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NO. COA11-592
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v.

Wake County
No. 10 CRS 205709

KEVIN BRANCH

Appeal by defendant from judgment entered 9 November 2010 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 27 October 2011.

Roy Cooper, Attorney General, by Harriet F. Worley, Assistant Attorney General, for the State.

J. Edward Yeager, Jr., for the defendant.

THIGPEN, Judge.

Kevin Branch ("Defendant") appeals from a conviction of violating a protective order. We must decide whether the trial court erred by (I) allowing testimony about Defendant's previous acts of violence and his drug problem and (II) telling Defendant it could reopen the case to allow a witness to testify again. After a review of the record on appeal, we find no error.

At trial, the State's evidence tended to show that Michelle Morgan-Lopez and Defendant began a romantic relationship in September 2007. The couple broke up in March 2008, after an incident of domestic violence in which Ms. Morgan-Lopez testified over objection that Defendant assaulted her and was removed from her home by police, but broke into the home and assaulted her again by grabbing her neck and slamming her into the hall closet. Ms. Morgan-Lopez also testified over objection that Defendant "had a drug problem" and that when they were together "money kept disappearing[.]" Following the March 2008 incident, Ms. Morgan-Lopez obtained her first domestic violence protective order against Defendant.

After the March 2008 incident, the couple rekindled their relationship. However, Ms. Morgan-Lopez stated the couple's relationship ended on 18 May 2008, when Defendant grabbed her hair, beat her in the head and face, and broke her nose. In May 2009, approximately two weeks after the expiration of the first domestic violence protective order, Ms. Morgan-Lopez began receiving harassing telephone calls from Defendant, who was incarcerated at the time. Ms. Morgan-Lopez applied for a new domestic violence protective order against Defendant which was issued on 26 May 2009.

Ms. Morgan-Lopez testified that she received three more telephone calls from Defendant on 4 March 2010. Ms. Morgan-Lopez recorded the last two calls, and the recordings were played for the jury at trial. Ms. Morgan-Lopez stated she was able to identify the caller as Defendant based on his tone of voice and what he was saying. Ms. Morgan-Lopez reported the 4 March 2010 telephone calls to police.

Defendant was charged with violating a protective order. Following a jury trial on 9-10 November 2010, the jury found Defendant guilty, and the trial court entered a judgment sentencing Defendant to 7-9 months imprisonment. Defendant appeals from this judgment.

I. Admission of Evidence

Defendant first contends the trial court erred by allowing Ms. Morgan-Lopez to testify about Defendant's previous acts of violence against her and his drug problem because the probative value of the testimony was substantially outweighed by its prejudicial effect. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence provides that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be

admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009). Even if evidence is admissible pursuant to Rule 404(b), it may be excluded pursuant to Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2009). "The determination of whether relevant evidence should be excluded under Rule 403 is a matter that is left in the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion." *State v. Lanier*, 165 N.C. App. 337, 345, 598 S.E.2d 596, 602 (2004) (quotation and quotation marks omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Here, Defendant does not contend Ms. Morgan-Lopez's testimony was irrelevant or that it was inadmissible under Rule 404(b); rather Defendant only argues "whatever probative value there might have been in the extensive testimony regarding the history of domestic violence" was substantially outweighed by its prejudicial effect. Specifically, Defendant challenges Ms.

Morgan-Lopez's testimony that Defendant assaulted her; broke into her home; had a drug problem; stole money from her; broke her nose; threatened her; and made harassing telephone calls in 2009.

Ms. Morgan-Lopez's testimony regarding Defendant's previous acts of violence against her and his drug use was probative in that it tended to "establish[] the chain of circumstances or context of the charged crime . . . [and] enhance the natural development of the facts[.]" *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 853 (citations omitted), *cert. denied*, 516 U.S. 994, 116 S. Ct. 530, 133 L. Ed. 2d 436 (1995). Accordingly, the trial court's decisions to admit Ms. Morgan-Lopez's testimony were not "manifestly unsupported by reason[,]" *White*, 312 N.C. at 777, 324 S.E.2d at 833 (citation omitted), and we cannot conclude the trial court abused its discretion by allowing the testimony.

II. Statements by Trial Court

Defendant next contends the trial court erred by telling him it could reopen the case to allow Ms. Morgan-Lopez to testify regarding whether Defendant knew about the domestic violence protective order. We disagree.

"An accused is not entitled to a new trial because of remarks of the trial judge unless they tend to prejudice defendant in light of the circumstances in which they were made, and the burden of showing that he had been deprived of a fair trial by such remarks is upon the defendant." *State v. Greene*, 285 N.C. 482, 489, 206 S.E.2d 229, 234 (1974) (citations omitted). Our Supreme Court has explained a trial court's power to reopen a case:

The trial judge has the discretionary power to permit the introduction of additional evidence after a party has rested its case and can reopen a case for additional testimony after arguments to the jury have begun. Also, the manner and presentation of evidence is largely within the discretion of the trial judge and his control of the case will not be disturbed absent a manifest abuse of discretion.

State v. Howard, 320 N.C. 718, 724, 360 S.E.2d 790, 793 (1987) (internal citations omitted); see also N.C. Gen. Stat. § 15A-1226(b) (2009) ("The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict.").

Here, the following colloquy occurred at trial after the close of all the evidence as the trial court discussed jury instructions with the attorneys for the State and for Defendant:

THE COURT: Ms. Fetter, have you had a chance

to look at the draft?

MS. FETTER: Yes, your Honor. I think, your Honor, the only thing is with respect to the instruction on the DVPO violation, one of the elements, the third element, the defendant did so knowingly, there is a parenthetical in the instruction that defines so to speak knowingly, where a domestic violence protective order has been served on a defendant, you may presume that the defendant knew the specific terms of the domestic violence protective order.

THE COURT: There's no evidence that it's been served. Do you know of any?

. . .

MS. FETTER: When we stipulated to the order, I just presumed that that was a part of the stipulation, because we -- we stipulated to the fact that it was a valid domestic violence protective order. Ms. Morgan-Lopez was present at the hearing, and I believe would tell the Court, if we put her back on the stand, that [Defendant] was there, as well at the domestic violence protective order hearing. . . . In my discussions with [Defendant's attorney] prior to trying this case, . . . we discussed that that wasn't actually something that was going to be necessary because [Defendant] w[as] stipulating to the order, the validity of the order and that information.

THE COURT: Was he present at the hearing?

MS. FETTER: He was present at the hearing, your Honor. They actually continued it a number of times. He was in custody the entire time, and they brought him over from the Wake County Jail.

THE COURT: Is that in evidence?

MS. FETTER: I would argue that that was part of the stipulation that was made to you when we stipulated that a valid domestic violence protective order had issued.

. . .

THE COURT: Is the -- is the defendant willing to stipulate that he has been served with it?

MR. BLUM: Well -

THE COURT: I'm allowed to put the victim back on the stand to testify.

MR. BLUM: Rather than that do that, we'll stipulate service, your Honor.

THE COURT: All right. I will include that.

Defendant contends the trial court raised the issue of whether the State needed to show Defendant had knowledge of the domestic violence protective order *sua sponte* and "threatened" to allow the State to reopen its case if Defendant did not stipulate that he had been served with the order. A review of the trial transcript, however, shows the State initially raised the issue of whether Defendant had knowledge of or was served with the domestic violence protective order after reviewing the draft jury instructions. Furthermore, the trial court did not "threaten" Defendant if Defendant did not stipulate that he had been served with the order; rather, the trial court asked if

Defendant was willing to stipulate to service and told Defendant the court could put Ms. Morgan-Lopez back on the stand to testify.

We conclude the trial court's question and comment were not error. Defendant had already stipulated that a valid domestic violence protective order was in effect on 4 March 2010. Specifically, Defendant's attorney made the following statement to the trial court during pretrial motions on 9 November 2010:

[B]efore going into argument here, it should be noted that all parties have signed a stipulation to the domestic violence protective order. What we have stipulated to is that there is -- there was a domestic violence protective order in place on the date of the alleged offenses and there was a valid order and that it would have applied to Mr. Branch.¹

Furthermore, we do not believe the trial court erred by informing Defendant that it could allow Ms. Morgan-Lopez to testify again, as "[t]he judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict." N.C. Gen. Stat. § 15A-1226(b); *see also* State v. Wise, 178 N.C. App. 154, 163, 630 S.E.2d 732, 737 (2006)

¹The Stipulation to Domestic Violence Protective Order dated 9 November 2010 and signed by Assistant District Attorney Kristen Fetter, Defendant, and Defendant's attorney is included in the record on appeal and states "that on the offense date of March 4, 2010, a valid Domestic Violence Protective Order was in effect" between Ms. Morgan-Lopez and Defendant.

(holding that "the judge did not depart from his neutral role as a judicial officer by discussing the law with the attorneys"). Accordingly, considering the circumstances in which the trial court's question and comment were made, the trial court did not err.

NO ERROR.

Judges HUNTER, JR. and McCULLOUGH concur.

Report per Rule 30(e).