IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-240

No. COA20-150

Filed 1 June 2021

Durham County, No. 19 CVD 500121

DARLENE CHEEK-TAROUILLY, Plaintiff,

v.

JOSHUA STANHISER, Defendant.

Appeal by Defendant from order entered 14 June 2019 by Judge Amanda L. Maris in Durham County District Court. Heard in the Court of Appeals 9 February 2021.

William J. Cotter and Kelly Fairman for plaintiff-appellee.

Mark Hayes for defendant-appellant.

MURPHY, Judge.

¶ 1 The issuance of a domestic violence protective order ("DVPO") may be proper when the trial court finds the parties had a personal relationship as defined by N.C.G.S. § 50B-1(b) and this finding is supported by competent evidence. Here, the trial court did not err in issuing a DVPO against Defendant where Defendant made a judicial admission that he and Plaintiff had "lived together," falling under a "personal relationship" as defined by N.C.G.S. § 50B-1(b), in his opposing request for

a DVPO against Plaintiff.

¶ 2 Further, evidentiary error committed by the trial court must be prejudicial to a defendant to entitle him to relief. Defendant does not demonstrate the requisite prejudice where the exhibit was merely offered to illustrate his testimony. We affirm the DVPO.

BACKGROUND

¶ 3 Jamie Stanhiser and Defendant Joshua Stanhiser were married in June 2014 and Jamie gave birth to twins in July 2017. During their relationship, Jamie's mother, Plaintiff Darlene Cheek-Tarouilly, came to North Carolina to help assist with the twins on two occasions. Plaintiff's first trip occurred around the time the twins were born. She stayed for three months and lived with Defendant and Jamie during this time. After those three months, Plaintiff returned to her residence in California. She later returned to North Carolina and lived with Defendant and Jamie again from January of 2018 until May of 2018. Defendant and Jamie then hired a "live-in babysitter" who stayed at the house for approximately three months, including before and after the Stanhisers separated on 25 July 2018.

¶ 4 After Defendant and Jamie separated, a consent DVPO was obtained by Jamie against Defendant. The DVPO provided Defendant with supervised visitation of the twins. Defendant's scheduled visitations with the twins were originally supervised by Plaintiff, who had been living with Jamie and the twins since around July 2018.

¶ 5 During a scheduled visitation supervised by Plaintiff, there was an incident resulting in Plaintiff and Defendant filing DVPO complaints against each other. At the hearing on 14 June 2019, the trial court addressed the reciprocal DVPO complaints between Defendant and Plaintiff, a renewal of the consent DVPO between Defendant and Jamie, and temporary custody of the twins. At the hearing, the trial court announced the matters would be consolidated and each side would be given at least an hour to present evidence.

¶ 6 At the hearing, Plaintiff testified that, during a visitation on 5 March 2019, while she was holding the twins:

> I saw [Defendant] coming to -- looming towards us. He was running over and he -- so I was just covering both babies with my body not sure what was going to happen. I knew he was mad, he'd already been yelling, and he pushes me back and starts pulling her out of my arms. And it would have pulled her little body apart and her little arms just came off of my neck and I couldn't stop him from taking her, and I fell backwards onto the floor with [the other child] in my arms . . . .

Plaintiff further testified Defendant then charged and shoved her two more times, causing bruises that were shown in photos admitted at the hearing. Defendant denied the actions and claimed they instead argued about whether Plaintiff was interfering with Defendant's visitations. Defendant stated if "[Plaintiff] didn't want to have the conversation any more, she could go into the office like she usually does and I would proceed with my visitation. She refused and said she was going to call

the police. I encouraged her to please call the police . . . ."

¶ 7 During Defendant's presentation of evidence, Defense Counsel attempted to play a thirty-minute audio recording of the alleged 5 March 2019 incident. The trial court notified Defense Counsel she was limited on time and Defense Counsel responded, "I am still asking to listen to voir dire." The trial court responded, "I paused it. I paused it for this, but frankly, you have a minute and 8 seconds left, total. . . . Of course, if there's time, I'll let [Defense Counsel] [have] an extra minute for her argument, but this is the end." There was no further discussion or objection regarding the audio recording.

¶ 8 Following the hearing, the trial court granted Plaintiff's DVPO complaint against Defendant after determining the parties were "unmarried, of opposite sex, currently or formerly living together" and "[Defendant] [] committed acts of domestic violence against [Plaintiff]." Defendant's DVPO against Plaintiff was denied, Jamie's DVPO against Defendant was renewed, and the temporary custody matter was continued to another day.

¶ 9 Defendant appeals the trial court's order granting Plaintiff's DVPO against him, asserting two issues on appeal. First, Defendant challenges the trial court's finding that the parties were "unmarried, of opposite sex, currently or formerly living together." Second, Defendant argues the trial court committed error when it refused to admit the audio recording of the 5 March 2019 incident that resulted in Plaintiff's

DVPO complaint against Defendant.

ANALYSIS

A. Challenged Finding of Fact

¶ 10 We have held:

> When the trial court sits without a jury regarding a DVPO, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

Hensey v. Hennessy, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (internal marks omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (internal marks omitted).

¶ 11 Defendant argues the trial court erred in finding the parties were "unmarried, of opposite sex, currently or formerly living together" when the evidence did not support finding the parties had ever lived together under N.C.G.S. § 50B-1(b)(2). Specifically, Defendant argues the times Plaintiff stayed in the same house as Defendant were temporary visitations and do not constitute living together under N.C.G.S. § 50B-1(b)(2).

¶ 12 Pursuant to N.C.G.S. § 50B-1(a), "[d]omestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child

residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a *personal relationship* . . . ." N.C.G.S. § 50B-1(a) (2019) (emphasis added). The term "personal relationship" includes "persons of opposite sex who live together or have lived together[.]" N.C.G.S. § 50B-1(b)(2) (2019). N.C.G.S. § 50B-1(b)(2) does not define "lived together," and does not include how long the parties must have lived together, how long the parties have lived apart, or the need for a spousal relationship. Similarly, our caselaw has not defined "lived together" in the context of this statute.

¶ 13 Although Defendant contends the evidence here does not support a finding that he "lived together" with Plaintiff under the statute according to the common understanding of the phrase, it is unnecessary for us to conduct statutory analysis to determine the meaning of this phrase in light of the circumstances of this case. When Defendant filed his *Complaint and Motion for Domestic Violence Protective Order* against Plaintiff, under N.C.G.S. § 50B-1, he checked the box indicating that Defendant and Plaintiff "are persons of the opposite sex who are not married *but live together or have lived together*" and that they "are *current or former household members*." (Emphasis added). These allegations constitute a binding judicial admission that the parties "lived together" under N.C.G.S. § 50B-1(b)(2). *See Universal Leaf Tobacco Co. v. Oldham*, 113 N.C. App. 490, 493, 439 S.E.2d 179, 181 (internal citation and marks omitted) ("It is well established in this jurisdiction that

a party is bound by his pleadings and, unless withdrawn, amended, or, otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. Allegations contained in the pleadings of the parties constitute judicial admissions which are binding on the pleader as well as the court."), *disc. rev. denied*, 336 N.C. 615, 447 S.E.2d 412 (1994); *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964) ("A party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings.").

¶ 14 Relatedly, at the hearing, Defendant never contended Plaintiff did not live with him, likely because such an argument would necessarily defeat his requested DVPO.[1] Defendant cannot now on appeal raise a new argument, never argued to or ruled on by the trial court, which in fact contradicts his own contentions in requesting a DVPO before the trial court. *See Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 348, 712 S.E.2d 328, 332, *disc. rev. denied*, 365 N.C. 357, 718 S.E.2d 391 (2011) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)) ("Our Supreme

[1] Although Defendant did file a motion to dismiss, alleging that the parties did not have a "personal relationship" under N.C.G.S. § 50B-1(b), the following day Defendant filed a DVPO alleging the grounds for a DVPO under N.C.G.S. § 50B-1(b)(2) discussed above. The same day Defendant filed the DVPO, he also voluntarily dismissed, with prejudice, his motion to dismiss Plaintiff's DVPO.

Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount' in the appellate courts.").

B. Defendant's Audio Recording

¶ 15 Next, Defendant argues the trial court committed error by failing to admit an audio recording of the incident that resulted in the DVPO between Plaintiff and Defendant. Plaintiff contends this issue was not preserved on appeal because Defendant did not make "an offer of proof" for the recording at the trial court.

1. Preservation

¶ 16 "In order to establish error in the exclusion of evidence, there must be a showing of what the excluded testimony would have been." *State v. Foust*, 220 N.C. App. 63, 71, 724 S.E.2d 154, 160 (2012) (citing *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) ("It is well-established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify."). Typically, "the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010); *see also* N.C.G.S. § 8C-1, 103(a)(2) (2019).

¶ 17 Here, the transcript provides what the audio recording contained according to

Defendant, and the audio recording itself is provided within the Record as an exhibit. At trial, Defendant testified to his version of the 5 March 2019 incident, which he then stated was recorded. This audio recording, according to Defendant, would have helped illustrate his testimony. The significance of the audio recording in reinforcing Defendant's allegation of the events on 5 March 2019 is "obvious from the [R]ecord," permitting us to review the trial court's failure to admit the recording. *Foust*, 220 N.C. App. at 71, 724 S.E.2d at 160.[2]

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[2] Here, according to the *Certificate of Settlement*, the Record was settled by consent between Defendant and Plaintiff. While Plaintiff now argues the evidence was not offered at trial, the Record provides "[Defendant] *offered into evidence an audio file on a thumbdrive, but the Court denied its admission*. The exhibit was not numbered. It will be submitted with this [R]ecord." (Emphasis added). Pursuant to North Carolina Appellate Procedure Rule 11, the record on appeal can be settled by agreement after an appellee's objections or amendments:

> Within thirty days . . . after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. . . . [O]bjections to the proposed record on appeal . . . shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate."

N.C. R. App. P. 11(c) (2021). If Plaintiff wanted to object to whether an offer of proof was submitted, there was an opportunity to give an objection to the statement when she was served with the proposed Record on appeal. The Record provides, in a joint statement settled on appeal by both parties, the audio recording was offered to the trial court by Defendant, making the exhibit reviewable by our Court. *See Town of Leland v. HWW, LLC*, 725 S.E.2d 1, 2 n.2 (N.C. App. 2010) (unpublished) ("In its reply brief, HWW contends because this letter was not filed, served, submitted for consideration, admitted, and no offer of proof was tendered to the trial court for it, it should not be considered by this Court. *See* [N.C. R. App.

2. Failure to Admit Audio Recording

¶ 18 Next, we must determine whether the trial court abused its discretion by failing to admit the audio recording of the 5 March 2019 incident that resulted in the DVPO between Plaintiff and Defendant. "[T]he manner of the presentation of evidence is a matter resting primarily within the discretion of the trial judge, and his control of the case will not be disturbed absent a manifest abuse of discretion." *Wolgin v. Wolgin*, 217 N.C. App. 278, 282, 719 S.E.2d 196, 199 (2011) (internal marks omitted). "Abuse of discretion results where the [trial] 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). Pursuant to N.C.G.S. § 8C-1, Rule 611(a), "[t]he [trial] court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C.G.S. § 8C-1, Rule 611(a) (2019).

¶ 19 Here, in the following exchange, the trial court did not permit Defendant to present the audio recording when Defendant was testifying on direct examination:

P. 11(c)]. HWW's failure to properly object to the 23 April 2007 letter's inclusion in the Rule 11(c) supplement to the record on appeal waives its current objection. *See* [N.C. R. App. P. 11(c)].").

[DEFENSE COUNSEL:] Did you tape this occurrence?

[DEFENDANT:] Yes. Around that time, I started the tape recording and I -- the phone was recording the entire time in my pocket.

[DEFENSE COUNSEL:] And do you have a copy of that recording with you today?

[DEFENDANT:] Yes, I do.

[DEFENSE COUNSEL:] Okay. Would it illustrate your testimony if we ever had time to play this recording?

[DEFENDANT:] Yes.

[DEFENSE COUNSEL]: Okay. Your Honor, please, I have a thumb drive of a 30-minute recording of the entire incident that has been provided to [Plaintiff's Counsel].

[PLAINTIFF'S COUNSEL]: I can't imagine she has 30 minutes.

[DEFENSE COUNSEL]: I don't.

THE COURT: You don't.

[DEFENSE COUNSEL]: I am still asking to listen to voir dire.

THE COURT: I paused it. I paused it for this, but frankly, you have a minute and 8 seconds left, total.

[PLAINTIFF'S COUNSEL]: How much time do I have, 15?

THE COURT: Five and 56 seconds.

[DEFENSE COUNSEL]: Okay.

THE COURT: Of course, if there's time, I'll let [Defense Counsel] an extra minute for her argument, but this is the end.

The trial court provided no reasoning for its failure to admit the audio recording under any rule of evidence, nor did it suggest the decision was for one of Rule 611's enumerated reasons. The Record provides there was no objection to its admission when Defendant attempted to admit the evidence, and the trial court provided no reasoning behind not admitting the audio recording except Defendant was running out of his allocated time. Additionally, there is no indication as to why the audio recording could not have been heard *in camera*, or continued to another time, rather than immediately issuing a ruling.

¶ 20 Assuming, without deciding, that the trial court's refusal to admit the audio recording was a manifest abuse of discretion, in this case, the refusal was not prejudicial to Defendant. "When considering evidentiary errors on appeal, the burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred." *Scheffer v. Dalton*, 243 N.C. App. 548, 554, 777 S.E.2d 534, 540 (2015) (internal marks omitted) (citing *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002), *disc. rev. denied and cert. denied*, 357 N.C. 66, 579 S.E.2d 107 (2003)), *disc. rev. denied*, 368 N.C. 772, 782 S.E.2d 901 (2016). Defendant contends he was prejudiced as, in the absence of the recording, the dispute was essentially a "he said, she said" and the recording would provide objective evidence on the incident favoring Defendant. We disagree.

¶ 21 The audio recording was offered only as illustrative evidence of Defendant's testimony regarding the incident giving rise to the DVPO. Illustrative evidence is "competent to enable the [fact finder] to understand the oral testimony and to realize more completely its cogency and force." *Williams v. Bethany Volunteer Fire Dept.*, 307 N.C. 430, 434, 298 S.E.2d 352, 354 (1983); *see also* N.C.P.I.—Civil 101.40 (2019) ("This [evidence] is not substantive or direct evidence, that is, it has not been received into evidence to prove any fact in this case. You may consider this [evidence] only for the purpose of illustrating and explaining the testimony of the witness, to the extent, if any, that you find that it does so illustrate and explain the testimony of the witness. You may not consider it for any other purpose in connection with the trial of this case."). As illustrative evidence of Defendant's testimony, the substance of the recording was already before the trial court in Defendant's testimony regarding the incident. Even assuming, *arguendo*, it was an abuse of discretion not to admit the audio recording, a different result was not likely if not for the error and Defendant has not demonstrated prejudicial error. *See Bowden v. Bell*, 116 N.C. App. 64, 69, 446 S.E.2d 816, 820 (1994) (citing *Wells v. French Broad Elec. Membership Corp.*, 68 N.C. App. 410, 415, 315 S.E.2d 316, 319, *disc. rev. denied*, 312 N.C. 498, 322 S.E.2d 565 (1984)) ("Where a photograph is offered to illustrate the testimony of a witness, and the witness testifies as to the subject matter of the photograph, the exclusion of the photograph is not prejudicial error.").

CONCLUSION

¶ 22 We affirm the trial court's finding that the parties were "unmarried, of opposite sex, [and] currently or formerly living together" as Defendant made a judicial admission they had "lived together" under N.C.G.S. § 50B-1(b)(2) when he indicated they had "lived together" in his request for a DVPO against Plaintiff. Additionally, we affirm the DVPO as any error committed by the trial court in refusing to consider the audio recording, which would have merely illustrated Defendant's testimony, was not prejudicial.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).