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NO. COA05-1562

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

STATE OF NORTH CAROLINA

v.

DANIEL COREY BENSON

New Hanover County  
No. 03 CRS 20455-60  
04 CRS 66838  
04 CRS 66884-86  
04 CRS 66919  
04 CRS 66922

Appeal by defendant from judgments entered 27 June 2005 by Judge Benjamin G. Alford in New Hanover County Superior Court. Heard in the Court of Appeals 17 August 2006.

*Attorney General Roy Cooper, by Assistant Attorney General Donna D. Smith, for the State.*

*Terry W. Alford for defendant.*

LEVINSON, Judge.

Daniel Corey Benson (defendant) appeals from judgments entered upon his convictions for misdemeanor and felonious defacing and desecration of grave sites. We find no error.

The State's evidence at trial tended to show the following: On the evening of 9 October 2004, defendant and approximately nine others gathered at defendant's home. Defendant was 22 years old, and the remaining individuals ranged in age from 15 to 18 years of age. C.C. drove defendant and two juveniles, L.B. and S.T., to a

Food Lion store to purchase alcohol. C.C. stayed in the car while defendant went into the store and purchased a thirty case of beer.

The juveniles searched for a place to drink the alcohol and subsequently entered the Oakdale Cemetery, located at 520 North 15th Street in Wilmington, North Carolina. After drinking for approximately thirty to forty-five minutes, defendant and several juveniles began knocking over gravestones and destroying grave sites throughout the cemetery for about thirty minutes to one hour. Defendant and the juveniles left the cemetery. Thereafter, defendant, L.B. and a third individual returned to the cemetery and destroyed additional grave sites.

Eric Kozen, superintendent of Oakdale Cemetery, surveyed the damage on 10 October 2004. Kozen found several beer cans that had not been present when the cemetery closed the previous day. The damage spanned a large area of the cemetery, covering nine different sections.

Lee Odham, a detective with the Wilmington Police Department, investigated the events of 9 October 2004 at Oakdale Cemetery. Odham obtained a Food Lion surveillance video and computer printout, which revealed defendant purchasing beer that matched the beer cans found at Oakdale Cemetery. David Freeman, a special agent with the North Carolina State Bureau of Investigation, testified that defendant's DNA was not found on any of the items tested, including beer cans and cigarette butts.

Defendant did not present evidence. The jury convicted defendant of 14 counts of felonious desecration of graves and 86

counts of misdemeanor desecration of graves. The trial court consolidated the offenses into six judgments, and defendant now appeals.

In defendant's first argument on appeal, he contends that the trial court erred by denying his motion to continue made on the date of trial because he had been given new statements by accomplices only three days earlier. We disagree.

Traditionally, the decision to grant or deny a continuance rests within the discretion of the trial court. However, that discretion does not extend to the point of permitting the denial of a continuance that results in a violation of a defendant's right to due process. This Court has long held that when a motion for a continuance is based on a constitutional right, the issue presented is an issue of law and the trial court's conclusions of law are fully reviewable on appeal.

*State v. Tunstall*, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993)  
(citations omitted).

[T]he constitutional guarantees of assistance of counsel and confrontation of witnesses include the right of a defendant to have a reasonable time to investigate and prepare his case, but no precise limits are fixed in this context, and what constitutes a reasonable length of time for defense preparation must be determined upon the facts of each case.

*State v. Searles*, 304 N.C. 149, 153-54, 282 S.E.2d 430, 433 (1981).

To establish that the trial court's failure to give additional time to prepare constitutes 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." *State v. Covington*, 317 N.C. 127, 130,

343 S.E.2d 524, 526 (1986). "[A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986). "[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." *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (quoting *State v. Gibson*, 229 N.C. 497, 502, 50 S.E.2d 520, 524 (1948)).

In the instant case, defendant failed to articulate how granting a continuance would have helped him better prepare an adequate defense. Defendant did not provide an affidavit setting forth grounds for his motion to continue. The statements released in the days preceding trial that were the basis for defendant's motion to continue differed from the earlier statements provided to defendant only to the extent that the declarants admitted to their own involvement. Every statement provided to defense counsel implicated defendant in the activities for which he stood accused. We observe, too, that defense counsel had a full opportunity to cross-examine all juvenile witnesses to elicit inconsistencies or weaknesses in their testimony. On this record, where defendant had ample time to prepare an adequate defense and failed to show that he was materially prejudiced by the denial of his motion to continue, the trial court did not err by denying his motion to continue. This assignment of error is overruled.

In defendant's next argument on appeal he contends that (1) the trial court erred by failing to dismiss the charges for

insufficiency of the evidence, and (2) the felony charges should have been reduced to misdemeanor offenses because no substantial evidence regarding the value of the damage to the grave sites was presented. These arguments lack merit.

When ruling on a motion to dismiss, "the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996).

Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.

*State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255-56 (2002) (internal citations and quotation marks omitted). "The rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Crouse*, 169 N.C. App. 382, 389, 610 S.E.2d 454, 459 (quoting *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981)), *disc. review denied*, 359 N.C. 637, 616 S.E.2d 923 (2005).

N.C. Gen. Stat. §§ 14-148(a)(3) and 14-149(a)(3) (2005) provide, in pertinent part, that:

It is unlawful to willfully . . . [t]ake away, disturb, vandalize, destroy, tamper with or deface any tombstone, headstone, monument, grave marker, grave ornamentation, grave artifacts, shrubbery, flowers, plants or other articles within any cemetery erected or placed to designate where a body is interred or to preserve and perpetuate the memory and name of any person, without authorization of law or the consent of the surviving spouse or next of kin, thereby causing damage of less than one thousand dollars (\$1,000).

. . . .

It is a Class I felony, without authorization of law or the consent of the surviving spouse or next of kin of the deceased, to knowingly and willfully . . . [t]ake away, vandalize, destroy or deface any tombstone, headstone, monument, grave marker, grave ornamentation, grave artifacts, shrubbery, flowers, plants or other articles within any cemetery erected or placed to designate the place where any dead body is interred or to preserve and perpetuate the memory and the name of any person, causing damage of more than one thousand dollars (\$1,000).

In the instant case, there was substantial evidence that defendant defaced or desecrated the grave sites at Oakdale cemetery in violation of the aforementioned statutes. Defendant's four accomplices maintained that defendant participated in knocking and pushing over many gravestones of various sizes after drinking alcohol at Oakdale cemetery on 9 October 2004. Furthermore, a Food Lion surveillance camera revealed defendant purchasing the same type of beer cans that were found the following morning at Oakdale cemetery.

In addition, there was substantial evidence that the damages to each of the gravestones or grave sites corresponding to the felony charges exceeded \$1,000. Based upon his experience, Eric

Kozen, superintendent of Oakdale cemetery, was received by the trial court as an expert witness in the valuation of the repair or replacement of headstones, monuments and tombstones. See N.C. Gen. Stat. § 8C-1, Rule 702(a) (2005) ("If . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto. . . ."). Kozen prepared a spreadsheet containing estimates of repair and replacement costs, and testified that the damage to each stone corresponding to each of the fourteen felony convictions was greater than \$1,000. Therefore, taken in the light most favorable to the State, there was sufficient evidence to carry the felony charges to the jury. This assignment of error is overruled.

We have evaluated defendant's remaining assignments of error and conclude that they have either been abandoned or are without merit.

No error.

Judges STEELMAN and STEPHENS concur.

Report per rule 30(e).