NO. COA06-1332

NORTH CAROLINA COURT OF APPEALS

Filed: 18 September 2007

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 05 CRS 09577
05 CRS 55842

TRAVIS WADE JONES

Appeal by Defendant from judgments entered 9 December 2005 by Judge Ronald K. Payne in Superior Court, Buncombe County. Heard in the Court of Appeals 22 May 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert J. Blum, for the State.

Leslie C. Rawls, for the defendant-appellant.

WYNN, Judge.

Defendant Travis Wade Jones appeals from his convictions for robbery with a dangerous weapon and felony first-degree murder by premeditation and deliberation, arguing that he received ineffective assistance of counsel and that the trial court abused its discretion in several of its rulings. After a careful review of the record and transcripts before us, we find Defendant received a trial free of error.

At trial, the State presented evidence tending to show that on 2 May 2005, Defendant was living in a mobile home on property owned

by his father, Ted Jones, in Candler, North Carolina. Teresa Rigsby, a woman with whom Defendant had an ongoing sexual relationship, was living with Defendant in his mobile home. Approximately two weeks prior to the incident in question at trial, Ms. Rigsby's estranged husband Stephen Rigsby moved into the mobile home with Defendant and Ms. Rigsby. All three were using crack cocaine on a regular basis, and none were employed at the time of the incident.

On 2 May 2005, Defendant was "toying" with a .22 caliber rifle in the mobile home. After telling Mr. Rigsby that, "This is for anybody that gets in my way," Defendant put the rifle back in a shed on the property. Later that evening, Defendant left the mobile home with a table leg and went to his father's house, approximately three hundred fifty to four hundred feet away. Defendant testified that he was going to borrow his father's truck and to ask him for money for food and cigarettes for Ms. Rigsby, but took the table leg because he knew his father was upset at seeing Ms. Rigsby earlier in the day.

Defendant testified that he had a struggle with his father, took the keys to his father's truck, and left the house. As Defendant began to drive away, Mr. Jones fired a shotgun blast at the truck, peppering Defendant with birdshot. Defendant lost control of the truck, hit a tree, and returned to his mobile home.

In the meantime, Mr. Jones yelled to call 911 because he had shot Defendant; Mr. Rigsby ran to a neighbor's house to ask him to call 911. Defendant then went to the shed, retrieved the .22

caliber rifle, and shot Mr. Jones twice. Mr. Jones died of internal bleeding. His wallet was found in his pocket, but some contents were on the ground near his body.

Ms. Rigsby testified that Defendant regularly stole money and marijuana from his father and would use the money to support his drug habit; Mr. Rigsby corroborated those statements. The State also offered a voluntary statement made by Defendant to police that he had taken five blank checks from his father's house in March 2005 and used one for food and fuel and three for cash. Ms. Rigsby further stated that, prior to the shooting, Defendant had stolen a gun from his father identified at trial as the .22 caliber rifle used to kill Mr. Jones. However, Defendant testified that his father had given him the rifle for protection about two weeks before the shooting, after Mr. Jones became aware that Defendant owed money to several people for crack cocaine. Stephen and Teresa Rigsby told the jury that Defendant believed his father was going to will all of his property to Defendant and that Defendant had recently cut the brake lines on Mr. Jones's truck in the hope that he would die.

At the conclusion of his trial, the jury returned verdicts of guilty of felony first-degree murder, with premeditation and deliberation, and of robbery with a dangerous weapon. After entering judgment on the verdicts, the trial court sentenced Defendant to life in prison without parole. Defendant now appeals, arguing that (I) the trial court abused its discretion and denied Defendant's right to effective counsel by denying his motions for

a continuance on medical grounds related to defense counsel's health and; (II) the trial court abused its discretion and erred by ruling over Defendant's objection that the jury could consider evidence that was improperly allowed.

I.

Defendant first argues that the trial court abused its discretion by denying his motions for a continuance. At the beginning of Defendant's trial, defense counsel moved for a continuance on medical grounds that he suffered from an eye condition and pain from a broken crown on a molar. Defendant contends that allowing his trial to move forward as scheduled, with his defense counsel unable to see well and in pain, violated his constitutional right to effective assistance of counsel.[1] We disagree.

Our standard of review of a trial court's ruling on a motion for continuance is well established:

> Ordinarily, 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.

[1] Defendant's second contention to this Court is that he received ineffective assistance of counsel; because that assertion also relates to our standard of review of the trial court's decision to deny Defendant's motions to continue, we consider both arguments together here.

State v. Taylor, 354 N.C. 28, 33-34, 550 S.E.2d 141, 146 (2001) (internal citations omitted), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2001). To establish that the denial of a motion for a continuance was prejudicial, a 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. Williams*, 355 N.C. 501, 540-41, 565 S.E.2d 609, 632 (2002) (quotation and citation omitted), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

Moreover, to determine whether a criminal defendant received effective assistance of counsel, we follow the two-part test established by our state and federal Supreme Courts:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). "Thus, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d at 249. Moreover, our Supreme Court has also held that "[c]ounsel is

given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 550 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002).

In the instant case, when defense counsel made his first motion to continue due to an eye condition called acute superficial punctate keratitis (causing symptoms including blurred vision, pain around the eyes, photophobia, tearing, and headaches), the trial court instructed him to have his eye doctor call the trial court. The optometrist then telephoned the trial court and informed him that defense counsel's vision was likely 20/40 as a result of the condition. Noting that defense counsel's vision was not perfect but was "certainly not bad[,]" the trial court denied the motion to continue but appointed another attorney "out of an abundance of caution" to assist defense counsel as a notetaker and reader as necessary.

Defense counsel then made another motion to continue because he had lost a crown on a lower molar that "exposed a nerve to the opening in [his] mouth[,]" and he believed "those things taken together render[ed him] . . . to the point of potential ineffective assistance of counsel." The trial court denied the motion, noting that defense counsel "seem[ed] to be quite on top of the game today[]" and pledging to "take whatever steps necessary to accommodate the dentist that might be fixing [the crown]" if the dentist was able to work defense counsel in for an appointment

during the course of the trial. The record shows that the trial court did go into recess early one afternoon during the trial to allow defense counsel to go to a 3:00 p.m. dentist appointment.

In his brief to this Court, Defendant acknowledges that it is "difficult to point to specific instances where [defense] counsel's physical infirmities conflicted with his ability to represent [Defendant]." We agree. From the record and transcripts before us, it is clear that defense counsel mounted a vigorous defense of Defendant and was engaged in every aspect of the trial, including comprehensive cross-examination of prosecution witnesses, presentation of direct testimony, and numerous evidentiary and other objections.

Indeed, Defendant identifies only the failure to renew Defendant's motion to dismiss at the close of all evidence as a concrete example of ineffective assistance of counsel. Defendant asserts that the State failed to present evidence as to each element of the felony charge of robbery with a dangerous weapon, such that both that and the charge of felony murder should have been dismissed. He further argues that the State failed to present evidence of the requisite *mens rea* for murder by premeditation and deliberation. We find these contentions to be without merit.

The crime of robbery with a dangerous weapon is defined as "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Small*,

328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (quotation and citation omitted); *see also* N.C. Gen. Stat. § 14-87 (2005). Additionally, to survive a motion to dismiss, the State must have presented "substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citation and quotations omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). "Substantial evidence" is "relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *Id.* (citations omitted). In considering a motion to dismiss by the defense, such evidence "must be taken in the light most favorable to the state. . . . [which] is entitled to all reasonable inferences that may be drawn from the evidence." *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986).

At trial, the State presented evidence tending to show that Defendant got into Mr. Jones's truck and started to drive away, when Mr. Jones fired a shotgun at the truck. Although Defendant testified that Mr. Jones often let him borrow the truck, we find it eminently reasonable that the jury might have concluded from the fact that Mr. Jones shot at the truck that Defendant had, at least on this occasion, taken the truck without permission. Moreover, Defendant admitted to taking the table leg with him to his father's house, and the State offered testimony tending to show that Mr. Jones had suffered from blunt force trauma to the head. In light of this evidence, we find that the State offered sufficient

evidence to establish each element of robbery with a dangerous weapon to withstand a motion to dismiss, had it been made at the close of all evidence.

Defendant also argues that the State failed to present evidence of the requisite *mens rea* for murder by premeditation and deliberation, and that charge should likewise have been dismissed. However, Stephen and Teresa Rigsby testified that Defendant had earlier told them that he had cut the brake lines on his father's truck in the hope that he would die, and that he had gone to his father's house with a table leg in his hands. We find this evidence sufficient for the jury to conclude that Defendant acted with premeditation and deliberation in the murder of his father.

Given the overwhelming evidence presented by the State to establish each element of the crimes Defendant was charged with, we conclude that "there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different[.]" *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. Accordingly, and noting the vigorous defense reflected in the record and transcripts before us, we decline to determine whether defense counsel's performance was actually deficient. *Id.* Defendant's assignments of error alleging ineffective assistance of counsel are therefore overruled.

Further, nowhere in the record or transcripts before us is there any suggestion that defense counsel's failure to renew his motion to dismiss at the close of all evidence was in any way related to his eye condition or tooth pain. Again, we observe that

the record and transcripts before us indicate that defense counsel was actively engaged in every aspect of the trial, from cross-examining prosecution witnesses to eliciting direct testimony to lodging objections to evidence and certain lines of questioning. We see no abuse of discretion in the trial court's refusal to grant Defendant's motions to continue in such circumstances, as we can find no evidence that Defendant was prejudiced by the trial moving forward, particularly in light of the accommodations made by the trial court for defense counsel. These assignments of error are overruled.

II.

Finally, Defendant argues that the trial court abused its discretion and erred by ruling over Defendant's objection that the jury could consider evidence that was improperly allowed. Defendant contends that it was improper to allow the jury to consider Defendant's statement to police about the checks he had stolen from his father, as the prejudicial effect of such evidence outweighed its probative value. We disagree.

Our Rules of Evidence exclude evidence of other crimes, wrongs, or acts offered to prove character or propensity to commit the crime charged; however, such evidence is allowed for other purposes, such as to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005). Moreover, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of

unfair prejudice, confusion of the issues, or misleading the jury, . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2005). A trial court's rulings under Rule 403 are reviewed for an abuse of discretion, *see State v. Lanier*, 165 N.C. App. 337, 345, 598 S.E.2d 596, 602, *disc. review denied*, 359 N.C. 195, 608 S.E.2d 59 (2004), as are those under Rule 404(b). *See State v. al-Bayyinah*, 359 N.C. 741, 747, 616 S.E.2d 500, 506 (2005) ("Whether to exclude evidence is a decision within the trial court's discretion."), *cert. denied*, 547 U.S. 1076, 164 L. Ed. 2d 528 (2006). This Court will find an abuse of discretion only where a trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation and quotation omitted), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006).

When the State sought to have Defendant's statement to police about the stolen checks read to the jury, defense counsel objected, and the trial court offered the following limiting instruction:

> All right, members of the jury, I'm allowing you to hear this evidence for two purposes: First, you may consider this evidence, if you believe it, that it corroborates the testimony of any prior witnesses that may have testified about these alleged events. In other words, you can consider it for corroborative purposes in determining whether you believe or disbelieve the prior testimony.
>
> You may also consider this evidence for the purpose of showing whether or not the Defendant had the intent, which is a necessary element of Robbery with a Dangerous Weapon, that is one of the two charges that is before you, and accept this for those two purposes. If you believe this evidence, you may consider it, but only for those two purposes and

nothing else.

Defendant asserts that the statement should not have been allowed to show intent, as the crime described in the statement - namely, forgery - was too remote in time and subject matter to be relevant to the crimes of robbery and murder at issue at Defendant's trial.

Nevertheless, we find the statement and the prior bad acts relevant to show the intent and willingness of Defendant to steal property from his father and sell it, as he had done in the past to support his drug habit. Given the trial court's limiting instruction, we see no abuse of discretion in determining that the probative value of the statement was not substantially outweighed by its prejudicial effect. Even assuming *arguendo* that allowing the statement to be read was improper, we conclude that it did not prejudice Defendant in light of the other, overwhelming evidence against him, including as to establish the element of intent. This assignment of error is overruled.

No error.

Judges TYSON and CALABRIA concur.

Report by Rule 30(e).