

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA04-298

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2004

STATE OF NORTH CAROLINA

v.

Washington County  
No. 02 CRS 50879

JEROME PHELPS, JR.

Appeal by defendant from judgments entered 15 October 2003 by Judge William C. Griffin, Jr., in Washington County Superior Court. Heard in the Court of Appeals 4 October 2004.

*Attorney General Roy Cooper, by Assistant Attorney General J. Douglas Hill, for the State.*

*Thomas R. Sallenger, for defendant-appellant.*

TYSON, Judge.

Jerome Phelps, Jr. ("defendant") appeals from judgments entered after a jury convicted him of first-degree burglary and attempted robbery with a dangerous weapon. We find no error.

#### I. Background

The State's evidence tends to show that at approximately 2:30 a.m. on 5 December 2002 the occupants of Room 26 at the Pine Tree Motel in Plymouth were awakened when the door to the room was kicked in. Four men, wearing ski masks, stood at the door. One of the men fired a gun and demanded the occupants' money. After one of the occupants stated that the owner of the motel could see them,

the intruders fled.

Brothers Michael and William White testified they participated in the break-in of Room 26 at the Pine Tree Motel on 5 December 2002. The two brothers identified defendant as one of the men who accompanied them to the motel. They stated that they plotted to rob the occupants of the motel room to obtain money to buy Christmas presents for defendant's daughter and William White's girlfriend.

Defendant testified that upon returning home from a visit to a store about 10:30 to 11:00 p.m. on 4 December 2002, he went to bed and slept until he arose at 5:00 a.m. the next day. Darlene Phelps, defendant's wife, testified in corroboration of his testimony. From jury convictions of first-degree burglary and attempted robbery with a dangerous weapon, defendant appeals.

## II. Issues

Defendant contends the court erred by: (1) denying his motion for a continuance to secure the attendance of an out-of-state defense witness, Ronnie Blount ("Blount"), who refused to return personally to North Carolina to testify because of an outstanding warrant for his arrest in Washington County; and (2) failing to admit Blount's affidavit into evidence as an alibi.

## III. Motion to Continue

A motion to continue is ordinarily addressed to the trial court's discretion, but when the motion raises a constitutional issue, the trial court's ruling is fully reviewable. *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001), *cert. denied*,

535 U.S. 934, 152 L. Ed. 2d 221 (2002). Even when the motion raises a constitutional issue, the denial of the motion is grounds for a new trial only if it is shown that the denial of the motion was erroneous and the defendant was prejudiced by the denial of the motion. *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). The defendant must show how his case "would have been better prepared" or how his "defense was materially prejudiced by the denial of the motion." *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986). When a continuance is sought to obtain the attendance of an unavailable witness, the defendant must show that he exerted due diligence in attempting to procure the attendance of the witness and that the witness would provide evidence material to his defense. *State v. Kuplen*, 316 N.C. 387, 403-04, 343 S.E.2d 793, 802 (1986).

Here, the proffered evidence by Blount simply shows that he was with defendant between 10:00 p.m. and 11:00 p.m. Blount's statement does not provide defendant with an alibi during the time frame the offenses were committed. For these reasons, we conclude the trial court did not abuse its discretion or commit error in denying defendant's motion to continue.

#### IV. Admission of Blount's Affidavit

Defendant also contends the trial court erred by refusing to admit into evidence an affidavit prepared by Blount in which he indicated he accompanied defendant to a store between 10:00 p.m. and 11:00 p.m. on 4 December 2002. In order for a statement of an unavailable witness to be admissible into evidence as a hearsay

exception, the proponent of the statement must show, *inter alia*, that the evidence concerns a material fact and that it "is more probative on the point . . . than any other evidence which the proponent can produce through reasonable efforts." *State v. Triplett*, 316 N.C. 1, 9, 340 S.E.2d 736, 741 (1986). As noted, Blount's statement does not provide defendant with an alibi during the key time frame when the crime occurred. Defendant had and offered another available witness, Darlene Phelps, who offered alibi evidence more probative to the time the crime occurred. The trial court did not err by refusing to admit Blount's affidavit.

#### V. Conclusion

Defendant failed to show the trial court abused its discretion or committed error by denying defendant's motion to continue. Defendant did not show Blount would have provided material evidence at trial. The trial court also properly refused to admit Blount's affidavit.

Defendant failed to show that Blount's testimony was more probative than other evidence or testimony available to and offered by defendant. Darlene Phelps's testimony corroborated defendant's testimony and was evidence of an alibi. Blount's statements did not present defendant with an alibi at the time the crimes occurred. We find no error in defendant's conviction or the judgment and sentence entered.

No error.

Judges WYNN and GEER concur.

Report per Rule 30(e).