brought forward and argued in his brief, defendant contends that the "trial court erred by ordering Defendant to pay restitution for injuries to the complaining witness related to a sexual [sic] transmitted disease where the State offered no evidence that the complaining witness contracted such a disease from Defendant."

A sentencing court is authorized to require the defendant to "make restitution to the victim or the victim's estate for any injuries or damages arising directly and proximately out of the

offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34.(c) (2005). An order of restitution must be supported by evidence adduced at the trial or sentencing hearing. *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560, *aff'd*, 318 N.C. 502, 349 S.E.2d 576 (1986).

Defendant argues the evidence is insufficient to show that the victim contracted the disease of herpes from defendant. We disagree. The victim, a young child, identified only defendant and nobody else as the perpetrator of sexual acts upon her. The sexual abuse of the child first came to the child's mother's attention when the child suffered an outbreak of genital herpes in her vaginal area after having engaged in sexual activity with defendant. The victim's mother, with whom defendant had a sexual relationship, also tested positive for the herpes virus. Based upon the foregoing evidence, a finding could reasonably be made that the victim contracted the herpes virus as a result of defendant's perpetrating upon the victim the sexual acts forming the basis for the charges.

Defendant also argues the amount of restitution awarded by the court is not supported by the evidence. We note that defendant has not made an assignment of error to the amount of restitution ordered. As this argument is not raised by an assignment of error, it is not properly before us. *State v. Fluker*, 139 N.C. App. 768, 776-77, 535 S.E.2d 68, 74 (2000). Moreover, defendant did not object to the amount awarded although he had the opportunity to raise the issue in the motion for appropriate

relief. Defendant's failure to raise this issue in the court below results in a waiver of appellate review. *State v. Kimble,* 141 N.C. App. 144, 147, 539 S.E.2d 342, 344-45 (2000), *disc. review denied,* 353 N.C. 391, 548 S.E.2d 150 (2001). This argument is dismissed.

We find no error.

No error.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).