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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-995

Filed: 6 September 2016

Wake County, Nos. 12 CRS 204285, 206010; 12 CRS 3090, 3100, 3101

STATE OF NORTH CAROLINA

v.

JAIRED ANTONIO JONES

Appeal by defendant from judgments entered 9 February 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 10 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Donna E. Tanner, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

CALABRIA, Judge.

Jaired Antonio Jones ("defendant") appeals from judgments entered after this Court remanded his case for resentencing. *See State v. Jones*, 237 N.C. App. 526, 767 S.E.2d 341 (2014), *disc. review denied*, __ N.C. __, 771 S.E.2d 304 (2015) ("*Jones I*"). We conclude defendant received a fair resentencing hearing, free from prejudicial error.

I. Background

Defendant was originally indicted on charges arising from his five-year, "on-and-off-again" relationship with Ms. Smith,[1] the mother of his child. *Jones I*, 237 N.C. App. at 528, 767 S.E.2d at 342. Throughout their relationship, defendant exhibited a pattern of violent behavior towards Ms. Smith that eventually led her, on 21 February 2012, to obtain a temporary restraining order against him. *Id.* The following day, defendant confronted Ms. Smith as she attempted to deliver defendant's personal items to his father's apartment; defendant became violent and was arrested on the scene. *Id.* at 528, 767 S.E.2d at 342-43. Despite the restraining order, defendant called Ms. Smith from jail on at least two occasions. *Id.* at 528, 767 S.E.2d at 343. After she had the protective order extended to a full year, defendant sent Ms. Smith three letters in less than three months requesting that she drop the charges and not come to court. *Id.*

A jury returned verdicts finding defendant guilty of assault on a female; five counts of habitual violation of a domestic violence protective order ("DVPO") (one count for each of the two phone calls and three letters); and interfering with a witness (for the three letters). *Id.* Defendant subsequently pleaded guilty to attaining habitual felon status based on previous offenses unrelated to his relationship with Ms. Smith. *Id.*

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[1] We adopt the *Jones I* Court's pseudonym for the victim in this case.

Based on the foregoing, the trial court entered: (1) a judgment sentencing defendant, as a habitual felon, to a term of 127 to 165 months' imprisonment for the offense of interfering with a witness; (2) a consolidated judgment sentencing defendant, as a habitual felon, to a consecutive term of 128 to 166 months' imprisonment for the assault on a female offense, which was upgraded to habitual misdemeanor assault based on defendant's admission to prior assault convictions; and (3) a consolidated judgment sentencing defendant, as a habitual felon, to a consecutive term of 128 to 166 months' imprisonment based on the five counts of habitual violation of a DVPO. *Id.* All of defendant's sentences were to be served in the North Carolina Division of Adult Correction. Defendant timely appealed from the trial court's judgments. *Id.*

In 2014, this Court vacated three of defendant's convictions for habitual violation of a DVPO and his conviction for assault on a female and remanded to the trial court for resentencing. *Id.* at 535, 767 S.E.2d at 347. We agreed with defendant that, pursuant to N.C. Gen. Stat. 50B-4.1(f) (2013), "he could not be punished for habitual violation of a DVPO, a [C]lass H felony, if he was also being punished for interfering with a witness, a Class G felony[,] for the same conduct." *Id.* at 530-31, 767 S.E.2d at 344 (alterations added); *see also* N.C. Gen. Stat. § 50B-4.1(f) ("*Unless covered under some other provision of law providing greater punishment,* any person who knowingly violates a valid protective order . . . after having been previously

convicted of two [domestic violence] offenses . . . shall be guilty of a Class H felony.") (emphasis and alteration added). Because four of defendant's convictions—three for habitual violation of a DVPO and one for interfering with a witness—were based on the three letters defendant sent to Ms. Smith from jail, we vacated three of defendant's five convictions for habitual violation of a DVPO and remanded to the trial court for resentencing on the two remaining counts. *Jones I*, 237 N.C. App. at 532, 767 S.E.2d at 345. Similarly, we also determined that defendant's assault on Ms. Smith at his father's apartment could not form the basis for convictions for both assault on a female and habitual misdemeanor assault. *Id.* at 533, 767 S.E.2d at 345; *see also* N.C. Gen. Stat. § 14-33(c)(2) (stating that assault on a female is a Class A1 misdemeanor, "[u]nless the conduct is covered under some other provision of law providing greater punishment"); N.C. Gen. Stat. § 14-33.2 (providing that habitual misdemeanor assault is a Class H felony). Because the convictions were derived from the same indictment and based on the same underlying conduct, we vacated defendant's conviction for assault on a female and remanded for resentencing on habitual misdemeanor assault. *Jones I*, 237 N.C. App. at 533, 767 S.E.2d at 346.

Defendant's resentencing hearing was held on 9 February 2015 in Wake County Superior Court before Judge Donald W. Stephens, who did not preside over defendant's original sentencing hearing. The State's attorney, Howard Cummings ("Cummings"), provided his interpretation of our decision in *Jones I* and identified

the judgments we vacated and the purpose of our mandate. Defendant's trial counsel, Charles Caldwell ("Caldwell"), agreed with Cummings's interpretation, but asked the court to consider reducing defendant's sentence because he had a job at the prison and had received some letters from the complainant, Ms. Smith. Cummings also asked the court to allow Amily McCool ("McCool"), the original prosecutor in defendant's case, to make a "statement on behalf of the State and on behalf of the victim" in order to put the resentencing court "in the same position" as the trial court:

> MR. CUMMINGS: . . . Ms. McCool is here, who prosecuted this case originally and . . . tried the case. These were all jury verdicts. And to put you as best I can in the same position that Judge Young was when he finished trying this case over the period of time that he did, someone should have attached to at least one of those judgments the worksheet to show what kinds of violations this [d]efendant had through the course of his history.
>
> THE COURT: All right.
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> MR. CUMMINGS: I believe with respect to the sending of the cards by the [d]efendant to the minor child and children, the response came not directly to the victim, as she wants to have no direct response, it was through a relative that those letters were sent. Ms. McCool has the time line [sic] of the relationship between these individuals from when they first started going to court, and the number of years that she dealt with them. And I would ask Your Honor to give her a chance to make some statement on behalf of the State and on behalf of the victim in this case.
>
> THE COURT: All right.

McCool was not called as a witness or sworn in before she addressed the court:

> MS. MCCOOL: Thank you, Your Honor. Just to give you a little more information about this, the information that as Mr. Cummings said Judge Young had before him, just to give you an idea about [defendant], you can see his entire criminal record, but specifically with regard to the domestic violence conviction against [Ms. Smith], it really was, frankly, relentless. And she was not able to really ever get a break from him.

McCool detailed the history of the restraining orders Ms. Smith had sought against defendant, including charges that had been dismissed, and described defendant's numerous violations of those orders, including his 22 February 2012 assault on Ms. Smith and her resulting injury. She explained how defendant called Ms. Smith from jail multiple times and wrote letters in an effort to persuade her to not come to court or to drop the charges. McCool asserted that defendant had sent Ms. Smith many more letters than those for which he had been charged. She opined that this Court's decision in *Jones I* was intended to correct "a clerical error" in the trial court's judgments, rather than the sentences they imposed.

When Caldwell explained that Ms. Smith's return address was on the envelope of one of the letters defendant received, McCool responded for Ms. Smith, even though she was outside the courtroom during the hearing. McCool also stated that Ms. Smith told her that she had been struggling with whether to reply to defendant, and would not allow him to call her children because she was concerned that defendant would use that communication to help reduce his sentence. Ms. Smith told McCool that she only responded to his letter because her youngest son wanted to contact defendant,

and even then her brother sent the response for her. Defendant did not object to any of McCool's statements during the proceeding.

At the conclusion of the resentencing hearing, the trial judge sentenced defendant to a minimum of 128 months and a maximum of 166 months for the habitual misdemeanor assault conviction. For the two counts of habitual violation of a DVPO, the judge resentenced defendant to a minimum of 128 months and a maximum of 166 months. The resentencing judge left undisturbed defendant's sentence for interfering with a witness because this Court found no error in that judgment. Defendant appeals.

II. Analysis

A. Violation of Statutory Mandate

Defendant first contends that the trial court reversibly erred by permitting McCool, the original prosecutor in defendant's case, to comment during his resentencing because she was not called as a witness, in violation of N.C. Gen. Stat. § 15A-1334(b) (2015). We disagree.

Although defendant failed to object to McCool's statements during resentencing, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe,* 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Thus, on appeal, defendant's burden is to show that (1)

the trial court abused its discretion by acting contrary to a statutory mandate, (2) which prejudiced him.

"Alleged statutory violations are questions of law[,]" reviewed *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011). "Under *de novo* review, this Court 'considers the matter anew and freely substitutes its own judgment' for that of the lower" court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation omitted). Notwithstanding exceptions inapplicable to the instant case, a defendant shows prejudice by demonstrating "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a). Nonetheless, in the context of sentencing, "[a] judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962).

N.C. Gen. Stat. § 15A-1334(b) prohibits anyone other than "the defendant, his counsel, the prosecutor, [or] one making a presentence report" from "comment[ing] to the court on sentencing unless called as a witness[.]" We have held that a sentencing judge erred and violated this statute by permitting a victim's private attorney, who was not sworn as a witness, to comment on the defendant's sentence. *See State v.*

Jackson, 119 N.C. App. 285, 458 S.E.2d 235 (1995) (concluding the trial court did not commit reversible error because the defendant failed to demonstrate prejudice). We have also held that a sentencing judge did not err by permitting a larceny victim to speak at the defendant's sentencing without being sworn in as a witness. *See State v. Hendricks*, 138 N.C. App. 668, 671, 531 S.E.2d 896, 899 (2000) (concluding there was no error because the rules of evidence do not apply during sentencing hearings).

In the instant case, the resentencing judge allowed McCool to comment during defendant's resentencing without first being called as a witness or placed under oath. Although N.C. Gen. Stat. § 15A-1334(b) permits "the prosecutor" to comment without being called as a witness, it is unclear whether this phrase was intended to include comments made by a *former* prosecuting attorney during resentencing. Our case law is also unclear as to whether the statute requires someone to be formally sworn in as a witness prior to commenting to the court on sentencing. Presuming, *arguendo*, that the trial court erred by allowing McCool to comment during resentencing, we nevertheless hold that defendant has failed to demonstrate that he was prejudiced by McCool's statements. *See State v. Jones*, 188 N.C. App. 562, 569, 655 S.E.2d 915, 920 (2008) (declining to address the defendant's argument that certain evidence was erroneously excluded because he failed to show the requisite prejudice so as to warrant reversal).

Defendant's sentence fell within the presumptive range, and he does not contest that the sentence imposed was unlawful or miscalculated. Nonetheless, defendant contends he was prejudiced by the trial court's procedural conduct because "it allowed him to be resentenced based on improper statements and hearsay not subject to cross-examination." Yet, defendant fails to identify any actual prejudice—"a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises[,]" N.C. Gen. Stat. § 15A-1443(a)—that he suffered as a result of the trial court's alleged error. Because defendant has failed to satisfy his burden of showing he was prejudiced during resentencing, we overrule his challenge. Moreover, defendant's failure to cite authority or advance a reasoned argument to support his assertion that McCool's statements prejudiced him deems his argument abandoned. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

B. Hearsay

Defendant next contends that "the trial court's consideration of [McCool's] hearsay testimony on behalf of [Ms. Smith], coupled with its decision not to require [Ms. Smith] to enter the courtroom or testify, deprived [defendant] of a fair hearing and requires remand for a new resentencing hearing." We disagree.

Unlike defendant's first challenge, which was preserved absent objection, defendant's failure to object to McCool's alleged hearsay testimony entitles him only to plain error review by this Court. *See, e.g.*, *State v. Braxton*, 352 N.C. 158, 205, 531 S.E.2d 428, 456 (2000) (holding that the defendant's failure to object to allegedly improper testimony during his capital sentencing proceeding warranted only plain error review on appeal).

In the instant case, defendant's brief fails to specifically and distinctly argue plain error. Defendant does not list plain error in the standard of review section of his brief, but instead lists plain error among multiple alternative standards of review at the end of his argument regarding the trial judge's alleged statutory violation. He contends that "for error to constitute plain error, a defendant must demonstrate that the trial court committed a fundamental error." The remainder of defendant's brief, however, offers no specific and distinct argument regarding how the trial court's alleged errors amounted to plain error.

Particularly, defendant's request for plain error review of this specific argument, that the trial court improperly allowed McCool to give hearsay testimony, states as follows: "As in issue one, [defendant] asks this Court to find plain error review[.]" Although defendant listed plain error as an alternative in his brief, he failed to "specifically and distinctly contend" that the error "amount[ed] to plain error," as required by Rule 10(a)(4) of the North Carolina Rules of Appellate

Procedure and by our Supreme Court. *See State v. Grooms,* 353 N.C. 50, 66, 540 S.E.2d 713, 723 (2000) ("Additionally, while [the] defendant's assignment of error includes plain error as an alternative, he does not specifically argue in his brief that there is plain error in the instant case."). Therefore, defendant's argument is not properly before us.

Finally, defendant asks this Court to review his challenge under Rule 2 of the North Carolina Rules of Appellate Procedure in order to "prevent manifest injustice to a party[.]" Rule 2 provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2. Invoking Rule 2 is an "extraordinary step" that must be taken "cautiously" and only in "exceptional circumstances." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (quoting *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 205-06 (2007)). We conclude "[t]here are no exceptional circumstances, significant issues, or manifest injustices that would be corrected by our review of the merits" of defendant's challenge. *Holland v. Heavner,* 164 N.C. App. 218, 222, 595 S.E.2d 224, 228 (2004).

In any event, we note that the North Carolina Rules of Evidence do not apply in sentencing proceedings, N.C. Gen. Stat. § 8C-1, Rule 1101(b)(3), and "hearsay evidence can be used at such proceedings." *State v. Phillips*, 325 N.C. 222, 224, 381 S.E.2d 325, 326 (1989) (citing *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980)). We also reiterate that trial judges are "permitted wide latitude in arriving at the truth and broad discretion in making judgment[,]" *Pope*, 257 N.C. at 335, 126 S.E.2d at 133, and may "exercise a wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by law." *State v. Streeter*, 146 N.C. App. 594, 599, 553 S.E.2d 240, 243 (2001) (quoting *Williams v. New York,* 337 U.S. 241, 246 (1954)). As our Supreme Court has explained:

> it would not be in the interest of justice to put a trial judge in a straitjacket of restrictive procedure in sentencing. He should not be put in a defensive position and be required to sustain and justify the sentences he imposes, and be subject to examination as to what he has heard and considered in arriving at an appropriate judgment. He should be permitted wide latitude in arriving at the truth and broad discretion in making judgment. Pre-sentence investigations are favored and encouraged. There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amounting to a denial of some substantial right. A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

Pope, 257 N.C. at 335, 126 S.E.2d at 133 (citation omitted). In the instant case, the alleged hearsay testimony was presented in open court and in the presence of defendant and his counsel. Defendant was provided a full opportunity to object to the alleged hearsay, but he failed to do so.

Defendant has failed to preserve this challenge for appellate review, failed to specifically and distinctly allege plain error, and failed to demonstrate exceptional circumstances warranting this Court's invocation of Rule 2. Moreover, defendant has failed to satisfy his burden of establishing that the alleged error in the sentencing procedure amounted to an "abuse of discretion, procedural conduct prejudicial to [him], circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *Jackson*, 119 N.C. App. at 288, 458 S.E.2d at 238.

III. Conclusion

Defendant has failed to demonstrate that the trial court's alleged statutory violation resulted in "procedural conduct prejudicial to [him], circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *Id.* Therefore, the resentencing court did not reversibly err by allowing defendant's former prosecutor to comment to the court without first being sworn as a witness. Additionally, defendant failed to preserve his challenge, and we decline to invoke Rule 2 to address whether the trial court abused its discretion by permitting

McCool's alleged hearsay testimony on Ms. Smith's behalf. We conclude defendant received sentences within the presumptive range that are free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).