NO. COA05-558

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2006

STATE OF NORTH CAROLINA

v. Gaston County
No. 98 CRS 32925-27
99 CRS 7184, 15235

TROY DION REESE

Appeal by defendant from judgment entered 20 January 2000 by Judge Oliver Noble in Gaston County Superior Court. Heard in the Court of Appeals 11 January 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General John J. Aldridge, III, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel K. Shatz, for defendant.

LEVINSON, Judge.

Defendant (Troy Dion Reese) was convicted of assault with a deadly weapon on a government official, possession of stolen goods, driving without an operator's license, and resisting, delaying, and obstructing a public officer in the performance of her duties. In addition, defendant was convicted of having attained the status of habitual felon. We reverse on the offense of resisting, delaying, or obstructing a public officer, but find no error as to the remaining charges.

The evidence presented at trial may be summarized as follows:

Richard Foster testified that his car, a 1993 Mercury Sable, was stolen in Monroe, North Carolina. On the morning of 26 October 1998, between 5:30 a.m. and 6:00 a.m., Foster stopped at a gas station to purchase gas. As he walked out of the store, he observed his car being driven away by a person with "a black head." Foster called the police on his cell phone and reported that his car had been stolen.

Trooper Beth Patterson of the North Carolina Highway Patrol testified. At approximately 1:00 p.m. on 26 October 1998, she observed Highway Patrolman Tommy Dellinger stopped by the right-hand side of southbound I-85 investigating a motor vehicle collision. Patterson observed another vehicle, the 1993 Mercury Sable, stopped near the median partially blocking the left-hand lane of traffic. Patterson pulled behind the Mercury. She observed defendant changing a flat tire on the vehicle. Patterson directed defendant to finish changing the tire, and to pull his car entirely over against the median. Instead of pulling directly over to the median, defendant first pulled into the left-hand travel lane, and then to the width of the shoulder adjacent to the median. Patterson observed that the spare tire was flat, too. Patterson keyed the license number of the vehicle into her patrol vehicle computer and received information from the Department of Motor Vehicles (DMV) pertaining to the license tag number. She learned that the tag number did not match the vehicle. Patterson asked defendant for his driver's license or some other identification. Defendant told her he did not have a license or any identification

with him. Defendant told Patterson the vehicle belonged to his friend "Brownie." Patterson then "told the [d]efendant he was under arrest for driving with no operator's license[.]" She reached for her handcuffs and, as she was securing them to defendant's right wrist, he pulled away, striking her in the forehead with his hand and the handcuffs. Patterson was knocked to her knees. Defendant jumped over the barrier into the oncoming northbound traffic and was struck by a vehicle. Patterson was taken to the hospital, where she received stitches for a laceration on her forehead and was released later that same day.

Tanya Pack, a paramedic, testified she helped stabilize defendant and rode with him in an ambulance to the hospital. Defendant had suffered a broken leg and two broken arms. According to Pack, defendant was "alert and oriented", but "wasn't really cooperative" with treatment. Defendant stated that "the b---- wasn't going to take him back to prison or back to jail and that he was a bad mother f-----[.]"

Defendant testified that, on 26 October 1998, "Brownie" rented the use of the 1993 Mercury for a twenty dollar rock of cocaine, and offered to take defendant to Gastonia. As defendant and Brownie were driving on southbound I-85, they experienced a flat tire. Defendant told Brownie that he would change the flat tire and that Brownie should dispose of beer cans and marijuana. While Brownie was disposing of these items, Patterson pulled her vehicle behind defendant. Defendant told Patterson that his friend was driving the car but had gone to get help. He told Patterson he did

not have a license. Patterson asked him to move the car. As he was moving the car, Patterson put on her lights and siren and directed him to pull over. Defendant got out of the car and Patterson asked to see his license. He told her he did not have a license but gave her his name and address. Patterson then told defendant, "look, you are going to jail for driving with no license." He turned around to ask her why she had to arrest him and she "lunged at [him] like this like she was going to reach for a weapon." Defendant testified, "I panicked. . . . I thought she was going to shoot me." Defendant hit Patterson, trying to "knock her out." He punched her in the eye and cut her with his thumbnail. He did not hit her with the handcuffs. Thinking the police would kill him, defendant jumped onto the concrete barrier, and ran into the northbound lanes of traffic. He was hit by a pick-up truck.

On cross-examination, defendant testified about his prior convictions; stated he knew he could go to prison for being convicted of driving a stolen car; and denied telling the paramedic that the "b---- wasn't taking [him] back to prison."

The jury convicted defendant on all charges. The trial court consolidated the offenses, and sentenced defendant as an habitual felon to a term of 152-192 months imprisonment. Defendant appeals.

We first address defendant's contention that the trial court committed plain error in its jury instructions on the resist, delay

and obstruct charge by instructing the jury on the officer's performance of a duty not alleged in the indictment.

> A warrant charging a violation of G.S. 14-223 must, . . . (a) identify by name the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of the statute, (b) indicate the official duty he was discharging or attempting to discharge, and (c) state in a general way the manner in which accused resisted or delayed or obstructed such officer.

State v. Wiggs, 269 N.C. 507, 512, 153 S.E.2d 84, 88 (1967) (internal quotation marks and citations omitted). "'In the offense of resisting an officer, the *resisting* of the public officer in the *performance* of some duty is the primary conduct proscribed by that statute and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense[.]'" *State v. Waller,* 37 N.C. App. 133, 135, 245 S.E.2d 808, 810 (1978) (quoting *State v. Kirby*, 15 N.C. App. 480, 488, 190 S.E.2d 320, 325 (1972)). "'It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment.'" *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420 (1986) (quoting *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980)).

Defendant in the instant case made no objection to the trial court's jury instructions. We therefore review for plain error. Plain error is "a *fundamental* error, something so basic, so

prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks and citation omitted). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79 (citation omitted).

In the instant case, the indictment charging defendant with resisting, delaying, or obstructing a public officer in the exercise of her duties, under N.C. Gen. Stat. § 14-223 (2005), stated that at the time defendant resisted, delayed and obstructed Patterson, she was engaged in "a duty of her office, assisting Trooper T. Dellinger with a wreck investigation." The trial court instructed the jury on the charge of resist, delay and obstruct as follows:

> Now I charge that for you to find the Defendant guilty of this offense, the State must prove five things beyond a reasonable doubt. First, that the victim was a public officer. . . . Second, that the Defendant knew or had reasonable grounds to believe that the victim was a public officer. Third, that the victim was attempting to make a lawful arrest. An arrest for no operator's license is a lawful arrest. Fourth, that the defendant resisted the victim in attempting to make a lawful arrest; and, fifth, that the Defendant acted willfully and unlawfully[.]

As the trial court instructed the jury on the duty of <u>attempting to make an arrest</u>, which doesn't comport with the duty set forth in the indictment of <u>assisting with a wreck</u>

investigation, we conclude the trial court committed plain error. In reaching this conclusion, we necessarily reject the State's contention that, on these facts, the attempted arrest was sufficiently connected to Patterson's initial assistance in a wreck investigation. We therefore reverse the conviction for resist, delay and obstruct a public officer.

Defendant next argues the trial court erred by failing to dismiss the charge of possession of stolen goods because the evidence was insufficient to establish defendant knew, or had reasonable grounds to believe, he was in possession of a stolen vehicle. We disagree.

The essential elements of possession of stolen property are:

> (1) possession of personal property;
>
> (2) which has been stolen;
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> (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and
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> (4) the possessor acting with a dishonest purpose.

See State v. Perry, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982) (citations omitted); *see also* N.C. Gen. Stat. § 14-71.1 (2005).

"'A defendant charged with possession of stolen property . . . may be convicted if the State produces sufficient evidence that defendant possessed stolen property (i.e. a vehicle), which he *knew or had reason to believe* had been stolen or taken.'" *State v. Bailey*, 157 N.C. App. 80, 83-84, 577 S.E.2d 683, 686 (2003) (quoting *State v. Lofton*, 66 N.C. App. 79, 83, 310 S.E.2d 633, 635-36 (1984)). "[G]uilty knowledge need not be shown by direct proof

of actual knowledge, . . . rather, such knowledge may be implied by evidence of circumstances surrounding the receipt of the goods." *State v. Scott*, 11 N.C. App. 642, 645, 182 S.E.2d 256, 258 (1971) (citation omitted). Circumstantial evidence in the form of evidence that a defendant fled from police officers can be evidence of a defendant's consciousness of guilt as well. *See State v. Parker*, 316 N.C. 295, 304, 341 S.E.2d 555, 560 (1986) (evidence that defendant fled from police officers at a high speed, wrecking the car and attempting escape on foot, was evidence defendant knew or had reason to believe the car was stolen).

The standard of review for a motion to dismiss in a criminal trial is well established:

> "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
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> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed."

State v. Scott, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "[T]he trial court is to consider the evidence in the light most favorable to the State, which entitles the State 'to every reasonable intendment and every reasonable inference to be drawn from the evidence[.]'" *Bailey*, 157 N.C. App. at 83, 557

S.E.2d at 686 (quoting *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982)).

In the instant case, defendant was in possession of the stolen vehicle within seven and one half hours of its having been stolen; there was no evidence that his friend "Brownie", who he claimed "rented" the vehicle for cocaine, existed; defendant was unable to provide "Brownie's" full name; and defendant fled as Patterson attempted to arrest him. These facts, considered with the balance of the evidence in the record in the light most favorable to the State, support a reasonable inference that defendant had reasonable grounds to believe that the vehicle was stolen. *See id.* (sufficient evidence presented that defendant knew or had reason to believe the vehicle was stolen where defendant drove vehicle several hours after it was stolen, the rightful owner had not given anyone permission to drive the vehicle that day, defendant would not give the name of his "friend" who he said owned the vehicle, and defendant had the rightful owner's keys in his possession). This assignment of error is overruled.

Defendant also contends the trial court erred by failing to dismiss the charge of assault on a government official with a deadly weapon. Defendant asserts there was insufficient evidence that he struck Patterson with handcuffs and, further, that there was a fatal variance between the indictment for this offense and the evidence presented at trial. We disagree.

Under N.C. Gen. Stat. § 14-34.2 (2005), "any person who commits an assault with a firearm or any other deadly weapon upon

an officer . . . of the State . . . in the performance of his duties shall be guilty of a Class F felony."

> A deadly weapon is "any instrument which is likely to produce death or great bodily harm, under the circumstances of its use . . . . The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself."

State v. Palmer, 293 N.C. 633, 642-43, 239 S.E.2d 406, 412-13 (1977) (quoting *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924)).

> Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury.

Smith, 187 N.C. at 470, 121 S.E. at 737 (citations omitted).

Considering the evidence in the light most favorable to the State, which we must, Patterson was in the process of securing handcuffs to defendant's wrists when he twisted away from her, striking her in the forehead with the handcuffs. Patterson testified that defendant "pulled away and struck me upside the right forehead area and eye area with his hand and my handcuffs. . . . He hit me so hard he knocked me to both knees." Patterson was covered in blood from a cut in her forehead. Patterson testified she sustained the following injuries: a laceration in her forehead

requiring three stitches; a black eye; lacerations around her eye and eyebrow; a large raised swelling "like a softball . . . cut . . . in half" on her forehead; a sore ear, jaw, and nose; and a bruised cornea. The handcuffs were made of stainless steel. Defendant testified he punched Officer Patterson with his fist in an attempt to "knock her out".

We conclude there was substantial evidence of each element of assault on a government officer with a deadly weapon to survive defendant's motion to dismiss. This assignment of error is overruled.

We next address defendant's argument that there was a fatal variance between the indictment for the offense of assault with a deadly weapon upon a governmental officer, under G.S. § 14-34.2, regarding the duty Trooper Patterson was performing at the time of the assault, and the evidence presented at trial. The indictment for the charge of assault with a deadly weapon on a governmental officer read in pertinent part: "At the time of the assault, the officer was performing the following duty of that office, assisting Trooper T. Dellinger with a wreck investigation." Defendant contends the evidence established that the duty Patterson was performing at the time of the assault was attempting to arrest defendant for driving without an operator's license. Even assuming *arguendo* the evidence established that Patterson was attempting to make an arrest at the time of the assault rather than investigating a vehicular wreck, we must reject defendant's argument.

In *Waller*, this Court interpreted the requirements of an indictment charging the offense of assault on an officer under G.S. § 14-33(b)(4) (repealed 1991):

> The particular duty the officer was performing when assaulted is not of primary importance, it only being essential that the officer was performing or attempting to perform *any* duty of his office. . . .
>
> Although we hold that a warrant charging a violation of G.S. 14-33(b)(4) is sufficient if it alleges only in general terms that the officer was discharging or attempting to discharge a duty of his office at the time the assault occurred, without alleging specifically exactly what that duty was, we caution that to sustain a conviction of violating that statute it is still necessary, of course, that the State present evidence and that the jury find under appropriate instructions from the court that the officer was discharging or attempting to discharge some duty of his office when the defendant assaulted him.

Waller, 37 N.C. App. at 136, 245 S.E.2d at 810-11 (internal quotation marks and citations omitted).

Here, the evidence established Patterson was assaulted while carrying out an official duty, attempting to make an arrest. This assignment of error is overruled.

Defendant next argues the trial court erred by denying his motion for a continuance to subpoena expert witnesses. When the case was called for trial, defendant stated he had not been able to procure the attendance of unnamed witnesses due to his incarceration and his having received discovery from the State only two weeks before trial. On appeal, defendant contends he was prejudiced by the denial of his motion because he was forced to

proceed to trial without expert witnesses who could have provided evidence regarding the genesis, nature, and extent of Patterson's injuries. We disagree.

"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 . . . prejudice is presumed in cases where the trial court fails to grant a continuance which is essential to allowing adequate time for trial preparation." *In re Bishop*, 92 N.C. App. 662, 666, 375 S.E.2d 676, 679 (1989) (internal quotation marks and citations omitted).

> To establish that the trial court's failure to give additional time to prepare constituted 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. [A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance. [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.
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> . . . .
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> [C]ontinuances 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.

State v. Jones, 342 N.C. 523, 531, 467 S.E.2d 12, 17 (1996) (internal quotation marks and citations omitted). Our Supreme Court has held that "[t]he denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial only upon a showing by the defendant that the denial was

erroneous and also that his case was prejudiced as a result of the error." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982) (citation omitted). "[A] mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial to a later term." *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (internal quotation marks and citation omitted). In *Branch*, our Supreme Court held that a defendant failed to demonstrate prejudice from a denial of his motion for a continuance where "[t]he record on appeal . . . fail[ed] to reveal that the defendant informed the trial court of the name of a single witness the defendant allegedly sought to bring before the court . . . [or] what the defendant expected to attempt to prove through these witnesses[.]" *Branch*, 306 N.C. at 105, 291 S.E.2d at 657. Furthermore, the defendant in *Branch* failed to show "why the period between formal charges and his trial date was not sufficient to locate necessary witnesses and have them present for trial." *Id.*

Here, defendant made an oral motion for a continuance on the day of trial. With the assistance of his standby counsel, defendant requested a continuance "in order for him to subpoena the expert witnesses that he is going to need on his behalf." No evidence or affidavits were presented in support of this motion. There was no further explanation identifying who the witnesses were or why their testimony would be necessary. Defendant had been indicted on the instant charges 1 March and 3 May 1999; defendant's trial began 19 January 2000. Although, at the time of trial,

defendant had released his court appointed counsel and was proceeding *pro se*, there is nothing in the record demonstrating why defendant had been unable to procure the witnesses he sought between the time he was formally charged and the trial date. Under these circumstances, we cannot hold either that the trial court erred by denying defendant's motion for a continuance, or that defendant suffered any prejudice thereby. This assignment of error is overruled.

Defendant's remaining arguments are either rendered moot as a result of this opinion or are without merit.

Because the conviction for resist delay and obstruct a public officer was consolidated with the other offenses, we must remand for entry of a new judgment. On remand, the trial court judge may enter a new judgment consistent with this opinion in the absence of defendant.

No error in part, reversed and remanded in part.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).