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NO. COA01-1076

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

IN THE MATTER OF

Wake County  
No. 93 J 66

BRYANT EDWARD WILLIAMS

Appeal by respondent from order entered 30 April 2001 by Judge Michael R. Morgan in Wake County District Court. Heard in the Court of Appeals 15 May 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.*

*Peter Wood, for respondent-appellant.*

BRYANT, Judge.

This is an appeal from a juvenile adjudication order finding respondent responsible on two counts of assault on a government employee, two counts of simple assault and one count of resisting, delaying and obstructing a public officer.

The State's evidence tended to show the following. Respondent was a detainee at Wake Juvenile Detention Center on 3 February 2001. When a fire broke out in a laundry room, the residents were evacuated to the basketball court. At some point during the evacuation, respondent and several other detainees were seen punching and "stomping" Eric Hutchinson, another detainee.

Respondent then sought out David Inman, also a detainee. Respondent punched and kicked Inman. When the director of the Detention Center, Donald Miles, learned of the fights, he and the staff ordered the detainees inside to control the situation. Respondent and other detainees refused to go to their rooms and began to turn over desks and throw chairs. At that point, the director grabbed his arm to return respondent to his room. The Raleigh Police Department was called to assist in restraining respondent and other detainees who refused to return to their rooms. Respondent kicked the director in the chest and face as four or five uniformed police officers arrived to handcuff him. Respondent continued to resist, at one point spitting in the face of one of the officers.

Respondent was eventually restrained and charged with two counts of assault on a government employee, two counts of simple assault and one count of resisting, delaying and obstructing a public officer. Respondent was convicted of the same and now appeals.

Respondent argues that the juvenile court committed plain error by failing to dismiss the charges after a two-month recess. Specifically, respondent argues that the memory of the attorneys and judge are inherently unreliable and that this State, like a few others, should "presume that a lengthy recess during a trial is an abuse of discretion as a matter of law." We decline to do so and affirm the decision of the juvenile court.

Respondent failed to object to the recess on 14 March 2001, but did so once the hearing resumed on 30 April 2001. Our Rules of Appellate Procedure provide that

[i]n criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(c)(4). The "plain error" rule applies only to the preservation of issues relating to jury instructions and the admission of evidence. *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). In this case, once respondent moved for dismissal, he did so on the basis that the delay violated his due process rights stating that it was impossible for anyone to remember the evidence presented two months earlier. Not only was respondent's motion untimely, it was also based on the plain error rule, which does not apply to such a motion.

Even assuming that the motion was timely and proper, we find respondent has shown no prejudice and therefore we find no error. In *In re T.C.S.*, \_\_\_ N.C. App. \_\_\_, 558 S.E.2d 251 (2002), this Court upheld a three-month recess in a juvenile delinquency proceeding, holding that the juvenile failed to show that he was prejudiced by the delay. In the instant case, the State's evidence tended to show that respondent assaulted two juvenile detainees at the detention center, assaulted the director of the detention center and a police officer who tried to help, and resisted the

officers' attempts to control him. In reviewing the transcript and record, we find that the Juvenile Court judge had taken extensive notes at the March 14 hearing which he referred to when the hearing continued on April 30. There is no evidence that the memory of the judge was unreliable as to the prior testimony. "The trial court, not the appellate court, weighs the credibility of evidence. Therefore, '[w]here there is competent evidence in the record supporting the court's findings, we presume that the court relied upon it and disregarded the incompetent evidence.'" *State v. Coronel*, 145 N.C. App. 237, 250, 550 S.E.2d 561, 570 (2001) (citations omitted), *review denied*, 355 N.C. 217, 560 S.E.2d 144 (2002). We conclude that there is competent evidence in support of the juvenile court's findings and hold that the court did not err in denying respondent's motion to dismiss.

AFFIRMED.

Judges WALKER and McCULLOUGH concur.

Report per Rule 30(e).