NO. COA05-1471

NORTH CAROLINA COURT OF APPEALS

Filed: 19 September 2006

STATE OF NORTH CAROLINA,

v. Madison County
No. 04 CRS 50417

DAVID LEWIS DOCKERY,
Defendant.

Appeal by defendant from a judgment dated 7 July 2005 by Judge Richard L. Doughton in Madison County Superior Court. Heard in the Court of Appeals 23 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General John P. Barkley, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Keischa M. Lovelace, for Defendant-Appellant.

BRYANT, Judge.

David Lewis Dockery (defendant) appeals from a judgment dated 7 July 2005 entered consistent with a jury verdict finding him guilty of felonious cruelty to animals. For the reasons stated herein, we find no error.

Facts

On the morning of 1 September 2004, defendant's children went to the school bus stop near the bottom of defendant's driveway. The defendant's pet dog, a Boston Terrier, accompanied the children. Another dog, a Labrador Retriever, was also at the bus

stop. The Labrador Retriever and the Boston Terrier began fighting in a nearby ditch. No one testified as to how the fight began. After making an unsuccessful attempt to stop the dog fight, the defendant's son sought help from a woman sitting in a car parked nearby. The woman, Ms. Cindy Winkler, got out of her car and picked up a small board. She used the board to hit the Labrador on its rear end in order to dislodge it and to try to pry the dogs apart. Her efforts failed. She then joined another parent and assured the children the dogs would stop fighting when they tired. The dogs separated once, then re-attached with the Labrador on top.

Meanwhile, defendant's daughter ran home and woke her father, crying, "He's killing him." The daughter and defendant's girlfriend ran out the door. Defendant grabbed his shotgun. The dogs were still fighting when defendant arrived. Defendant and his girlfriend testified that he first poked at the Labrador with his gun to see if it would let go. Defendant and several witnesses testified he picked up the Labrador by the nape of its neck, lifting the dog's front paws off the ground. He then put the shotgun directly against the dog's side and fired. The Labrador fell down dead. After he fired, defendant turned and asked another witness, "Why couldn't you stop them?" Defendant went home to change clothes. He then returned to the bus stop and picked up the dead dog. He buried it at a friend's home.

Procedural History

On 5 July 2005, defendant was indicted for felonious cruelty to animals. The case was tried before a jury the next day at the

6 July 2005 Criminal Session of Madison County Superior Court, the Honorable Richard L. Doughton presiding. The jury found defendant guilty of felonious cruelty to animals. Judge Doughton entered Judgment and Commitment on 7 July 2005 imposing a suspended sentence of six to eight months imprisonment. The suspended sentence was conditioned upon sixty months probation, payment of restitution, and other special probationary conditions. Notice of Appeal was given in open court.

Defendant presents two issues on appeal: (I) whether there was sufficient evidence to sustain defendant's conviction; and (II) whether the trial court erred or abused its discretion in denying defendant's motion for a continuance.

I

We first consider whether there was insufficient evidence to sustain the conviction. 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)). After careful review of the record, briefs, and contentions of the parties, we find no error.

A person commits felonious cruelty to animals if he kills an animal "intentionally and with malice or bad motive." N.C. Gen.

Stat. § 14-360(c) (2005). "'[I]ntentionally' refers to an act committed knowingly and without justifiable excuse[.]" *Id.* As stated in the charge to the jury, malice can be "the condition of the mind which prompts a person to intentionally inflict serious bodily harm which proximately results in injury without just cause, excuse or justification." *See State v. Sexton*, 357 N.C. 235, 237-38, 581 S.E.2d 57, 58-59 (2003).

Here, defendant admits he knowingly shot the dog. However, defendant argues that the killing was unintentional, and without malice, because his use of deadly force was justified. We disagree.

The North Carolina Supreme Court has long held:

> If the danger to the animal, whose injury or destruction is threatened, be imminent or his safety presently menaced, in the sense that a man of ordinary prudence would be reasonably led to believe that it is necessary for him to kill in order to protect his property, and to act at once, he may defend it, even unto the death of the dog, or other animal, which is about to attack it.

State v. Smith, 156 N.C. 628, 634, 72 S.E. 321, 323 (1911); *see State v. Dickens*, 215 N.C. 303, 305, 1 S.E.2d 837, 839 (1939) (finding no evidence it was reasonable to kill dog in order to protect property); *see also State v. Simmons*, 36 N.C. App. 354, 355, 244 S.E.2d 168, 168-69 (1978) (citing *Smith*, 156 N.C. at 631, 72 S.E. at 322) (killing justified if it is necessary then and there to protect property).

In the instant case, the State provided substantial evidence that it was neither reasonable nor necessary for defendant to kill

to protect his property. Neither dog was shown to be the aggressor, nor did the Labrador have any history of aggression. There was no evidence to show the dogs were about to attack the children or anyone else. Moreover, when defendant arrived, he was able to separate the fighting dogs by lifting the Labrador off the ground, an act which might infer that deadly force was not necessary to protect his dog. After shooting the Labrador, defendant did not immediately attend to his own dog but went to change clothes and then to bury the dead dog. Therefore, taking the evidence in the light most favorable to the State, a jury could properly infer that defendant was not justified in killing the dog and thus committed felonious cruelty to an animal. Accordingly, this assignment of error is overruled.

II

Defendant next argues that the trial court erred or abused its discretion in denying defendant's motion for a continuance. 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. "While a defendant must be afforded a reasonable opportunity to prepare a defense, neither the United States Constitution nor the North Carolina Constitution guarantees a particular length of time for the preparation. The facts of each case are pertinent." *State v. Morgan*, 359 N.C. 131, 144, 604 S.E.2d 886, 894 (2004) (finding adequate time for preparation),

cert. denied __ U.S. __, 163 L. Ed. 2d 79 (2005); *see also State v. Harris*, 290 N.C. 681, 687, 228 S.E.2d 437, 440 (1976) (upholding denial of a motion to continue made the day the case was called for trial). To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. *Harris*, 290 N.C. at 687, 228 S.E.2d at 440; *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986) (finding defendant could not show how he would be better prepared had continuance been granted)[1].

"[A continuance] is proper if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts[,] [b]ut a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial . . . ." *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (citation and quotations omitted). In order to obtain relief, a defendant must show that the error asserted is material and prejudicial. *State v. Franklin*, 23 N.C. App. 93, 96, 208 S.E.2d 381, 383 (1974).

Defendant argues the denial of his motion for a continuance violated his right to "effective assistance and adequate defense," specifically that his counsel did not have adequate time to prepare. Defendant points to the fact there was only one day

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[1]*But cf. State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977) (finding defendant first meeting new counsel minutes before trial was inadequate time to prepare); *State v. Maher*, 305 N.C. 544, 290 S.E.2d 694 (1982) (finding defendant retaining new counsel four days before trial and conferring for fifteen minutes was inadequate time to prepare).

between the indictment and the trial. Defendant also claims that the denial of the motion prevented the defense counsel from meeting with a new, recently discovered witness. We are not persuaded.

After defendant delivered his plea of not guilty at the trial in this case, the following colloquy occurred between the trial court and defense counsel during the motion for continuance:

> [Defense Counsel]: Your Honor, we request at this time a motion to continue, I understand it is a late date, I believe in order to provide effective assistance and adequate defense to this matter Your Honor. . . . I just recently learned of [a witness who] was actually present at the scene and not listed in any of the State's materials. I believe that witness would also have some incredible insight as to what is going on and I would like the opportunity to go over this with my client present and talk to the witnesses, and we request we set this over and be ready for trial at that session.
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> THE COURT: Mr. Reinhardt, as I understand the case management system in this county requires you to make your motion for a continuance at the administrative session that sets the case for trial. Now was there an administrative session that set the case for trial for this case?
>
> Defense Counsel: There was Your Honor.
>
> . . .
>
> [Prosecutor]: I believe Your Honor that was May 23.
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> THE COURT: The rule, 15-a, requires motions to continue to be filed by Wednesday before the week of court. Was there any motion made?
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> [Defense Counsel]: There was none, Your Honor, this is more appealing in the interest of justice, I learned of this witness this morning.

> THE COURT: Sir, you have had adequate time to talk to your client, to raise this objection, you have failed to procedurally to file the proper request for a continuance and I am going to deny the motion for continuance. I will do this for you . . . is this a local witness that you need to subpoena?
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> [Defense Counsel]: I believe so, Your Honor.
>
> . . .
>
> THE COURT: I will give you an opportunity tonight to talk with that witness. We will proceed with the trial as far as we can go today and if we get through with all the State's evidence, and all of your evidence with the exception of that witness, and if you need additional time . . . I will give you that opportunity. Is that fair enough?
>
> [Defense Counsel:] That is fair, Your Honor, thank you.

In the instant case, defendant was indicted for the same crime for which he was earlier charged in an arrest warrant. Shortly after his arrest he was appointed counsel. Defendant retained the same counsel throughout preparation for trial and during trial. Defendant and counsel had been aware of the scheduled trial date for approximately a month and a half before trial, yet the motion to continue was made on 6 July 2005, the day the trial began, based on a newly discovered witness. However, the identity of the newly discovered witness was not revealed to the trial court, nor did defense counsel disclose any new facts that he believed this new witness might offer. *See State v. Bryant*, 19 N.C. App. 55, 197 S.E.2d 895 (1973) (no error denying motion for continuance where defendant argued some of the witnesses to be called on his behalf were in Central Prison, but he did not name those witnesses or

state what facts were expected to be testified to by them or that the evidence would be procured at or before some named subsequent term). Defendant presented a mere intangible hope that something helpful to defendant may possibly turn up with the newly discovered witness rather than a belief that material evidence would be revealed and reasonably grounded on known facts. Despite defense counsel's vague reference to the newly discovered witness, the trial court allowed defense counsel time during the evening recess to find and question the witness. This allowance, combined with the month and a half defendant had to confer with his counsel and to investigate, prepare and present his defense, was ample in light of these circumstances.

Defendant has failed to make a showing that the alleged error here is material and prejudicial. As such, the trial court did not abuse its discretion in denying the motion for a continuance. *See State v. Sampley*, 60 N.C. App. 493, 496, 299 S.E.2d 460, 462 (1983) (no abuse of discretion to deny oral motion to continue on the first day of trial when defendant had more than a month from the withdrawal of his original attorney in which to retain a new one), *disc. review denied*, 308 N.C. 390, 302 S.E.2d 257 (1983). This assignment of error is overruled.

No error.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).