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NO. COA02-384

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

DONNELL PITTMAN

Martin County
Nos. 00 CRS 3835
01 CRS 379
01 CRS 1949

Appeal by defendant from judgments entered 1 November 2001 by Judge Clifton W. Everett, Jr., in Martin County Superior Court. Heard in the Court of Appeals 7 October 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for the State

Paul T. Cleavenger for defendant-appellant.

EAGLES, Chief Judge.

Donnell Pittman ("defendant") appeals from judgments entered on jury verdicts finding him guilty of first degree murder, robbery with a dangerous weapon, felonious breaking and entering of a motor vehicle, and misdemeanor larceny. After careful review of the briefs and record, we discern no error.

The State's evidence tended to show that on 11 December 2000, Don Milton Baker ("the victim") was found dead in his home. The cause of death was determined to be a stab wound to the neck that penetrated the jugular vein. The victim also suffered from several

other stab wounds, abrasions and incisions. The victim's blood was found throughout his home, including bloodstains and smears on the floor all around him, the interior side of the doorknob on the kitchen door which lead out of the house, the curtain on the door, the stove, kitchen table, refrigerator, television and washing machine. Also found were several shoe impressions which appeared to be in blood. Police also recovered a blood stained hammer. Another hammer and a knife were found on the couch near the victim. Finally, police recovered two plastic bottles from the top of the television set which contained remnants of a white powder later determined to be cocaine.

Later that evening defendant turned himself in to police and handed the police a written statement. Defendant wrote that he had gone to the victim's home and that once inside, the victim grabbed half of a bat and swung it at him. Defendant was able to catch part of the bat with his hand and the victim swung again. Defendant stated that he grabbed a hammer off the table and hit the victim with it but the victim kept swinging the bat. Defendant hit the victim several more times with the hammer before grabbing a knife off the table and swinging it at the victim. Defendant wrote that he hit the victim in the neck area and then the victim fell. Defendant got scared, grabbed the victim's car keys and drugs off of a table, and drove away in the victim's car. Defendant claimed that the victim attacked him because he owed the victim \$80 from a previous drug purchase. When defendant was arrested, investigators

noticed that defendant's shoes had blood on them. The blood was later determined to be that of the victim.

Defendant gave another statement to investigators on 12 December 2000. Defendant again claimed that the victim had swung a bat at him. Defendant claimed that he swung at the victim twice with a knife and hit the victim in the head with a hammer while defending himself. Defendant claimed that the victim fell when defendant struck him in the throat with the knife. Defendant stated that he then sat in a chair for several minutes before taking the victim's car keys and driving away. Defendant also took \$200 to \$300 worth of "crack rocks" from plastic bottles in the victim's house.

On 25 June 2001, defendant was indicted for the murder of Don Milton Baker, robbery with a dangerous weapon, felonious breaking and entering of a motor vehicle, and misdemeanor larceny. The case was tried at the 29 October 2001 Criminal Session of Martin County Superior Court. On the day of trial, defendant asked the trial court to continue his case for the term because he felt that his lawyer was not "representing me to the best of my interests." Defendant complained that counsel had not adequately investigated his case, contested his hiring of a private investigator, and had discussed his case with another lawyer. Counsel denied the charges although he admitted discussing the case with another lawyer without violating defendant's confidentiality. Counsel stated that he was aware of defendant's dissatisfaction and informed defendant that he had the right to hire a new lawyer. Counsel stated that he

advised defendant that it was "highly unlikely at this stage of the proceedings for another lawyer to be appointed." Counsel further stated that he was unaware of any efforts by defendant to retain new counsel. Counsel indicated he was prepared to try the case. The trial court denied defendant's motion for a continuance.

The jury returned guilty verdicts on all charges. The trial court entered judgment and sentenced defendant to life imprisonment without parole for the first degree murder conviction. Additionally, defendant was sentenced to consecutive terms of 103 to 133 months for the robbery conviction and six to eight months imprisonment for the breaking and entering and misdemeanor larceny convictions. Defendant appeals.

On appeal, defendant contends that the trial court erred: by arraigning him on the same day as his trial; by denying his motion for a continuance; and in denying his motion to dismiss for insufficiency of the evidence. Defendant also contends that he received ineffective assistance of counsel. After careful consideration of the briefs and record, we discern no error.

Defendant first argues that the trial court erred by arraigning him on the same day as his trial in violation of G.S. § 15A-943. However, G.S. § 15A-943 applies specifically to counties "in which there are regularly scheduled 20 or more weeks of trial sessions of superior court at which criminal cases are heard, and in other counties the Chief Justice designates." G.S. § 15A-943(a). We take judicial notice that Martin County is not a county that regularly schedules twenty or more weeks of criminal sessions

a year, thereby making this statute inapplicable. See *State v. Sellars*, 52 N.C. App. 380, 388, 278 S.E.2d 907, 914 (taking judicial notice that Chatham County did not meet criteria of G.S. § 15A-943), *disc. review denied and appeal dismissed*, 304 N.C. 200, 285 S.E.2d 108 (1981). Accordingly, the assignment of error is overruled.

We next consider whether defendant received ineffective assistance of counsel and whether the trial court erred by denying his motion for a continuance. Defendant sought a continuance before the trial because he felt counsel was not representing his best interests. Specifically, defendant complained that counsel had not adequately investigated the case and had discussed the case with another attorney which violated his right to confidentiality. Defendant contends that counsel argued against the motion to continue the case, stating that he was prepared to proceed with the trial. Thus, defendant contends that the trial court should have continued the case to consider whether new counsel should have been appointed. Defendant asserts that he was prejudiced by having to go to trial with an attorney who he had attempted to discharge but had refused to withdraw. We are not persuaded.

This Court has stated:

A trial court's ruling on a motion to continue ordinarily will not be disturbed absent a showing that the trial court abused its discretion, but the denial of a motion to continue presents a reviewable question of law when it involves the right to effective assistance of counsel.

In re Bishop, 92 N.C. App. 662, 666, 375 S.E.2d 676, 679 (1989). Here, defendant argues that the issue presents a question of law because he did not receive effective assistance of counsel. Specifically, defendant contends that it was clear that he was dissatisfied with counsel, noting that he and counsel were arguing against each other when counsel should have been supporting his motion for a continuance. However, defendant was not entitled to a continuance. The bases for defendant's dissatisfaction with counsel were general and unsupported allegations that counsel was not acting in defendant's best interests. "Nothing in the record indicates that [counsel] was not qualified to represent defendant in this case. Nor is there any evidence that [counsel] did not serve as a zealous advocate for defendant throughout the entire time in which he represented [him]." *State v. Anderson*, 350 N.C. 152, 167, 513 S.E.2d 296, 306, cert. denied, 528 U.S. 973, 145 L. Ed. 2d 326 (1999). Furthermore, we note that "a defendant does not 'have the right to insist that new counsel be appointed merely because he has become dissatisfied with the attorney's services.'" *Id.* at 167-68, 513 S.E.2d at 306 (quoting *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981)). Additionally, "[w]hile it is a fundamental principle that an indigent defendant in a serious criminal prosecution must have counsel appointed to represent him, an indigent defendant does not have the right to have counsel *of his choice* appointed to represent him.'" *Id.* at 166-67, 513 S.E.2d at 305 (citation omitted) (emphasis in original)

(quoting *State v. Thacker*, 301 N.C. 348, 351-52, 271 S.E.2d 252, 255 (1980)).

Furthermore, defendant has failed to show how "he was materially prejudiced by the denial of his motion." *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986). Counsel indicated he was prepared to proceed to trial and defendant cites no error by counsel "so serious as to deprive the defendant of a fair trial." *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). Accordingly, we conclude that the trial court did not err by denying the motion for continuance and defendant received effective assistance of counsel.

Defendant finally argues that there was insufficient evidence to support the conviction. Defendant contends that the State failed to prove the specific intent necessary to convict him of first degree murder. Although the State relied on the "felled victim" theory, defendant argues that while the victim received a number of wounds, they were superficial and not life threatening. Furthermore, there was no evidence that defendant continued the attack after the fatal wound was inflicted. Defendant additionally argues that the evidence did not support a conviction under the felony murder rule because the evidence shows that he formulated the decision to search for the drugs only after the fight had occurred, not before. Thus, defendant asserts that the evidence shows that he was not engaged in a robbery when the victim was killed. We are not persuaded.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)).

Defendant was charged with first degree murder on the basis of premeditation and deliberation pursuant to the “felled victim” theory and the felony murder rule. “[T]he premise of the “felled victim” theory of premeditation and deliberation is that when numerous wounds are inflicted, the defendant has the opportunity to premeditate and deliberate from one [blow] to the next.” *State v. Leazer*, 353 N.C. 234, 239, 539 S.E.2d 922, 926 (2000) (quoting *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653, cert. denied, 484 U.S. 916, 98 L. Ed. 2d 224 (1987)).

Here, the victim was struck 50 times, including 21 blunt force injuries and 29 sharp force injuries. Blunt force injuries are injuries caused by a blunt object striking a body while sharp force injuries are injuries caused by an object such as a knife. Several of the victim’s injuries were described as “defense wounds” which resulted from the victim grabbing a sharp instrument. The existence of “defense wounds” belies defendant’s contention that the victim was wielding a bat because the victim would have to have his hand free to grab the object. Moreover, no blood was recovered from the bat found in the victim’s residence although blood was

found spattered throughout the home. The bat was found where the victim kept it hidden which was in a small area wedged between the refrigerator and the wall. We also note that the victim had previously suffered a stroke and did not have complete use of his left hand or left leg. Additionally, the blows to the head likely rendered the victim "semiconscious or certainly not as coherent as they would be were they wide awake." One of the injuries to the back of the victim's head was not consistent with an attacker striking the victim while facing him. Finally, the victim did not die instantly and prompt medical attention may have saved his life. See *State v. Beck*, 346 N.C. 750, 755, 487 S.E.2d 751, 755 (1997) (leaving the victim to die was evidence of premeditation and deliberation). Accordingly, in the light most favorable to the State, a reasonable mind could conclude from this evidence that defendant murdered the victim with premeditation and deliberation.

Defendant also argued that there was insufficient evidence to support his first degree murder conviction under the felony murder rule. We note that the evidence was sufficient to sustain the conviction on this alternative theory as well. Defendant contends that the intent to commit robbery must precede the murder. We disagree. Our Supreme Court has stated:

The evidence is sufficient to support a charge of felony murder based on the underlying offense of armed robbery where the jury may reasonably infer that the killing and the taking of the victim's property were part of one continuous chain of events. Neither the commission of armed robbery . . . nor the commission of felony murder based on armed robbery depends upon whether the intention to commit the taking of the victim's property was

formed *before or after* the killing. Under N.C.G.S. § 14-17, a killing is committed in the perpetration of armed robbery when there is no break in the chain of events between the taking of the victim's property and the force causing the victim's death, so that the taking and the homicide are part of the same series of events, forming one continuous transaction.

State v. Handy, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1992) (citations omitted) (emphasis added). Thus, whether defendant formed the intent to rob the victim before or after he killed him is not dispositive. Here, it is undisputed that defendant remained in the victim's home after killing him, and then stole his drugs, took his keys and drove away in the victim's car. Accordingly, in the light most favorable to the State, a jury could properly infer that the killing and the robbery were part of one continuous transaction.

No error.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).