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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-45

Filed: 15 October 2019

Surry County, Nos. 17 CRS 50366, 308

STATE OF NORTH CAROLINA

v.

JOSEPH ODELL SPENCER

Appeal by defendant from judgment entered 7 September 2018 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 18 September 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Ryan C. Zellar, for the State.*

*Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.*

TYSON, Judge.

Joseph Odell Spencer (“Defendant”) appeals from a judgment entered after a jury found him guilty of failing to report and register a new address by a convicted sex offender. Defendant admitted to attaining habitual felon status. We find no error in the jury’s verdict and the judgment entered thereon. We allow Defendant’s petition

for writ of certiorari and affirm the trial court's imposition of attorney's fees. Defendant's motion for appropriate relief is denied.

I. Background

Defendant was convicted of a felony attempted first degree sexual offense in 1998. Defendant has been listed on the sex offender registry since this conviction. The parties stipulated "[t]he defendant during the timeframe of 31 October 2016 and 27 January 2017 did have a conviction which required him to register as a sexual offender." Defendant testified to awareness of the rules and regulations associated with his status and his obligations as a registered sex offender.

Defendant registered his address as "116 Dry Rock Lane," Mount Airy, North Carolina with the sex offender registry. This property is numbered either 116 or 117 Dry Rock Lane. On 31 October 2016, law enforcement officers attempted to verify the location and current address of Defendant. Betty Spencer ("Ms. Spencer"), Defendant's step-mother who lives at 116 Dry Rock Lane, Mount Airy, North Carolina, testified three officers had spoken to her late-husband, Defendant's father, concerning Defendant and his whereabouts.

Law enforcement officers returned to her address on 7 November 2016 and spoke to Ms. Spencer, who also told them that Defendant did not live at that address on the property. Ms. Spencer was unaware of Defendant's address at the time. She

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provided the officers with a potential address where she believed Defendant might be located.

After these two visits, officers were unable to verify Defendant's sex offender registration address. Officers referred Defendant's file to Surry County Sherriff's Detective James Turner ("Detective Turner"). Detective Turner oversaw compliance with the sex offender registry. In January 2017 Defendant's address remained unverified. On 27 January 2017, Defendant's sex offender address verification letter, mailed to 116 Dry Rock Lane, Mount Airy, North Carolina, was returned unserved by the United States Postal Service. Later that day, Detective Turner went to 116 Dry Rock Lane and also spoke with Ms. Spencer. Ms. Spencer stated Defendant "hadn't stayed at the address in well over a year." She thought he was "possibly living with his girlfriend, Heather, or Melissa Linville." Ms. Spencer could not provide a specific address, but gave Detective Turner directions to the general location where she believed Defendant was residing. Defendant was indicted for Failure to Report New Address- Sex Offender on 9 May 2017.

At trial, during closing arguments, the State argued the "[f]act of the matter is he's already been convicted once of giving false information about where he's living to the sex offender registry. In fact, it was a little over two years ago from today in this courtroom." Defendant's attorney did not object.

The State continued:

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And ultimately, when it comes down to it, ladies and gentlemen, in North Carolina the rules for sex offender registry are very strict for a reason. So either I proved my case and you should say guilty and we'll take it from there, or say not guilty and let him loose back on the streets. It's up to you.

Defendant's counsel objected and the trial court sustained the objection. Defense counsel failed to move to strike or for a limiting instruction or mistrial.

While the jury was deliberating, Defendant fled the courthouse. Defendant could not be located nor could Defendant's counsel articulate a reason for Defendant's absence.

The jury's verdict found Defendant guilty of failing to report a current address by a convicted sex offender *in absentia* on 10 January 2018. On 11 January 2018, an order for attorney fees was issued in the amount of \$2,100.00 for Defendant's counsel's time preparing for and conducting Defendant's trial. Defendant's sentencing was delayed until he could be located and arrested.

Defendant was subsequently located, returned to court, and was sentenced on 7 September 2018. Defendant admitted his guilt to attaining the status of a habitual felon. He was sentenced to 110 to 144 months in prison, with the sentence to run consecutively to the sentence for failure to report a new address by a convicted sex offender. Defendant entered oral notice of appeal. Defendant subsequently filed a petition for a writ of certiorari and a motion for appropriate relief.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

### III. Issues

Defendant argues the trial court: (1) lacked jurisdiction over the habitual felon indictment; (2) erred by failing to *ex meru motu* intervene in the State's closing arguments; and, (3) erred by increasing the civil judgment for attorney's fees without affording Defendant an opportunity to be heard.

### IV. Habitual Felon Indictment

Defendant asserts the trial court lacked jurisdiction over the habitual felon indictment because the judgment in an underlying felony used to obtain the indictment was void. The original judgment entered was "Submitting False Info-Sex Offender," rather than the offense being entered on the amended judgment as "Attempt to Submit False Info- Sex Offender." Defendant never pled guilty to the offense identified in the indictment.

#### A. Standard of Review

"An attack on an indictment is waived when its validity is not challenged in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). "However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in

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the trial court.” *Id.* The sufficiency of an indictment is subject to a *de novo* standard of review. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008).

B. Analysis

The purpose of an indictment ‘is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense and be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense; [and,] (2) to enable the court to know what judgment to pronounce in case of conviction.’

*State v. Russell*, 282 N.C. 240, 243-44, 192 S.E.2d 294, 296 (1972) (citations omitted).

In *State v. Sturdivant*, our Supreme Court held “it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged.” 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981).

N.C. Gen. Stat. § 14-7.3 (2017) sets forth the specific requirements for a habitual felon indictment:

the date that the prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

A defendant is provided with adequate notice of the bases for the habitual felon status when the indictment contains all of the information as required by N.C. Gen. Stat. § 14-7.3. *State v. Langley*, 371 N.C. 389, 395-96, 817 S.E.2d 191, 196 (2018).

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Here, the indictment listed Defendant's three prior felony offenses: Felony Attempted First Degree Sexual Offense, Felony PWIMSD SCH. II CS, and Felony Submitting False Information- Sex Offender. The indictment correctly contained the dates the prior felony offenses were committed, the name of the state against whom the felony offenses were committed, the dates of the convictions in the felony offenses, and the identity of the court where the convictions were entered. The requirements of N.C. Gen. Stat. § 14-7.3 were met. Defendant has not demonstrated any prejudice from the misnomer. Defendant's arguments are overruled.

V. Closing Argument

Defendant next contends the trial court abused its discretion when it allowed the State to argue the jury should convict Defendant, because the “[f]act of the matter is he’s already been convicted once of giving false information about where he’s living to the sex offender register.”

A. Standard of Review

“Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel’s remarks is extreme and is clearly calculated to prejudice the jury.” *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984) (citation omitted). This Court will “not review the exercise of this discretion unless

there be such gross impropriety in the argument as would be likely to influence the verdict of the jury.” *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976).

### B. Analysis

Our Supreme Court has stated: “The prosecuting attorney should use every honorable means to secure a conviction, but it is his duty to exercise proper restraint so as to avoid misconduct, unfair methods or overzealous partisanship which would result in taking unfair advantage of the accused.” *State v. Holmes*, 296 N.C. 47, 50, 249 S.E.2d 380, 382 (1978).

N.C. Gen. Stat. § 15A-1230(a) (2017) provides that during closing arguments:

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.

In *State v. Degraffenreid*, the prosecutor commented during closing arguments on the defendant exercising his constitutional right to a trial by jury in a condescending manner. \_\_\_ N.C. App. \_\_\_, \_\_\_, 821 S.E.2d 887, 889 (2018). This Court in *Degraffenreid* did not find any reversible error. *Id.* Here, this comment was a direct argument supporting the facts and evidence brought forward during cross examination. “Statements or remarks in closing argument must be viewed in context and in light of the overall factual circumstances to which they refer.” *State v. Goss*,



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361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citations and quotation marks omitted).

The Supreme Court of North Carolina has held that attorneys “can argue to the jury that they should not believe a witness.” *State v. Golphin*, 352 N.C. 364, 455, 533 S.E.2d 168, 227 (2000) (citations omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). It is improper for counsel to argue that a witness or party is a “liar.” *State v. Huey*, 370 N.C. 174, 176, 804 S.E.2d 464, 467 (2017).

Defendant cites N.C. Gen. Stat. § 8C-1, Rule 404(a) (2017) and argues “[e]vidence of a person’s character or a trait of his character is not admissible for the purposes of proving that he acted in conformity therewith on a particular occasion.” However, closing arguments are not evidence and should be viewed “in the context in which the remarks were made and the overall factual circumstances to which they referred.” *State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005) (citations omitted).

Prejudicial error is not shown to have occurred here. The prosecutor told the jury of Defendant’s past conviction for submitting a false address as a registered sex offender, a fact already in evidence. This statement draws reasonable inferences of Defendant’s credibility, an essential issue before the jury.

Prior to the argument Defendant takes issue on this appeal, the State argues that a reasonable inference would be to question Defendant’s credibility based on

facts in evidence of his criminal record to support the habitual felon indictment. Defendant pleaded guilty to a crime, in which truthfulness is an essential element of the crime. *See* N.C. Gen. Stat. § 14-208.11(a)(4) (2017). Defendant's argument is overruled.

#### VI. Attorney's Fees

After Defendant voluntarily left the courtroom, without notice or excuse, absconded and fled the jurisdiction, the trial court entered a civil judgment against Defendant for \$2,100.00 in attorney's fees. Defendant concedes he failed to comply with the statute and appellate rules for timely filing valid notice of appeal from the judgment entered for this civil judgment for attorney's fees. N.C. R. App. P. 4(a)-(b). In our discretion we allow Defendant's petition for writ of certiorari to review his argument. Defendant contends the trial court erred in entering a civil judgment against him for attorney's fees without first affording him an opportunity to be heard.

##### A. Standard of Review

The "trial court's conclusions of law drawn from the findings of fact are reviewable de novo." *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (citations omitted), *disc. review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007).

##### B. Analysis

N.C. Gen. Stat. § 7A-455(b) permits a trial court to enter a civil judgment against an indigent criminal defendant, following his or her conviction for the amount

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of the fees incurred by the defendant's appointed counsel. N.C. Gen. Stat. § 7A-455(b) (2017). Defendant must be given notice and opportunity to be heard prior to the entry of a civil judgment for attorney's fees. *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005).

In *State v. Friend*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 809 S.E.2d 902, 907 (2018), this Court found this statutory notice requirement was satisfied by a personal colloquy between the trial court and the Defendant and not solely with the defendant's counsel prior to entry. This Court in *Friend* further held without a colloquy "the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and *chose not to be heard*." *Id.* at \_\_\_, 809 S.E.2d at 907 (emphasis supplied). In the present case, Defendant absconded without notice or excuse while the jury was out deliberating his guilt or acquittal.

Our Supreme Court has held a "defendant's voluntary and unexplained absence from court subsequent to commencement of trial constitutes . . . a waiver" of his constitutional right to confront accusers at trial. *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991). Trial courts can conduct sentencing hearings in a defendant's absence when a defendant has absconded from justice. *See State v. Miller*, 142 N.C. App. 435, 446, 543 S.E.2d 201, 208 (2001). Defendant has waived his right and "chose not to be heard" on the issue. *Friend* \_\_\_ N.C. App. at \_\_\_, 809 S.E.2d at

907. Defendant's argument is without merit. The civil judgment of Defendant's attorney's fees is affirmed.

VII. Conclusion

Defendant has failed to carry his burden to show any prejudicial error in the sufficiency of the indictment, or, in the absence of an objection, the trial court's failure to intervene *ex meru motu* during the State's closing argument.

We allow Defendant's petition for certiorari. We affirm the trial court's imposition of a civil judgment against Defendant of \$2,100.00 in attorney's fees. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We deny Defendant's motion for appropriate relief without prejudice. *It is so ordered.*

NO ERROR IN PART, AFFIRMED IN PART, DENIED IN PART.

Judges DILLON and BROOK concur.

Report per Rule 30(e).