

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No. 20170187
)	
vs.)	
)	
Richie Edwin Wilder, Jr.,)	District Court No. 51-2015-CR-02854
)	
Defendant/Appellant.)	
)	

APPEAL FROM THE DISTRICT COURT CRIMINAL JUDGMENT
IN AND FOR THE COUNTY OF WARD, STATE OF NORTH DAKOTA,
NORTH CENTRAL JUDICIAL DISTRICT
HONORABLE GARY H. LEE
JUDGE OF THE DISTRICT COURT, PRESIDING

BRIEF OF APPELLEE

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[¶2] STATEMENT OF FACTS

[¶3] Richie Edwin Wilder, Jr., was convicted by a jury of murdering the mother of his two oldest children, Angela Wilder. The evidence presented at trial showed Richie and Angela Wilder had a volatile relationship, even after their divorce. Tr. p. 34, lines 4-13. They shared custody of their minor children. Tr. p. 33, line 20 – p.34, line 3. Angela Wilder was stabbed 44 times in the bedroom of her home while her live-in boyfriend was at work in the early morning hours of November 13, 2015. Tr. p. 18, lines 5-22, p. 22, lines 14-25, p. 151, lines 18-21. Angela Wilder's youngest child was located in his bedroom, unharmed. Tr. p. 21, lines 13-18. The two Wilder children were in Richie Wilder's custody at the time of the murder. Tr. p. 37, lines 1-3. Angela Wilder's blood was found inside Richie Wilder's vehicle. Tr. p. 183, lines 2-12, p. 212, lines 4-9. His DNA was found under her fingernails. Tr. p. 204, lines 12-20.

[¶4] Richie Wilder was arrested for Angela Wilder's murder on December 18, 2017. App. 15. Jury trial commenced December 12, 2016. App. 7. In the time Richie Wilder was incarcerated awaiting trial, he gave multiple statements to multiple people, including investigators and fellow inmates, about different people who he alleged were responsible for the murder. Testimony was received regarding those statements. Tr. p. 244, line 10 – p. 245, line 25, p. 249, line 16 – p.250, line 20, p. 260, lines 13-23, p. 262, lines 18-25, p. 272, line 20 – p. 276, line 16, p. 284, line 5 – p. 287, line 3, p. 378, line 4 – p. 379, line 19, p. 380, line 22 – p. 381, line 3; Register of Actions, Doc. ID 226, 227. In closing arguments, the State recounted the statements for the jury. Tr. p. 416-421, 426-428, 434-436. After approximately one hour of deliberations, the jury convicted Richie Wilder of Angela Wilder's murder. Register of Actions, Doc. ID 266. In sentencing Richie Wilder

to life in prison without the possibility of parole, the trial court ordered defendant to have no contact with the two children. App. 81.

[¶5] Richie Wilder moved the trial court to correct the sentence, alleging the no contact order amounted to an illegal sentence. App. 106. After hearing, the motion was denied. App. 140.

[¶6] LAW AND ARGUMENT

[¶7] I. The State's comments in closing arguments were not improper references to Mr. Wilder's silence.

[¶8] “The control and scope of closing arguments are left to the discretion of the trial court.” State v. Ebach, 1999 ND 5, ¶5, 589 N.W.2d 566, *citations omitted*. This Court will not reverse on the ground the prosecutor exceeded the scope of closing argument absent a clear abuse of discretion. Id. To establish an abuse of discretion, the defendant must show the prosecutor's comments were improper and unfairly prejudicial. Id. “Error is unfairly prejudicial only if it causes substantial injury to the defendant such that a different decision would have resulted absent the error.” Id.

[¶9] The evidence presented at trial showed that in the months between the murder and the trial, Mr. Wilder gave multiple statements to law enforcement investigators and to other inmates at the Ward County Jail. Each of these statements varied with respect to who was involved in and responsible for the murder of Angila Wilder. In closing, the State recounted each of these statements. Tr. p. 416-421, 426-428, 434-436. Mr. Wilder selected two comments from the State's closing which he asserts violated his right to remain silent. However, those statements must be examined in context.

[¶10] The State did ask the jury the rhetorical question about why Mr. Wilder did not report certain “facts” to the investigators. However, that rhetorical question and the State's recitation of “facts” that Mr. Wilder did not tell law enforcement were all designed to point out the inconsistencies in his various statements. Those statements were not references to Mr. Wilder's silence, but rather comments about his evolving stories about how the murder of Angila Wilder was committed. The State's comments about the evidence were not improper references to Mr. Wilder's silence and did not

violate his constitutional rights. State v. Myers, 2006 ND 242, ¶14, 724 N.W.2d 168. Rather, the State's comments drew attention to the inconsistencies among Mr. Wilder's various statements. See State v. Ebach, 1999 ND 5, ¶15, 589 N.W.2d 566.

[¶11] The trial court instructed the jury that statements of counsel are not evidence and are not to be considered as evidence. App. 41. It is presumed that the jury will follow the trial court's admonition and instructions. State v. Azure, 525 N.W.2d 654, 655 (N.D. 1994). The complained of statements do not amount to a violation of constitutional rights or rise to the level of substantial injury to the defendant such that a different decision would have resulted absent the error.

[¶12] **II. The no contact provision in the Amended Criminal Judgment does not constitute an illegal sentence.**

[¶13] The trial court sentenced Mr. Wilder to life in prison without the possibility of parole. App. 81. The trial court initially ordered that Mr. Wilder have no contact, whatsoever, with Angila Wilder's two oldest children. App. 81. Mr. Wilder moved the trial court to rescind that order, alleging it constitutes an illegal sentence. App. 106. Following a hearing on the issue, the trial court issued its Order affirming the no contact order, but modifying it to be effective until each of the children reaches the age of majority. App. 140-155.

[¶14] While this Court has apparently not addressed the issuance of a no contact order as part of an executed sentence, a number of other jurisdictions have. The general consensus seems to be that such an order is valid only if authorized by statute (State v. Pugh, 753 N.W.2d 308 (Minn. App. 2008)), cannot impose no contact order absent statutory authority; State v. Sanchez, 871 N.W.2d 520 (Iowa App. 2015), no contact order based on statutory authority is valid; State v. France, 308 P.3d 812 (Wash. App.

2013), statutory authority for no contact order; State v. Alcala, 348 P.3d 570 (Kan. 2015), no contact order is probation condition that cannot be imposed in conjunction with prison sentence per statute; Jarrett v. State, 829 N.E.2d 930 (Ind. 2005), no contact order not authorized by statute is invalid; State v. Hunt, 727 S.E.2d 584 (N.C. App. 2012), statute authorizes permanent no contact order).

[¶15] A. **Application of Article 1, Section 25, North Dakota Constitution**

[¶16] While North Dakota’s sentencing chapter does not provide for a no contact order in conjunction with an executed sentence, the State submits that “Marsy’s Law” does. N.D.Const. Art. I, §25. A victim has the right to be reasonably protected from the accused. N.D.Const. Art. I, §25(1)(c). The State asserts that trial courts can only protect a victim from an accused by ordering the accused to have no contact with the victim.

The children of a deceased victim may assert the rights afforded by “Marsy’s Law.” N.D.Const. Art. I, §25(4). The State submits that Mr. Wilder’s interpretation of “victim” set forth in N.D.Const. Art. I, §25(4) is wrong. The language in §25(4) states that a child of deceased victim “may also exercise these rights.” It does not say, as Mr. Wilder asserts, that the child may exercise the victim’s rights. Even before the passage of “Marsy’s Law,” family members of deceased victims were included in the statutory definition of “victim.” N.D.C.C. 12.1-34-01(10).

[¶17] The purpose of “Marsy’s Law” is to “preserve and protect the right of crime victims to justice...” N.D.Const. Art. I, §25(1). There is no authority to support Mr. Wilder’s position that protecting victims of crime by means of a no contact order is the equivalent of a sentencing enhancement, requiring a factual determination by the fact finder.

[¶18] The State acknowledges that no one asserted the rights afforded by “Marsy’s Law” on behalf of the minor children. At the time of sentencing, the children were in the care of Mr. Wilder’s wife, Cynthia Wilder, who was arrested for her role in the murder of the children’s mother fifteen days after sentencing. *See 51-2017-CR-01155*. The trial court, justifiably, had “little faith that Cynthia Wilder would protect the children from further psychological injury,” and acted sua sponte in the role of parens patriae, a doctrine referring to the public policy power of the state to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection. App. 148. *See Kirton v. Fields*, 997 So.2d 349 (Fla. 2008), *In re W.*, 76 A.D.2d 784 (N.Y.App. 1980), *Custody of Smith*, 137 Wn.2d 1 (Wash. 1998), *Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992), *Kent v. U.S.*, 383 U.S. 541 (1966).

[¶19] **B. The trial court did not err in finding authority to issue the no contact order in Article VI, Section 8, N.D.Const., and N.D.C.C. 27-05-06.**

[¶20] The trial court relied on the authority vested in it by Article VI, Section 8, N.D.Const., which grants it the “authority to issue such writs as are necessary to the proper exercise of its jurisdiction,” and by Section 27-05-06, N.D.C.C., which grants district courts “[a]ll the powers” necessary to “the full and complete administration of justice.”

[¶21] The trial court relied on *State v. Howe*, 308 N.W.2d 743 (N.D. 1981), which provided for the inherent power and obligation of district courts to fashion remedies, without legislative authorization, to vindicate a violation of one’s constitutional rights. App. 147. The court reasoned that it should also have the power and the obligation to fashion remedies, without legislative authorization, to protect victims of violent crime.

App. 147. The court relied on “Marsy’s Law,” a self-enabling constitutional amendment, and the court’s existing statutory and inherent authority, to order no contact as part of a criminal sentence. App. 147.

[¶22] C. The trial court’s interpretation does not offend Constitutional implications.

[¶23] In order for Mr. Wilder’s separation of powers argument to stand, this Court must first find that the no contact provision ordered by the trial court is a penalty. The trial court imposed the no contact provision sua sponte, acting in its role of parens patriae. App. 148. The no contact provision was imposed for the protection and benefit of the children. App. 148. “Marsy’s Law,” a self-enabling constitutional amendment, requires the trial court to protect the rights of victims of crime. N.D.Const., Art. I, §2.

[¶24] Trial courts are required to consider, and may impose, an order prohibiting contact with victims by defendants charged with crimes of violence. N.D.C.C. 12.1-31.2-02. A trial court is given broad discretion in imposing probation conditions. State v. Shepherd, 554 N.W.2d 821, 823 (N.D. 1996). Probation conditions are designed to “ensure that the defendant will lead a law-abiding life...” N.D.C.C. 12.1-32-07(2). Contrary to Mr. Wilder’s argument, this Court has upheld probation conditions restricting a probationer from certain geographic locations. State v. Aune, 2002 ND 176, ¶8, 653 N.W.2d 53, State v. Sahr, 470 N.W.2d 185, 193 (N.D. 1991).

[¶25] The trial court’s reasoning is sound. “It would be incongruous to say that the Court has the authority at the front [e]nd to impose a no contact order as a condition of bond, and at the backend as a condition of probation, but has no authority to do the same thing in the middle while a violent felon is serving a sentence.” App. 143, ¶11. The district courts, in the exercise of their statutorily conferred jurisdiction, have the “power

to issue all writs, process, and commissions provided [by the constitution] or by law *or which may be necessary for the due execution of the powers with which the courts are vested*. N.D.C.C. 27-05-06, *emphasis added*. The trial court's reasoning that in exercising its inherent authority to protect children, the constitution and statutory authority to issue all writs necessary to a full and complete jurisdiction of the court, extends to the issuance of a no contact order for the protection of victims of violent crime from violent felons while serving sentence.

[¶26] Imposition of the no contact order pursuant to "Marsy's Law" does not violate the prohibition against *ex post facto* laws. An *ex post facto* law, as relevant to this case, is one which changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. State v. Burr, 1999 ND 143, ¶10, 598 N.W.2d 147. The protections afforded by "Marsy's Law" are protections afforded to victims of crime, not punishment of offenders. As such, imposition of the no contact order pursuant to "Marsy's Law" does not create an *ex post facto* violation of Mr. Wilder's rights.

[¶27] Imposition of the no contact order does not amount to termination of Mr. Wilder's parental rights implicating due process. For the reasons stated above, imposition of the no contact order pursuant to "Marsy's Law" is not imposition of an additional penalty, but rather serves to protect the children of Angila Wilder from psychological harm that contact with the murderer of their mother may cause. It is remedial in nature.

[¶28] Mr. Wilder, by being incarcerated for the remainder of his life, lost custody of the children. As the trial court observed, incarcerated inmates may be subject to the denial of basic rights, even rights of a constitutional dimension. *See State v. Ballard*, 2016 ND 8, 874 N.W.2d 61. The trial court eloquently pointed out that it is Mr. Wilder's own actions

which resulted in his lifetime incarceration. Evidence at trial showed that Mr. Wilder's sole motive in murdering Angila Wilder was to remove her from the children's lives.

[¶29] Mr. Wilder's reliance on Matter of Adoption of J.S.P.L., 532 N.W.2d 653 (N.D. 1995), is misplaced. That case involved the murder of the defendant's children's mother. This Court pointed out that courts all over the country "have uniformly held that the nature of the parent's crime for which he or she is incarcerated is indeed a very relevant factor in deciding whether to terminate parental rights, and that the intentional murder of the child's other parent may be sufficient in itself to support termination." Id., 532 N.W.2d at 665, *citations omitted*. This Court went on to state "[t]he circumstances of [defendant's] crime present a paradigm of parental unfitness and resulting continued deprivation of the children. Id.

[¶30] III. The trial court did not abuse its discretion in refusing to hear testimony of the children's guardian ad litem.

[¶31] Evidentiary rulings are reviewed under an abuse of discretion standard. State v. Streeper, 2007 ND 25, ¶11, 727 N.W.2d 759. A district court has broad discretion in admitting or excluding evidence. Id. A district court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably or if it misinterprets or misapplies the law. Id. At the hearing on his motion to correct illegal sentence, Mr. Wilder offered the testimony of the legal guardian ad litem appointed in the civil guardianship and adoption proceeding. The State objected, on hearsay grounds, to her testimony as to the wishes of the children. The trial court sustained the objection.

[¶32] The trial court amended its original lifetime no contact order, instead ordering no contact during the minority of the children. App. 155. The trial court made this amendment out of respect for the rights of the children to make their own choices upon

reaching the age of majority. The wishes of the children would not likely have changed the trial court's decision to impose the no contact provision.

[¶33] In imposing the no contact provision, the trial court cited the wisdom of the late Justice Meschke in his concurring opinion in In re Guardianship & Conservatorship of Norman, 521 N.W.2d 395 (N.D. 1994). Justice Meschke relied upon “[t]he tenet that, absent any redemptive reason, a murderous parent can be unfit and disqualified from any say about the custody of the deprived children...” Justice Meschke further noted that the rights of a parent who is incarcerated for a lengthy period have been “suspended by circumstances.” “When that parent’s rights to custody have been suspended, a murderous and unfit parent should have nothing further to say about the custodial placement of the deprived children unless a drastic change in his circumstances takes place.” Id. at 399. Justice Meschke cited several parallels that support the premise that a murderous parent loses all parental control and authority. He then cited several cases from around the nation to “demonstrate that a murderous father can be disqualified from a voice in custody of his children.”

[¶34] Justice Meschke cited Nancy Viola R. v. Randolph W., 356 S.E.2d 464 (W.Va. 1987), wherein that court declared the “first degree murder of a child’s parent is the ultimate act of savagery to that child. The emotional and psychological scarring the child has sustained as a result of his mother’s death at the hands of his father is no doubt substantial. We can conceive of few circumstances in which the termination of parental rights would be more justified.” Id. at 470.

[¶35] The trial court’s language throughout the order is quite strong. The trial court cites the “emotional and psychological scarring [the children] have no doubt already

suffered knowing that Richie Wilder, Jr., their father, brutally murdered, in cold blood, their mother. App. 149, ¶31. The trial court went on to state that it would not “sit idly by and allow Richie Wilder, Jr. to continue that brutalization of these children.” Id.

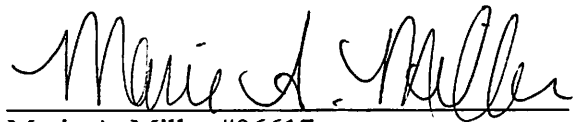
[¶36] In addition, the trial court said, “If the Court has erred by trying to shield these children from further contact with the cold-blooded killer of their mother, so be it. It is a mistake the Court will make every time in order to protect children.” App. 148, ¶28. Admission of the guardian ad litem’s testimony would not have changed the outcome.

[¶37] **CONCLUSION**

[¶38] The remarks about Mr. Wilder not reporting certain “facts” to law enforcement were nothing more than part of the discussion of the evidence of Mr. Wilder’s varying accounts of the murder. The trial court acted within its statutory and constitutional authority in imposing the no contact order. The testimony of the guardian ad litem would not have affected the outcome of the proceeding.

[¶39] For the foregoing reasons, the State respectfully requests this Court affirm the Amended Judgment.

Respectfully submitted this 19 day of December, 2017.



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