NO. COA06-386

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

STATE OF NORTH CAROLINA

v. Transylvania County
Nos. 04CRS52421-
WILLIAM D. BUHL 04CRS52422

Appeal by defendant from judgment entered 5 October 2005 by Judge Ronald K. Payne in Transylvania County Superior Court. Heard in the Court of Appeals 31 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly W. Duffley, for the State.

Glenn Gerding for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from a jury verdict of guilty of two counts of statutory rape. We determine there was no error.

FACTS

On 28 March 2005, William D. Buhl ("defendant") was indicted by a grand jury in Transylvania County for two counts of statutory rape. The evidence presented at trial tended to show the following:

Defendant met Miss A., the alleged victim, over the Internet in a chat room. After several conversations, defendant and Miss A. began discussing sexual matters. According to defendant, Miss A.

suggested that they meet. Defendant lived in Knoxville, Tennessee, and Miss A. lived in Brevard, North Carolina.

Defendant met with Miss A. on several occasions in August and September of 2004. In August 2004, defendant drove from Knoxville to Brevard to see Miss A. Miss A. testified that there was no physical contact on this trip. Defendant testified that after the August meeting, he and Miss A. exchanged nude pictures of themselves. On 3 September 2004, defendant traveled to Brevard again. Defendant denied meeting with Miss A. on this trip, but Miss A. testified that they had oral and vaginal intercourse. On 10 September 2004, defendant again traveled to Brevard. Defendant testified that Miss A. told him she was a high school senior. Miss A. testified that she told defendant she was 14 going on 15. Miss A. testified that they had vaginal intercourse on 10 September 2004, but defendant denied that they had any kind of sexual contact.

Sometime after 10 September 2004, defendant and Miss A. discussed Miss A. moving to Tennessee. Miss A. traveled to Knoxville with defendant. Once in Knoxville, Miss A. testified that she had intercourse with defendant. Defendant testified that they did not have any sexual contact. The day after Miss A. arrived in Knoxville, Detective Gale Mackey of Brevard picked her up and took her home. Sheriff's deputies returned to North Carolina with defendant in custody on 14 October 2004.

Defendant was read his *Miranda* rights, and subsequently waived them. Detective Mackey testified that defendant admitted knowing

Miss A. was 15 years old and that they had sexual intercourse at the Imperial Motor Lodge on one occasion, which was 10 September 2004.

On 28 March 2005, defendant was indicted by a grand jury in Transylvania County for two counts of statutory rape. On 4 October 2005, defendant filed a motion to continue on the basis that defendant's counsel determined that 30 pages of discovery was missing from the discovery documents provided by the State. Defendant's motion was heard prior to the start of trial on 5 October 2005 and it was denied. On 4 October 2005, defendant filed a motion to suppress defendant's statement made to investigators. The trial court conducted a voir dire on the motion and denied the motion to suppress. On 5 October 2005, the jury found defendant guilty of two counts of statutory rape. Defendant received a sentence of 240 to 297 months' imprisonment for each conviction.

Defendant appeals.

ANALYSIS

At the outset, defendant included four assignments of error in the record on appeal. Defendant briefed only two of the assignments of error, and therefore the remaining assignments of error are abandoned. N.C. R. App. P. 28(b)(6).

I.

Defendant contends the trial court erred when it refused to grant defendant a continuance to review discovery. We disagree.

Our 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."

State v. Jones, 172 N.C. App. 308, 311-12, 616 S.E.2d 15, 18 (2005) (citations omitted). In order to establish a constitutional violation, "'a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense.'" *State v. Williams*, 355 N.C. 501, 540-41, 565 S.E.2d 609, 632 (2002) (citation omitted), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). "'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.* (citations omitted).

In the instant case, we determine the trial court did not err in denying defendant's motion for a continuance. Defendant's attorney was appointed to represent defendant on 18 October 2004, almost one year prior to trial. Defendant's counsel received discovery documents from the State on 11 August 2005 which included 152 paginated pages. Defendant's counsel signed a statement that said, "if you find that your set of documents is missing any pages listed, please let me know as soon as possible." Defendant's

attorney did not discover that he was missing 30 of the paginated pages until the day before trial, 3 October 2005, almost two months after receiving the discovery from the State. Therefore, we believe defendant's attorney had ample opportunity to discover the missing documents prior to trial, and we do not think defendant suffered prejudice because of the trial court's decision.

Accordingly, we disagree with defendant's contention.

II.

Defendant contends the trial court committed plain error when it failed to *sua sponte* reconsider defendant's motion to suppress. We disagree.

Plain error is defined as 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) (citations omitted). To prevail on plain error review, defendant must show the jury would have likely reached a different result absent the alleged error. *Id.*

We conclude that defendant has not shown that a *sua sponte* reconsideration of defendant's motion to suppress would likely have resulted in a different verdict. First, no case law in defendant's brief on appeal illustrates that a trial court is required to *sua sponte* revisit a motion to suppress when new information is presented. Rather, the defendant has presented case law illustrating that a trial court may revisit an issue and it may conduct an evidentiary hearing *sua sponte*. *State v. Brewington*, 170 N.C. App. 264, 279-80, 612 S.E.2d 648, 658, *disc. review*

denied, 360 N.C. 67, 621 S.E.2d 881 (2005); *State v. McCall*, 162 N.C. App. 64, 68, 589 S.E.2d 896, 899 (2004). Further, defendant states in his brief that "[w]ithout [d]efendant's statement in evidence this case was a swearing match. Miss A. testified that she had intercourse with [d]efendant. Defendant testified that they did not have intercourse." Therefore, it is not likely that the jury would have reached a different result absent the alleged error. Thus, defendant has not met his required burden, and we disagree with his contention.

No error.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).