NO. COA05-1523

NORTH CAROLINA COURT OF APPEALS

Filed: 05 July 2006

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 04 CRS 30722-23

TAVARIUS LAMONT DAVIS

Appeal by defendant from judgment entered 14 April 2005 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General Steven Armstrong, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

STEELMAN, Judge.

Defendant appeals his conviction for attempted robbery with a dangerous weapon and assault with a deadly weapon. Finding no error, we affirm.

Ahmet Unutmaz testified that he started a business selling ice cream from a truck in 1995 or 1996. On the afternoon of 20 April 2004, he stopped his ice cream truck in front of the Little Rock Apartments on West Boulevard in Charlotte, North Carolina. Defendant approached the truck and grabbed a bag of chips and soda without paying for them. When Unutmaz asked defendant for money,

"he dropped the chips and drink back in the ice cream truck, inside." After making his rounds through several neighborhoods, Unutmaz returned to West Boulevard that evening and stopped in the Boulevard Homes community to "make one more trip before going home." Defendant came up to the truck's window a second time, "pulled [a] gun and he said, 'Give me the money.'" Thinking the gun was a toy, Unutmaz replied, "I have children. I don't make much money so why should I give it to you?" Defendant then shot Unutmaz in the left side of his lower back. Unutmaz drove away from defendant onto Barnette Avenue and called 911. He was taken by ambulance to a hospital where he remained for several hours. Unutmaz subsequently selected defendant's picture from one of three photographic lineups presented to him by police and identified defendant in court as the man who shot him.

Charlotte Mecklenburg Police Officer Rick Andringa testified that his department identified three possible suspects within the Boulevard Homes community who matched Unutmaz's description of the gunman. Andringa "created three photo line-ups for each of these three names that [he] received" and presented them to Unutmaz at his home on 28 April 2004. When shown the lineup containing defendant's photograph, Unutmaz "thoroughly looked through each of the pictures and then pointed to [defendant] and said that he was the shooter[.]" Upon viewing the second and third lineups, Unutmaz identified each of the two additional suspects as familiar to him but stated that neither of them had been involved in the shooting.

In his own testimony, defendant denied shooting Unutmaz and

claimed he spent the day of 20 April 2004 "at [his] mother's house on Tuckaseegee" with his sisters, Shacola and Shaquala Davis, and one of his two brothers, Demontreal Davis. He remembered the day in question, because he had attended the funeral of a friend on 19 April 2004, and spent the following day in his room "thinking about him, just remembering him." Defendant's mother had previously lived in Boulevard Homes but had already moved to Tuckaseegee at the time of the shooting. Although he might have left his house to spend time with his cousin at his grandmother's house "on Tuckaseegee, right down the street[,]" defendant testified that he did not go to the Boulevard Homes neighborhood on 20 April 2004.

Shacola Davis testified that she was with defendant and her mother on 20 April 2004, having recently moved from Boulevard Homes to Tuckaseegee. She remembered the day, because a family friend had recently died and his "funeral was on the weekend." Defendant was in the house playing a video game when their mother left for work at 4:00 p.m. Defendant spent the rest of the day at home with Shacola, because their mother "didn't like that neighborhood" and did not want her daughter to be left alone.

In his first argument, defendant contends that the trial court violated his constitutional rights to a fair trial and to effective assistance of counsel by denying his counsel's oral motion for a continuance at the beginning of his trial on 12 April 2005. We disagree.

In his brief to this Court, defendant asserts that he "moved to continue on the grounds his alibi witness [Shacola] had recently

been released from the hospital and could not communicate effectively." The transcript reveals, however, that counsel requested a continuance only "so we could interview the potential alibi witness [Shacola] and to allow [defendant] to get a proper haircut so he can be presented to the jury in a fair way[.]" Counsel did advise the court that Shacola was sick with tonsillitis and was having "a little trouble speaking," but stated that "when it comes time to give her testimony she will do her best and hopefully everyone will be able to understand her." Counsel did not claim that Shacola was unable to testify effectively due to her throat condition or seek to delay the trial on this ground.

"[W]here a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount'" on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Having not raised the issue of Shacola's throat condition as a ground for continuance in the trial court, defendant cannot do so now. Moreover, we find nothing in the record to suggest that any portion of Shacola's testimony was inaudible to the jury. Although the trial judge and court reporter each asked Shacola to repeat her response to a question on one occasion, a complete record of her testimony appears in the transcript prepared by the court reporter.

We find no error in the denial of defendant's request for a continuance. Defendant did not assert any constitutional grounds for a continuance in the trial court and may not do so for the

first time on appeal. *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005). Accordingly, we review the trial court's ruling only for abuse of discretion. *See State v. Morgan*, 359 N.C. 131, 143, 604 S.E.2d 886, 894 (2004) (citing *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981)), *cert. denied*, __ U.S. __, 163 L. Ed. 2d 79 (2005). The trial transcript reflects a reasoned exercise of the court's discretion.

Defendant requested a continuance in order to obtain a haircut and to allow his counsel the opportunity to interview Shacola. On the first grounds, the trial court offered to make arrangements for defendant to have a haircut, but he refused. As to the witness, Shacola, counsel conceded to the trial court that defendant identified her as a potential alibi witness six months prior to trial, in October of 2004. Although counsel claimed to have been unable to contact Shacola until the weekend before trial, he admitted speaking to her "for a brief moment" the preceding Friday. The trial judge further found that the defense had failed to apprise the State of its intention to call an alibi witness, in violation of the rules of discovery. Finally, we note that defendant moved for the continuance on 12 April 2005, and Shacola did not testify until 14 April 2005. Counsel had ample opportunity to interview the witness before calling her to testify at trial.

In his second argument, defendant contends that the trial court committed plain error and violated both his constitutional rights and the dictates of N.C. Gen. Stat. § 15A-1031 (2005), by requiring him to wear leg shackles at trial. We disagree.

Defendant was wearing leg restraints concealed under his pants at his trial. There is no evidence in the record that the jury was ever aware defendant was wearing these restraints. Defendant did not object at trial to his restraints or to the trial court's method of concealing them from the jury; nor did he assert any violation of his constitutional rights arising from the fact of his restraints. Defendant has failed to preserve this issue for regular appellate review. *See State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602 (citing N.C. R. App. P. 10(b)(1); *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991)), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003); *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002).

Defendant attempts to argue that the requirement of leg restraints at trial constitutes plain error. Plain error review is limited to jury instructions and evidentiary matters. *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109-10 (1998). This argument is without merit.

The record on appeal includes an additional assignment of error not addressed by defendant in his brief to this Court. By rule, we deem it abandoned. *See* N.C.R. App. P. 28(b)(6).

NO ERROR.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).