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NO. COA13-97
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

STATE OF NORTH CAROLINA

v. Nash County
Nos. 11 CRS 54616-17

JAMES LEE PARKER

Appeal by defendant from judgments entered 9 August 2012 by Judge Walter H. Godwin, Jr., in Nash County Superior Court. Heard in the Court of Appeals 23 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

ERVIN, Judge.

Defendant James Lee Parker appeals from judgments sentencing him to a term of 317 to 390 months based upon his conviction for sexual offense against a child in violation of N.C. Gen. Stat. § 14-27.7A(a), and to two consecutive terms of 21 to 26 months imprisonment based upon his convictions for two counts of taking indecent liberties with a child. On appeal, Defendant contends that the trial court erred by sustaining the

State's objection to an assertion made during his closing argument and by ordering that he enroll in lifetime satellite-based monitoring. After careful consideration of Defendant's challenges to the trial court's judgments and related orders in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed and that the trial court's satellite-based monitoring orders should be reversed and that these cases ~~that case~~ should be remanded to the Nash County Superior Court for a new satellite-based monitoring hearing.

I. Factual Background

A. Substantive Facts

1. State's Evidence

In the summer of 2011, T.L.,¹ who was thirteen years old, and her brother, J.L.,² who was twelve years old, lived with Defendant, who is her father, and his girlfriend, Charita Lewis. According to Tiffany, Defendant touched her in the area of her genitals and rubbed against her body on a number of occasions during that period. On the first of these occasions, Tiffany

¹T.L. will be referred to throughout the remainder of this opinion as Tiffany, a pseudonym used for ease of reading and to protect the child's privacy.

²J.L. will be referred to throughout the remainder of this opinion as John, a pseudonym used for ease of reading and to protect the child's privacy.

had come home from a park near Defendant's residence. After Tiffany complied with Defendant's instruction to "come here, because he had to check something," Defendant touched Tiffany's "private area" outside of her underwear and then inserted his fingers inside and rubbed her vagina for a few seconds. On another occasion, when Tiffany was leaving the bathroom near Defendant's bedroom, she found Defendant standing on the other side of his bed. After Tiffany returned to the bathroom and then emerged four or five minutes later, Defendant was still standing on the other side of his bed. As Tiffany began to walk toward the living room, Defendant pulled her pants down and rubbed the exterior of her vagina. One night, when Tiffany and John were sleeping in their usual place on the floor, Tiffany felt something on her breast, woke up, and saw Defendant getting up. On the following morning, as Tiffany was coming in from the park, Defendant pulled her pants down and told her that he was "trying to see if [she was] ready to have sex." After making this statement, Defendant pulled his own pants down and rubbed his penis against her buttocks. Although Defendant told Tiffany to refrain from telling anyone about these incidents, she told her brothers about Defendant's conduct and they told other family members, including Tiffany's mother. At the time that he was questioned by investigating officers, Defendant expressed

surprise at Tiffany's accusations, denied that Tiffany's claims had any validity, and suggested that Tiffany and her mother, Talisha L., were angry at him for sending the children back to their mother's residence earlier than anticipated.

2. Defendant's Evidence

Ms. Lewis testified that, during the time period in question, she was at the home that she shared with Defendant during the day and that Defendant worked at Rocky Mount Cord making lawn mower wires from 7:00 a.m. to 3:30 p.m. on weekdays. Ms. Lewis denied ever leaving Tiffany at home alone with Defendant and stated that she had no personal knowledge concerning Tiffany's allegations against Defendant despite being "there all the time."

B. Procedural History

On 12 September 2011, warrants for arrest charging Defendant with two counts of first degree sexual offense, three counts of taking indecent liberties with a child, and one count of attempted sexual offense against a child while occupying a parental role were issued. On 5 December 2011, the Nash County grand jury returned bills of indictment charging Defendant with two counts of sexual offense against a child in violation of N.C. Gen. Stat. § 14-27.7A(a) and four counts of taking indecent liberties with a child. On 3 January 2012, the State

voluntarily dismissed the charges of first degree sexual offense and attempted sexual offense against a child while occupying a parental role. On 6 August 2012, the State voluntarily dismissed one of the two sexual offense against a child in violation of N.C. Gen. Stat. § 14-27.7A(a) charges.

The remaining charges against Defendant came on for trial at the 6 August 2012 criminal session of the Nash County Superior Court before the trial court and a jury. During the trial, Tiffany's mother testified on behalf of the State. On cross-examination, Tiffany's mother admitted that she had previously been convicted of food stamp fraud. In the course of his closing argument, Defendant's trial counsel told the jury:

The mother too testified obviously the mother whose child was abused as my client - - as her daughter is alleged to have been abused, would have a right to be upset about it. But it was pretty obvious that she was angry with him since long before that. I mean, she was really angry. A two-time convicted felon. Of course, if you have credit card -- if you have foodstamp fraud, that means you've lied, you've cheated and you stole.

At that point, the trial court sustained the State's objection to the argument being made by Defendant's trial counsel.

On 8 August 2012, the jury returned verdicts convicting Defendant of one count of sexual offense against a child in violation of N.C. Gen. Stat. § 14-27.7A(a) and two counts of

talking indecent liberties with a child and acquitting Defendant of the other two counts of taking indecent liberties with a child. At the conclusion of the ensuing sentencing hearing, the trial court entered judgments sentencing Defendant to a term of 317 to 390 months imprisonment based upon his conviction for sexual offense against a child in violation of N.C. Gen. Stat. § 14-27.7A(a), to a consecutive term of 21 to 26 months imprisonment based upon one of his convictions for taking indecent liberties with a child, and to a consecutive term of 21 to 26 months imprisonment based upon Defendant's other conviction for taking indecent liberties with a child. The trial court also entered orders based upon all three convictions requiring Defendant to enroll in satellite-based monitoring for the remainder of his natural life following his release from imprisonment. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Defendant's Closing Argument

In his challenge to the trial court's judgments, Defendant argues that the trial court erred by sustaining the State's objection to the comments that his trial counsel made during closing arguments to the effect that Tiffany's mother had "lied," "cheated," and "stole." According to Defendant, these

comments had adequate evidentiary support and addressed a relevant subject, which was the credibility of Tiffany's mother. We do not find this argument persuasive.

"[T]he conduct of arguments of counsel to the jury must necessarily be left largely to the sound discretion of the trial judge." *State v. Robinson*, 339 N.C. 263, 281, 451 S.E.2d 196, 207 (1994) (quotation marks and citation omitted), *cert. denied*, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995). A trial court abuses its discretion when its ruling "could not have been the result of a reasoned decision." *State v. Simmons*, 205 N.C. App. 509, 513, 698 S.E.2d 95, 99 (2010) (quotation marks and citation omitted).

According to N.C. Gen. Stat. § 15A-1230(a):

During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

Although counsel are permitted wide latitude in jury arguments, "the permissible scope of counsel's argument to the jury is not unlimited." *State v. Whiteside*, 325 N.C. 389, 398, 383 S.E.2d 911, 916 (1989) (citations omitted). "It is improper for a

lawyer in his argument to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar." *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 345 (1967).

After carefully reviewing the record, we conclude that the trial court did not abuse its discretion by sustaining the State's objection to the statement made by Defendant's trial counsel that Tiffany's mother had "lied," "cheated," and "stole." Although the argument in question may have been intended to accomplish a legitimate purpose and although there would not have been an error of law inherent in a decision to overrule the State's objection, the trial court could have reasonably interpreted the argument in question as an impermissible assertion that Tiffany's mother was a liar. In addition, the jury's ability to evaluate the credibility of Tiffany's mother was not impaired by the trial court's ruling given that the members of the jury heard Tiffany's mother admit that she had been convicted of food stamp fraud and given that deception and dishonesty is inherent in any activity that is labeled as fraudulent. As a result, the trial court did not abuse its discretion by sustaining the State's objection to the challenged argument.

B. Satellite-Based Monitoring

Secondly, Defendant contends that the trial court erred by ordering him to enroll in satellite-based monitoring for the remainder of his natural life following his release from prison. Although Defendant acknowledges that he failed to give written notice of appeal from the relevant satellite-based monitoring orders, he contends that the trial court lacked the authority to require him to enroll in lifetime satellite-based monitoring and has requested that we grant his petition for the issuance of a writ of *certiorari* pursuant to N.C.R. App. P. 21(a) so as to permit appellate review of his challenge to these orders on the merits. As a result, in the exercise of our discretion, we allow Defendant's *certiorari* petition, *State v. Brooks*, 204 N.C. App. 193, 693 S.E.2d 204 (2010), and conclude that the challenged satellite-based monitoring orders should be reversed and that the cases should be remanded to the Nash County Superior Court for a new satellite-based monitoring hearing.

According to Defendant, the trial court erred by concluding that he should be required to enroll in lifetime satellite-based monitoring on the grounds that he committed an aggravated offense for purposes of N.C. Gen. Stat. §§ 14-208.40A and 14-208.6(1a). As the State candidly acknowledges, this Court held in *State v. Sprouse*, ___ N.C. App. ___, ___, 719 S.E.2d 234, 242 (2011), *disc. review denied*, ___ N.C. ___, 722 S.E.2d 787 (2012),

that statutory sexual offense and taking indecent liberties with a child are not aggravated offenses for satellite-based monitoring purposes. As a result, the trial court erred by determining that Defendant should be required to enroll in lifetime satellite-based monitoring.

In addition to determining that Defendant had been convicted of an aggravated offense, the trial court also found that Defendant's convictions involved the physical, mental, or sexual abuse of a minor. *State v. Jarvis*, __ N.C. App. __, __, 715 S.E.2d 252, 258 (2011) (holding that "solicitation to take" indecent liberties with a child involved the physical, mental, or sexual abuse of a minor). "Upon the determination that the defendant was convicted of an offense involving 'the physical, mental, or sexual abuse of a minor', the trial court must then order the Department of Correction ("DOC") to perform a risk assessment[.]" *State v. Smith*, 201 N.C. App. 681, 688, 687 S.E.2d 525, 530 (2010) (citation omitted). The trial court failed to order the performance of the required risk assessment in this instance. As a result, in light of the fact that the trial court erroneously ordered that Defendant enroll in lifetime satellite-based monitoring based on its determination that Defendant had been convicted of an aggravating offense while failing to order the performance of the required risk

assessment, we conclude that the trial court's satellite-based monitoring orders should be reversed and that these cases should be remanded to the Nash County Superior Court for a new satellite-based monitoring hearing.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant's challenge to the trial court's judgments lacks merit and that the trial court erred by ordering that Defendant enroll in lifetime satellite-based monitoring. As a result, the trial court's judgments should, and hereby do, remain undisturbed while the satellite-based monitoring orders are reversed and the cases are remanded to the Nash County Superior Court for a new satellite-based monitoring hearing.

NO ERROR IN PART; REVERSED AND REMANDED IN PART.

Judges GEER and DILLON concur.

Report per Rule 30(e).