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NO. COA05-425

NORTH CAROLINA COURT OF APPEALS

Filed: 17 January 2006

STATE OF NORTH CAROLINA

Forsyth County
Nos. 02 CRS 58142
03 CRS 5262

v.

CALVIN SCOTT TAYLOR

Appeal by defendant from judgment entered 14 July 2004 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 30 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey R. Edwards, for the State.

Blanchard, Newman & Hayes, by Gregory A. Newman for defendant-appellant.

CALABRIA, Judge.

Calvin Scott Taylor ("defendant") appeals from judgment entered upon jury verdicts finding him guilty of first degree burglary, larceny from the person, and attempted second degree rape. Defendant was sentenced to a term of 168 months to 211 months imprisonment in the North Carolina Department of Correction. We find no error.

The State presented the following evidence: on 5 July 2002, Kristie Wingate ("victim") and Randy Wingate ("husband") traveled to Winston-Salem, North Carolina from Virginia to celebrate

victim's birthday. After spending most of the day by a pool at a Comfort Suites ("hotel") where they were staying, victim and husband ate dinner and went to the mall. While at the mall, victim and husband met defendant at a shoe store.

After departing the mall, victim and her husband went to an Outback Steakhouse ("Outback") for a drink. While husband consumed beer, victim drank only a portion of her drink. Approximately twenty minutes after entering Outback, victim noticed defendant. During the next 45 minutes to one hour, victim engaged in a conversation with a couple at the bar. Since victim was preoccupied, she paid little attention to defendant though he sat next to her and husband. Defendant asked the bartender to pour victim a stiff drink to which victim stated, "No, I can't -- I can't drink." Though victim only drank soda for the remainder of time at Outback, she started feeling very ill. Victim testified she believed something "happened" to her drink. Victim told her husband, "I'm sick...we've got to leave...we've got to go."

Defendant offered both victim and her husband assistance in getting back to their hotel room. Once there, husband went to unlock the door and defendant carried victim over his shoulder to the hotel room. Victim testified that defendant touched her inappropriately while carrying her. Once inside the room, defendant put victim down. Victim immediately went to the bathroom and became very sick. Husband attempted to help victim as she was getting sick by removing her clothes. At this point, the only clothing victim wore was her bra and panties. After victim was

sick, husband carried her to the bed. At all times victim was ill, defendant remained by the room's door.

Defendant asked husband to have a "nightcap" with him. Despite husband's protests and victim's pleading to the contrary, husband eventually left with defendant to get a drink. Defendant drove husband to a parking lot and ordered him out of the car. Husband eventually flagged down a police car approximately 15 minutes later and returned to the hotel.

Victim awoke from her sleep to see defendant in her room. Victim asked defendant, "Where's [my husband] at?" Defendant responded husband was smoking crack cocaine and that he had been sent to the room by husband to have sex with her. Victim replied her husband would never engage in such behavior or condone such action. Defendant proceeded to kiss victim's lips and touch victim's breasts and groin while victim repeatedly told defendant to stop it and tried to "fight him off." Victim became sick on defendant who then threw victim down on the bed calling her a "worthless b**ch" who "wasn't worth it." Thinking defendant had left the room, victim rang the front desk for help. While on the phone, victim noticed defendant come through her room again, throw down her purse, and exit. When victim checked her purse, she noticed money, a ring, several earrings, and a check cashing card missing. The police and husband arrived subsequent to defendant leaving.

Tracy Smith ("Smith"), a friend of both victim and husband, testified that on the night in question she received a phone call

from defendant.¹ Smith stated she did not know anyone by defendant's name. Smith stated she relayed this information to husband's cousin.

Defendant presented the following evidence: he saw victim and husband at the mall and later at Outback. Husband invited defendant over for a drink. Both victim and husband were drinking. Husband asked defendant where he could get some cocaine. Defendant responded, "I don't know no cocaine." Because husband was intoxicated and victim "tipsy," defendant drove them back to their hotel room. Defendant carried victim to her room while husband went ahead to open the door. Defendant put victim down in the bathroom. Husband dumped the contents of victim's purse in search of medicine she had requested.

Subsequently, defendant and husband left looking for cocaine husband wanted. Husband promised defendant if defendant drove him to get cocaine, defendant could return to the hotel and wait for husband. Defendant left the husband in an area husband knew he could buy cocaine and returned to the hotel. Defendant, using a key given to him by husband, went to the room and watched television. When victim asked defendant about husband's whereabouts he told her husband was at the pool. Victim became hysterical and called the front desk. Defendant left the room. Defendant maintained he never had any inappropriate contact with victim.

¹Victim used defendant's cell phone to call Smith but when no one picked up the phone, she left a message. Smith, using caller ID, identified the sender of the call as defendant.

Defendant first argues the trial court erred in denying his motion to dismiss for insufficiency of the evidence. We disagree. N.C. R. App. P. 10(b)(3) (2005) states, in pertinent part, if "a defendant *fails to move to dismiss the action...at the close of all the evidence*, he may *not challenge on appeal the sufficiency of the evidence to prove the crime charged.*" (Emphasis added). In the instant case, defendant moved to dismiss based on insufficiency of the evidence after choosing not to testify or present evidence. The Court denied defendant's motion. The next day, however, defendant changed his mind and asked the court to permit him to testify, which the court allowed. Defendant proceeded to testify and present evidence. Consequently, defendant waived his earlier motion to dismiss by presenting evidence. See N.C. R. App. P. 10(b)(3) (2005). After presenting evidence, defendant failed to renew his motion to dismiss at the close of all the evidence. Here, because defendant chose to testify, the point at which all the evidence "closed" for purposes of the Rules of Appellate Procedure was subsequent to defendant's testimony. Thus, according to N.C. R. App. P. 10(b)(3), since defendant failed to move to dismiss at the close of all of the evidence, he cannot now challenge the sufficiency of the evidence on appeal. This assignment of error is overruled.

Defendant next argues a due process violation occurred when defendant's right to a speedy trial was delayed. We disagree. N.C. R. App. P. 28(b)(6) (2005) states, in pertinent part, "[a]ssignments of error...in support of which no reason or argument

is stated...will be taken as abandoned." In the instant case, defendant's applicable assignment of error number two reads "[t]he defendant received ineffective assistance of counsel from the Public Defender's Office for not timely filing a Speedy Trial Motion...." Defendant never argues ineffective assistance of counsel in his brief or cites any authority to support such a claim. Thus, according to N.C. R. App. P. 28 (b)(6) this assignment of error is abandoned.

In his last assignment of error, defendant argues he was denied effective assistance of counsel when the trial court refused to grant his motion for a continuance. We disagree.

It is well established precedent in North Carolina that

a motion to continue is addressed to the discretion of the trial court, and absent a *gross abuse* of that discretion, the trial court's ruling is not subject to review. When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal. Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error.

State v. Jones, __ N.C. App. __, __, 616 S.E.2d 15, 18 (2005) (citations omitted) (emphasis added). Moreover,

to establish that the denial of a continuance motion was prejudicial, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. To *demonstrate* that the time allowed was inadequate, the 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.

Id. (emphasis added) (citing *State v. Williams*, 355 N.C. 501, 540-41, 565 S.E.2d 609, 632 (2002), *cert. denied*, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003)) (quoting *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993)). Consequently, "a motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." *State v. Jones*, 342 N.C. 523, 531, 467 S.E.2d 12, 17 (1996) (quoting *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986)); see also *State v. Cradle*, 281 N.C. 198, 208, 188 S.E.2d 296, 303, *cert. denied*, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972) (explaining "continuances should not be granted unless the reasons therefor are fully established. Hence, a motion for a continuance should be supported by an affidavit showing sufficient grounds.")

In the instant case, defendant fails to show how his case would have been better prepared had the continuance been granted. Defendant, along with his trial counsel, had nearly one month to confer as well as investigate, prepare, and present his defense. Defendant also failed to provide an affidavit illustrating sufficient grounds for the continuance along with his motion citing any reasons for a continuance beyond generalizing he did "not hav[e] adequate time to prepare." Furthermore, defendant cannot show ineffective assistance of counsel. In fact, defendant's attorney was commended by the court on several occasions for his diligence and work ethic. Specifically, the court, after observing defendant's attorney at length, noted "he is prepared...has exhibited a keen sense of tactics and strategy...[and] has

exhibited a thorough knowledge of the law." In short, defendant cannot illustrate prejudice by the trial court's denial of his motion to continue. This assignment of error is overruled.

Defendant failed to argue assignments of error number three and four in his brief and thus, according to N.C. R. App. P. 28(b)(6) (2005), they are abandoned.

No error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).