NO. COA01-806

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v. Durham County
Nos. 00 CRS 51902, 51771

ANTOINE WATSON

Appeal by defendant from judgment entered 8 February 2001 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 28 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Sylvia Thibaut, for the State.

Daniel F. Read for defendant appellant.

McCULLOUGH, Judge.

Defendant was indicted on 20 March 2000 on a charge of first-degree rape of a child under the age of 13 years. On 1 May 2000, defendant was indicted on a charge of assault with a deadly weapon inflicting serious injury. The case was tried before the Honorable J. B. Allen, Jr., at the 2 October 2000 Criminal Session of Durham County Superior Court.

The State presented evidence at trial which tended to show the following: The victim, Kadisha, who was born on 2 September 1986, lived in an apartment complex in Durham, North Carolina, with her mother, stepfather, and two siblings. The defendant, who was born

in 1978, lived in the same apartment complex with his family. In April 1999, the defendant and the victim began a romantic relationship and the victim began to let the defendant into her apartment at night when the rest of her family was asleep. In May 1999, the two began to have a sexual relationship. At the time, the victim was twelve years old. The relationship continued until January 2000.

In February 2000, the victim told her mother that she was pregnant and that defendant was the father. The victim's mother called defendant over to the apartment to talk, and confronted him with the victim's pregnancy. Defendant agreed to "help out" with the baby. Eventually, however, defendant withdrew his offer of support and denied that the baby was his. Soon thereafter, the victim's mother filed a report concerning the relationship between defendant and the victim. After the report was filed, defendant came to the victim's apartment and assaulted her stepfather, hitting him across his face with a bottle and fracturing a bone.

On 14 February 2000, Detective A. H. Holland, Jr., of the Durham City Police Department contacted defendant to question him regarding the reported relationship between him and the victim. Defendant admitted to Detective Holland that he had sex with the victim on two occasions, the first time being in May 1999.

The victim's baby was born on 11 April 2000. DNA testing performed on the child revealed that defendant had a 99.91% probability of being the father of the baby.

The Office of the Public Defender was appointed to represent

defendant in March 2000. On 28 September 2000, defendant retained private counsel and the Public Defender was allowed to withdraw. The matter was called for trial on 2 October 2000. Prior to the start of trial, defendant's attorney asked the court for a continuance, stating that he had agreed to take defendant's case with the understanding that there would be a continuance. However, counsel was unaware that the trial court had allowed the Public Defender to withdraw with the understanding that the trial would not be delayed. The trial court denied the motion and appointed the Public Defender as co-counsel to assist defendant's private counsel during the trial.

On the first day of trial, defendant did not return to court after the recess for lunch. The defendant's bond was called and the trial proceeded in his absence. After the verdict was returned by the jury finding defendant guilty of first-degree rape, the court ordered that prayer for judgment be continued until defendant could be apprehended. Defendant was later apprehended and judgment was entered on 8 February 2001. Defendant was sentenced to 384 to 470 months' imprisonment for the first-degree rape charge. Defendant also pled guilty to assault with a deadly weapon inflicting serious injury and was sentenced to forty-six to sixty-five months' imprisonment. Pursuant to the plea agreement, the sentence for assault was to be served concurrent with the sentence for rape, and three habitual felon charges were dismissed. Defendant appeals.

Defendant brings forth the following arguments on appeal:

that the trial court erred (1) by denying the motion to continue; (2) by calling the bond and continuing the trial only six minutes after defendant was late, and by continuing the trial without the presence of defendant; (3) by not instructing on the lesser offense of second-degree sexual offense; (4) by imposing a sentence for the first-degree rape of a child under 13 years, 384 to 470 months, as the same is cruel and unusual and violated defendant's right to be free of excessive punishment under the Eighth Amendment to the United States Constitution and Article I, § 27 of the North Carolina Constitution.

I.

Defendant's first argument contends that the trial court erred by denying his motion for a continuance. Defendant asserts that his attorney accepted the case with the understanding that it would be continued, and was not aware that when the trial judge had allowed the prior counsel to withdraw, the judge had stated there would be no delays. Thus, defendant contends that he was forced to go to trial with two attorneys, one who had withdrawn the week before and had ceased preparing for trial, and one who did not have adequate time to prepare. Defendant argues that a review of the transcript reveals that his counsel did not aggressively challenge the victim's age, the paternity tests, and made no requests for instructions on lesser offenses. Accordingly, under the circumstances, defendant argues that the trial court's denial of his motion to continue deprived him of his right to effective assistance of counsel.

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. The right to effective assistance of counsel includes, as a matter of law, the right of client and counsel to have adequate time to prepare a defense. Unlike claims of ineffective assistance of counsel based on defective performance of counsel, prejudice is presumed in cases where the trial court fails to grant a continuance which is "essential to allowing adequate time for trial preparation."

In the Matter of Bishop, 92 N.C. App. 662, 666, 375 S.E.2d 676, 679 (1989) (citations omitted). Our Supreme Court further analyzed the legal standards governing the appeal of a denial of a motion to continue, stating that:

> "To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, defendant must show 'how his case would have been better prepared had the continuance been granted or that he was *materially prejudiced* by the denial of his motion.' '[A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance.' '"[A] postponement is proper if there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts."'
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> ... '"[C]ontinuances should not be granted unless the reasons therefor are fully established. Hence, a motion for a continuance should be supported by an affidavit showing sufficient grounds."'"

State v. Jones, 342 N.C. 523, 531, 467 S.E.2d 12, 17 (1996)

(citations omitted) (emphasis added).

After careful review of the record, briefs and contentions of the parties, we find no abuse of discretion. As in the *Jones* case, "[d]efendant's oral motion to continue, made on the date set for trial and not supported by an affidavit, did not set forth any form of 'detailed proof indicating sufficient grounds for further delay.'" *Id.* at 532, 467 S.E.2d at 18 (citation omitted); *see also State v. Cody*, 135 N.C. App. 722, 726, 522 S.E.2d 777, 780 (1999). Defendant has failed to show how he was materially prejudiced by denial of his motion, citing no evidence that would have "come to light" if his trial had been delayed, or how his attorneys would have been better prepared. Moreover, defendant was aided at trial by two attorneys, one who had been defendant's attorney for eight months and had withdrawn only a week prior to trial. Accordingly, we hold that the trial court did not abuse its discretion in failing to grant the motion for continuance. This assignment of error is overruled.

II.

Defendant next argues the trial court erred by calling his bond only six minutes after he was late and continuing the trial without his presence. Defendant contends that under the circumstances, "it was precipitous and erroneous for the court to call the bond so quickly without giving Defendant a chance to appear and explain why he was late." Defendant asserts that the trial court's action assured that if he did return, he would be confined during the remainder of the trial. We find no error.

This Court has stated that:

> In cases where a defendant is charged with less than a capital crime, his voluntary and unexplained absence from court after his trial begins constitutes a waiver of his right to be present.

State v. Stockton, 13 N.C. App. 287, 291, 185 S.E.2d 459, 463 (1971). Here, the trial court specifically told defendant when to be back in court after recess, and defendant did not return to court or give his counsel a reason for his absence. Accordingly, by voluntarily absenting himself after the trial had begun, defendant waived his right to be present during the trial and the rendition of the verdict. *See id.* This assignment of error is overruled.

III.

Defendant next contends that the trial court committed plain error by failing to instruct the jury on the lesser included offense of second-degree rape. Defendant asserts that no documentary proof of the victim's age was put into evidence, that there was some discrepancy as to the victim's age, and argues that she may have been older than twelve years old. Defendant notes that the victim's own mother testified that she looked older than her age, and cites his statement to police that the victim told him she was seventeen. Defendant also contends that proof of his age was never offered into evidence. Thus, defendant argues that the jury could have found that he committed a lesser offense because the victim may have been over the age of twelve, and he may have been less than six years older than the victim. *See* N.C. Gen.

Stat. § 14-27.7A(b).

Defendant admits that he failed to object or specifically request an instruction on second-degree sexual offense at trial. Thus, this question is not properly before this Court. *See* N.C.R. App. P. 10(b)(2) (2001); *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). This notwithstanding, review of the record reveals that no error, much less plain error, was committed by the trial court. N.C.R. App. P. 2 (2001); *see also State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and acquit him of the greater." *State v. Gary*, 348 N.C. 510, 524, 501 S.E.2d 57, 67 (1998).

Defendant was convicted of the Class B1 felony of first-degree rape under N.C. Gen. Stat. § 14-27.2(a)(1). The elements of this offense include that a defendant engage in vaginal intercourse with a victim under the age of 13 years and defendant be at least four years older than the victim. First-degree rape has several possible lesser-included offenses. *See* N.C. Gen. Stat. §§ 14-27.4, -27.5, -27.7(a), -27.7(b), -27.7A(a), and -27.7A(b) (1999). In its brief to this Court, defendant claims he was entitled to an instruction on second-degree sexual offense, which is found in § 14-27.5. However, defendant was apparently confused because his argument focused on the crime of statutory rape or sexual offense of a person who is 13, 14, or 15 years old, which is located in

§ 14-27.7A. We will assume, for argument sake, that defendant actually contends he was entitled to an instruction on statutory rape of a 13, 14, or 15 year old, as evidenced by the argument in his brief.

The elements of statutory rape of a 13, 14, or 15 year old under § 14-27.7A(a) include that a defendant engage in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and defendant is at least 6 years older than the person. N.C. Gen. Stat. § 14-27.7A(a). A defendant found guilty of violating this statute is guilty of a Class B1 felony. *Id.* Further, the elements of statutory rape of a 13, 14, or 15 year old under § 14-27.7A(b) include that a defendant engage in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and defendant is "more than four but less than six years older than the person ...." N.C. Gen. Stat. § 14-27.7A(b). A defendant found guilty of violating this statute is guilty of a Class C felony. *Id.*

In the case *sub judice*, defendant argues that a jury could rationally find that the victim was over twelve years old and that he was less than six years older than her, thus making him guilty of a Class C felony rather than the Class B1 felony. However, there is no evidence in the record to support defendant's assertions. The only credible evidence of the victim's age in the record was her sworn testimony that she was born on 2 September 1986 and was twelve years old when she had sexual intercourse with the defendant in May 1999. The victim also testified that she told

defendant she was twelve years old. The fact that the victim may have looked mature for her age, or that defendant told the police that she told him she was seventeen, is not sufficient evidence to support a charge on the lesser offense. Furthermore, there is no dispute in the record that defendant was over four years older than the victim. In fact, the only evidence in the record of defendant's age was that he was born 11 May 1978, and was thus over twenty years old on the date in question. Thus, we conclude there was no evidence to support a charge on the lesser offense. Accordingly, the assignment of error is overruled.

IV.

Lastly, defendant argues that the trial court erred by sentencing him to 384 to 470 months' imprisonment. Defendant contends that the sentence is cruel and unusual punishment. Defendant concedes that courts have ruled that non-capital sentences are generally left to the legislature and that the mandatory sentence for all first-degree sex offenses has been held not to violate the constitution. *State v. Higginbottom*, 312 N.C. 760, 764, 324 S.E.2d 834, 837 (1985); *State v. Shane*, 309 N.C. 438, 445, 306 S.E.2d 765, 770 (1983), *cert. denied*, 465 U.S. 1104, 80 L. Ed. 2d 134 (1984). However, defendant argues that these decisions should be reconsidered and overruled.

We find no constitutional violation. As conceded by defendant, our courts have held that non-capital sentences are generally left to the Legislature and that the mandatory sentence for all first-degree sex offenses has been held not to violate the constitution.

Higginbottom, 312 N.C. at 764, 324 S.E.2d at 837; *Shane*, 309 N.C. at 445, 306 S.E.2d at 770. "[T]his Court is required to follow decisions of our Supreme Court until the Supreme Court orders otherwise." *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 621, 504 S.E.2d 102, 106 (1998). This assignment of error is overruled.

No error.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

Report per Rule 30(e).