IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1307

Filed: 18 December 2018

Wake County, No. 16 CRS 208707

STATE OF NORTH CAROLINA

v.

MANUEL ALIRIO ACOSTA, Defendant.

Appeal by Defendant from judgment entered 16 June 2017 by Judge James K. Roberson in Wake County Superior Court. Heard in the Court of Appeals 15 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Michelle D. Denning, for the State.

James R. Parish, for defendant-appellant.

MURPHY, Judge.

Defendant, Manuel Alirio Acosta, was arrested for interfering with emergency communications arising from an incident where Defendant prevented the victim from calling emergency personnel on her cell phone after she awoke to Defendant on top of her in bed. After a subsequent investigation several days after the incident, officers also charged Defendant with sexual battery and communicating threats. The

communicating threats charge arose from voicemails Defendant was alleged to have left the victim after the incident. At trial, the defense discovered an investigating officer had taken handwritten notes regarding the voicemails, which were not turned over to the defense as discovery. Defendant moved to dismiss all three charges. The trial court found that the failure to disclose the notes violated Defendant's rights under *Brady* and dismissed the communicating threats charge, but determined that the failure to disclose did not affect the other two charges. Defendant moved for mistrial, which was denied. Defendant was ultimately convicted solely on the interfering with emergency communications charge. In sentencing Defendant on this charge, the trial court imposed a regular condition of probation requiring Defendant to enroll in an abuser treatment program. Defendant appeals the denial of his motion for mistrial and the imposition of the condition of probation.

Where suppressed evidence is not material to Defendant's guilt or punishment on a charge under *Brady*, it is not an abuse of discretion to deny Defendant's motion for a mistrial. Furthermore, a regular condition of probation predicated on an uncontested finding by the trial court is binding on appeal. Accordingly, we hold that Defendant received a fair trial, free from error.

BACKGROUND

At approximately 10:00 P.M. on 30 April 2016, Penelope[1] returned home from work to the apartment she shared with her son and two roommates. Upon entering the apartment, Penelope called her son to see where he was, and he responded that he would be home later that night. Penelope waited for her son to come home until approximately 3:00 A.M., when she fell asleep in her bed still dressed in her work clothes. She was awakened by a person throwing themselves on her while she was lying on the bed. Penelope believed the person to be her son and told him to go to his bed, but the person replied, "I'm not your son. Your son is out on the porch." At this point, Penelope realized the person was Defendant, whom she knew through her son.

Penelope testified that Defendant "wanted to take my clothes off," so she ran out of the bedroom and into the living room. Upon realizing the door leading to the porch was locked, Penelope ran into the kitchen, where Defendant cornered her. While Penelope was trapped in the corner of the kitchen, Defendant took Penelope's cellphone and said, "You're not going to call the police" and put the cellphone in his pocket. Penelope testified that Defendant then attempted to remove her clothing while touching her breasts and vagina. Penelope fought off Defendant and ran back into the living room, where she screamed for her roommate, "Call the police. I don't have a phone." Defendant then had an altercation with the roommate, at which

[1] We use the pseudonym "Penelope" throughout this opinion to protect the victim's privacy and for ease of reading.

time Penelope was able to escape the house and run down the street, where she found a person to call 911.

Officers Nguyen and Littlefield with the Raleigh Police Department arrived outside the apartment at approximately 7:30 A.M., where Penelope explained the situation, telling the officers that Defendant had taken her cellphone when she attempted to call 911. Defendant was still present at Penelope's apartment and answered the door, appearing intoxicated and holding a beer. Defendant denied taking the cellphone. Officers subsequently found the cellphone in the bathroom of the apartment. Defendant was placed under arrest for interference with emergency communication. Due to Defendant's resistance of arrest and aggressive behavior, Officer Nguyen was unable to further question Penelope or other witnesses at the time of the incident. Four days after the incident, Officer Nguyen was dispatched to follow up with Penelope. Penelope reported receiving threatening voicemail messages from Defendant during those four days after the incident. Defendant was then charged with communicating threats and sexual battery, in addition to the existing interfering with emergency communications charge.

Defendant was found guilty on all charges by the District Court and appealed his convictions to Superior Court. After the State rested its case during the trial in Superior Court, Defendant requested a *voir dire* examination of Officer Nguyen regarding his handwritten investigatory notes. Officer Nguyen testified that he took

handwritten notes during his follow up interview with Penelope and placed the notes in his evidence binder. He further testified that he did not turn the handwritten notes over to the District Attorney's office. The State noted that it had not been made aware of the notes prior to the trial.

The trial court instructed Officer Nguyen to retrieve the handwritten notes and subsequently reviewed them. The handwritten notes did not show any threat made in the voicemails that Officer Nguyen reviewed during his follow-up investigation with Penelope. The trial court found the notes to be exculpatory, "particularly as to the communicating threats charge," and that the failure to disclose them to the defense was a *Brady* violation. Accordingly, the charge of communicating threats was dismissed by the court. However, the trial court denied Defendant's motions to dismiss and for mistrial on the charges of interfering with emergency communications and sexual battery, noting that it "does not find that that exculpatory evidence affects the substance of the two other charges." The trial court then instructed the jury that it was not to consider any evidence concerning the voicemails and that any evidence concerning the voicemails was not to bear on their decisions as to the remaining charges.

The jury convicted Defendant on the charge of interfering with emergency communications, and the trial court declared a mistrial on the sexual battery charge due to the jury's inability to reach a unanimous verdict. The State prayed judgment

on the charge of interfering with emergency communications and dismissed the sexual battery charge. The court entered judgment on the interfering with emergency communications charge and sentenced Defendant to a suspended sentence of 60 days and placed Defendant on supervised probation for 24 months. As conditions of his probation, the court required Defendant to undergo a substance abuse assessment and to enroll in an abuser treatment program approved by the Domestic Violence Commission within 30 days of the date of entry of the judgment.

ANALYSIS

A. Brady Violation

As to the communicating threats charge, the trial court found that Officer Nguyen's handwritten notes were exculpatory and "essential . . . as to that charge," as "the notes of the officer from hearing the Spanish translation of the voicemails did not appear to have a threat included in the voicemails." The trial court accordingly found a *Brady* violation with respect to the communicating threats charge and dismissed that charge. However, the trial court did not find that the suppression of the evidence amounted to a *Brady* violation that required dismissal or a mistrial on the remaining charges of interfering with emergency communications and sexual battery. Defendant contends on appeal that the trial court erred in denying his motion for mistrial on the charge of interfering with emergency communications,

arguing that this charge was prejudiced by the State's failure to disclose Officer Nguyen's handwritten notes.[2] We disagree.

A trial court "must declare a mistrial upon the [D]efendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the [D]efendant's case." N.C.G.S. § 15A-1061 (2017). "Whether or not to declare a mistrial is a matter within the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent a gross abuse of such discretion." *State v. Bidgood*, 144 N.C. App. 267, 273, 550 S.E.2d 198, 202 (2001). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

In *Brady v. Maryland*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). Evidence favorable to an accused can be either exculpatory evidence or impeachment evidence. *United States*

[2] At trial, Defendant moved for mistrial on both the interfering with emergency communications and sexual battery charges. Because the sexual battery charge was subsequently dismissed, we only consider the motion for mistrial on the interfering with emergency communications charge for which Defendant was convicted.

v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). Evidence is material to either guilt or punishment "if there is a 'reasonable probability' of a different result had the evidence been disclosed." *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). "A reasonable probability of a different result is . . . shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1566 (internal quotation marks omitted). Indeed, "the focus should not be on the impact of the undisclosed evidence on [Defendant's] ability to prepare for trial, but rather should be on the effect of the nondisclosure on the outcome of the trial." *State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983).

Here, the State's failure to disclose Officer Nguyen's handwritten notes did not amount to an error under *Brady* that would require a mistrial on the interfering with emergency communications charge. Defendant contends that the handwritten notes were favorable as impeachment evidence, as their disclosure would have enabled him to "cross examine the alleged victim in the case during the State's case and then to impeach her with the prior inconsistent statements taken by the officer on the scene." Presupposing that the undisclosed evidence was favorable, Defendant cannot show the "materiality" required to establish a *Brady* violation. *See State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993) ("In *Agurs*, the [United States] Supreme

Court rejected the idea that every nondisclosure should be regarded as automatic error. Rather, the Court held that prejudicial error must be determined by examining the materiality of the evidence.")

Upon evaluating the effect of the nondisclosure on the outcome of the trial in the context of the entire record, we conclude Officer Nguyen's handwritten notes were not material to the charge of interfering with emergency communications. While impeachment evidence is favorable to a defendant and can constitute a *Brady* violation, the handwritten notes did not have such impeachment value that their nondisclosure undermined the confidence in the outcome of the trial with respect to that charge. The substantive content of the handwritten notes addressed the contents of a voicemail sent to Penelope days after the incident underlying the interfering with emergency communications charge. The transactional disconnect between the subject of the undisclosed evidence and the interfering with emergency communications charge diminished the impeachment value of the evidence, as it would not have related to any specific statements about or evidence on the 30 April incident. Given the transactional disconnect and the independent evidence supporting the interfering with emergency communications charge, Defendant has failed to show a reasonable probability of a different result had he been able to impeach Penelope's general credibility with the handwritten notes. *See United States v. Agurs*, 427 U.S. 97, 109–10, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976) ("The mere

possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.") (emphasis added). Because the undisclosed evidence was not material to the interfering with emergency communication charge, the trial court did not abuse its discretion in finding that there was no error under *Brady* that required a mistrial.

Defendant also contends that the trial court erred in denying his motion for mistrial, as he was prejudiced by the jury hearing evidence on the communicating threats charge. "Generally, when a trial court properly instructs jurors to disregard incompetent or objectionable evidence, any error in the admission of the evidence is cured." *State v. Diehl*, 147 N.C. App. 646, 650, 557 S.E.2d 152, 155 (2001). Here, the trial court instructed the jury not to consider any evidence related to the voicemails and that "testimony [related to the voicemails] is to have no bearing on your decision as to the charges of sexual battery and interfering with an emergency communication." Accordingly, we do not find any "improprieties in the trial so serious that they substantially and irreparably prejudice [Defendant's] case and [made] it impossible for [Defendant] to receive a fair and impartial verdict" so as to require a mistrial. *State v. Hurst,* 360 N.C. 181, 188, 624 S.E.2d 309, 316 (citations omitted), *cert. denied*, *Hurst v. North Carolina*, 549 U.S. 875, 127 S.Ct. 186, 166 L.Ed.2d 131 (2006).

B. Probation Condition

Defendant next challenges the condition of his supervised probation requiring him to enroll in an abuser treatment program within 30 days of the date of entry of the judgment. He claims that this condition was imposed as a *special* condition and that this condition was not reasonably related to the convicted offense of interfering with emergency communication. Because we find the condition, as written on the judgment, to be a *regular* condition of probation predicated on an uncontested finding of fact, we disagree.

Under "Regular Conditions of Probation" on the judgment, the trial court checked the box noting, "The Court finds that the defendant is responsible for acts of domestic violence and therefore makes the additional findings and orders on the attached AOC-CR-603C, Page Two, Side Two." Accordingly, the trial court made the finding on the attached form that "there is an abuser treatment program, approved by the Domestic Violence Commission, reasonably available to the defendant, who shall: . . . ENROLL WITHIN 30 DAYS."

Defendant mischaracterizes the type of condition the trial court imposed on his supervised probation and argues the trial court required him to enroll in "a sexual batterers program" as a special condition under N.C.G.S. § 15A-1343(b1). N.C.G.S. § 15A-1343(b1) authorizes a trial court to impose special conditions of probation "*[i]n addition* to the regular conditions of probation," including any "conditions determined

by the court to be reasonably related to [Defendant's] rehabilitation." N.C.G.S. § 15A-1343(b1) (2017) (emphasis added); N.C.G.S. § 15A-1343(b1)(10) (2017). The condition Defendant contests, however, was not imposed as a special condition of probation. On the written judgment, the only special conditions of probation imposed under N.C.G.S. § 15A-1343(b1) are related to a substance abuse assessment, waiver of jail fees, and a requirement that Defendant not have contact with Penelope or go about her places of residence or employment.

Rather, the condition requiring Defendant to enroll in an abuser treatment program was imposed as a regular condition of probation predicated on a finding of fact by the trial court that Defendant committed an act of domestic violence. N.C.G.S. § 15A-1343(b) sets forth regular conditions of probation. With respect to acts of domestic violence, N.C.G.S. § 15A-1343(b) states:

> (b) Regular Conditions. – As regular conditions of probation, a defendant *must*:
>
> . . .
>
> (12) Attend and complete an abuser treatment program if (i) the court finds the defendant is responsible for acts of domestic violence and (ii) there is a program, approved by the Domestic Violence Commission, reasonably available to the defendant, unless the court finds that such would not be in the best interests of justice. A defendant attending an abuser treatment program shall abide by all of the rules of the program.

N.C.G.S. § 15A-1343(b), (b)(12) (2017) (emphasis added). The trial court, on the written judgment, found that Defendant was responsible for acts of domestic violence and that there was an abuser treatment program approved by the Domestic Violence Commission. Once the trial court made this factual finding, enrollment in the abuser treatment program was required as a regular condition of Defendant's probation. Defendant's argument that the condition was not reasonably related to the convicted offense is therefore inapposite. Since Defendant contests the imposition of the condition itself and not the trial court's underlying finding that he committed an act of domestic violence, we do not reach whether the underlying finding was error. *See State v. Taylor,* 178 N.C. App. 395, 401, 632 S.E.2d 218, 223 (2006) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.") (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). This finding and the subsequently imposed regular condition of probation are thus binding on appeal, and we affirm the judgment.

CONCLUSION

After a thorough review, we conclude that the trial court did not err in denying Defendant's motion for mistrial or in imposing a regular condition of probation that required Defendant to enroll in an abuser treatment program. Accordingly, we hold that Defendant received a fair trial, free from error.

NO ERROR IN PART; AFFIRMED IN PART.

Judges CALABRIA and ARROWOOD concur.

Report per Rule 30(e).