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NO. COA05-1351

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

STATE OF NORTH CAROLINA

v.

Cumberland County
Nos. 03CRS067456-58

DWAYNE MIGUEL PURCELL

Appeal by defendant from judgments entered 2 May 2005 by Judge Knox V. Jenkins, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 17 May 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

HUNTER, Judge.

Dwayne Miguel Purcell ("defendant") appeals from judgments entered consistent with jury verdicts finding him guilty of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and misdemeanor assault with a deadly weapon. Defendant contends the trial court abused its discretion in denying his motion for a continuance and for allowing one of the victims to be present in the courtroom. We find no error in the judgments of the trial court.

The State presented evidence at trial tending to show defendant joined two other men in beating and robbing several

persons following an altercation at a nightclub. The morning of defendant's trial, counsel for defendant filed a motion seeking a continuance. As grounds for the continuance, defendant alleged the State had failed to turn over a taped interview with one of the victims, Syeda Boone ("Boone"). Defendant acknowledged he had received the investigator's summary of the interview with Boone, and that the tape had been destroyed. Defendant alleged the taped interview was a "necessary component of a fair defense" because various summaries of Boone's statements contained in the State's file revealed inconsistencies. Without the tape, defendant alleged he could not conduct a thorough cross-examination of Boone. Thus, argued defendant, he needed the testimony of the investigator who conducted the interview, Officer Joel Morrisette ("Officer Morrisette"). Defendant noted that Morrisette was unavailable at trial, in that he no longer resided in the United States. Defendant asked the trial court to continue trial until Morrisette returned to the jurisdiction of the court. The trial court denied defendant's motion to continue.

Upon review of the evidence, the jury found defendant guilty of assault with a deadly weapon inflicting serious injury, armed robbery, and assault with a deadly weapon. The trial court imposed consecutive terms of twenty-three to thirty-seven months for the conviction of assault with a deadly weapon inflicting serious injury, seventy to ninety-three months for the robbery with a dangerous weapon conviction, and seventy-five days for the misdemeanor assault. Defendant appeals.

By his first assignment of error, defendant contends the trial court erred in denying his motion for a continuance.

"A motion for a continuance is ordinarily addressed to the sound discretion of the trial court, and the ruling will not be disturbed absent a showing of abuse of discretion." *State v. Call*, 353 N.C. 400, 415, 545 S.E.2d 190, 200 (2001). "When a motion to continue raises a constitutional issue, however, the trial court's ruling thereon involves a question of law that is fully reviewable on appeal by examination of the particular circumstances presented in the record." *Id.* Yet even where a motion for a continuance raises constitutional issues, a defendant will receive a new trial only upon a showing that the trial court's denial of the motion was both erroneous and prejudicial. *Id.*

Some of the factors considered by North Carolina courts in determining whether a trial court erred in denying a motion to continue have included (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance.

State v. Barlowe, 157 N.C. App. 249, 254, 578 S.E.2d 660, 663 (2003).

Defendant asserts his motion for a continuance raises constitutional issues, because Officer Morrisette would have "provided critical evidence" regarding Boone's initial statement. The evidence of record indicates, however, that counsel for defense never spoke with Officer Morrisette before filing the motion to

continue, despite the fact that defense counsel possessed the necessary contact information. Thus defendant has no basis, beyond speculation, to support his assertion that Officer Morrisette's testimony was material to his defense. Defendant acknowledges that he received Officer Morrisette's written summary of Boone's statement. The State stipulated to the introduction of the summary of Boone's statement into evidence, and the trial court deemed it admissible. Defense counsel conducted a vigorous cross-examination of Boone at trial. Moreover, while Boone was an important witness for the State, she was by no means the sole witness. The State presented substantial testimony from two other witnesses regarding defendant's actions. There is no evidence of record to indicate the outcome of the trial would have been different had Officer Morrisette testified. Finally, defendant's motion to continue was not made until the morning of 25 April 2005, the day the case came to trial. Defense counsel could not state with certainty when Officer Morrisette would return to the United States, but agreed with the trial court that the earliest expected date would be 24 February 2006. Given these circumstances, we cannot say the trial court abused its discretion in denying defendant's motion for a continuance. We overrule this assignment of error.

Defendant next argues the trial court abused its discretion in allowing one of the victims of the assault, Joseph Holmes ("Holmes"), to be present in the courtroom during the testimony of the treating neurologist, Dr. Richard Serano. Holmes was confined to a wheelchair at the time of the trial and could not communicate

verbally. Holmes was present for approximately two-thirds of Dr. Serano's testimony and then later removed when, in the opinion of the trial court, it was "apparent that he's uncomfortable." Dr. Serano testified that Holmes had suffered extensive neurological damage, and that he was incapable of fully understanding the trial proceedings. Dr. Serano was the final witness for the State.

Defendant argues that the presence of Holmes in the courtroom was unnecessary and unduly prejudicial, and that it violated his right to confront witnesses. Defendant also contends the State essentially presented evidence of the obvious injuries suffered by Holmes without having to abide by the rules of evidence. Defendant argues he is thereby entitled to a new trial. We do not agree.

The State did not tender Holmes as a witness or attempt to use him as an exhibit. Thus, there is little "indication that the State attempted to utilize [Holmes'] presence for evidentiary purposes." *State v. Kemp*, 153 N.C. App. 231, 237, 569 S.E.2d 717, 721 (2002). Furthermore, we do not agree that Holmes' presence unduly affected the subsequent jury proceedings. The State presented substantial and uncontradicted evidence of the serious nature of the injuries sustained by Holmes. The State also presented substantial evidence of defendant's participation in the assault on Holmes. As such, we detect no abuse of discretion by the trial court in allowing Holmes to be present in the courtroom during the final moments of the State's case.

In conclusion, we hold the trial court did not abuse its discretion in (1) denying defendant's motion to continue, and (2)

denying defendant's motion to exclude the victim from the courtroom. Defendant received a fair trial, free from prejudicial error.

No error.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).