NO. COA11-1497
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 10 CRS 231075

JULIO CESAR GUTIERREZ-GONZALEZ

Appeal by Defendant from judgment dated 14 April 2011 by Judge Hugh B. Lewis in Superior Court, Mecklenburg County. Heard in the Court of Appeals 8 May 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Anne M. Gomez, for Defendant-Appellant.

McGEE, Judge.

Julio Cesar Gutierrez-Gonzalez (Defendant) was arrested on 30 June 2010 for alleged involvement in a drug deal in Mecklenburg County. Defendant was subsequently indicted on seven charges relating to cocaine, including: trafficking in 200 grams or more but less than 400 grams or more by possession; possession with intent to sell and deliver; conspiracy to commit

Level II trafficking by possession; conspiracy to commit Level II trafficking by sale; trafficking in 400 grams or more by possession; Level III trafficking by transportation; and conspiracy to commit Level III trafficking by sale. A jury found Defendant guilty of trafficking in more than 400 grams of cocaine by transport and not guilty of all other charges on 14 April 2011. Defendant was sentenced to 175 months to 219 months in prison. Defendant appeals.

I. Factual Background

The evidence at trial tended to show that on 21 June 2011, prior to Defendant's arrest, Federal Agent Ubaldo Rios (Agent Rios) set up a drug buy with Cesar Chinchilla (Mr. Chinchilla) in furtherance of a drug investigation targeting Mr. Chinchilla. When Mr. Chinchilla arrived for his meeting with Agent Rios, he was driving a Toyota Corolla (the Corolla) owned by Defendant. Defendant was riding in the passenger seat. Defendant remained in the Corolla while Mr. Chinchilla entered Agent Rios' truck and sold cocaine to Agent Rios. Agent Rios set up a second drug buy with Mr. Chinchilla for 30 June 2010 for three kilograms of cocaine. On 30 June 2010, Defendant was driving the Corolla, with Mr. Chinchilla and Duber Murillo (Mr. Murillo) as passengers. Defendant parked the Corolla at a gas station, at which time Mr. Chinchilla called Agent Rios to inform him he would only be able to deliver one kilogram of cocaine. Shortly

thereafter, officers from the Charlotte Mecklenburg Police Department (the CMPD) stopped the Corolla, searched it, and found a kilogram of cocaine. Defendant was taken into custody.

Defendant was interrogated by Detective James Beaver (Detective Beaver) of the CMPD. Agent Cesar Gutierrez (Agent Gutierrez) of the State Bureau of Investigation assisted Detective Beaver by acting as interpreter. Agent Gutierrez read Defendant his *Miranda* rights in Spanish. Defendant responded that he did not "have money for an attorney and that [he was] clean and he [didn't] mind answering any questions."

Wilfred Nwauwa (Mr. Nwauwa) was appointed as counsel for Defendant on 15 July 2010. The State offered Defendant a written plea agreement that indicated that Mr. Nwauwa should provide blank CDs and DVDs to the district attorney's office for the copying of discovery documents. At a pretrial readiness conference on 3 February 2011, both the State and Defendant indicated the case was ready to go forward. The trial court issued a pretrial readiness order, stating that "[c]ounsel have indicated that no conflicts exist preventing this case from moving forward to trial." The trial court stated that continuances would be granted only "for a circumstance that could not have been reasonably foreseen and/or [if] the fair administration of justice requir[ed] a continuance." A trial date was set for 11 April 2011.

Defendant told Mr. Nwauwa on 9 February 2011 that he wanted a new attorney. Two days later, Mr. Nwauwa emailed Assistant District Attorney Spencer Merriweather (Mr. Merriweather) to indicate that Defendant had rejected a plea deal and wanted a new attorney. Defendant wrote a letter to Mr. Nwauwa on 28 March 2011, requesting that Mr. Nwauwa withdraw from representation of Defendant. In his letter, Defendant stated that he believed Mr. Nwauwa was pressuring him to plead guilty. Mr. Nwauwa emailed Trial Court Administrator Eva House (Ms. House) on 1 April 2011 and requested that a withdrawal hearing be scheduled before 11 April 2011. Ms. House indicated that the question of withdrawal would have to be heard by the trial judge on 11 April 2011. Mr. Nwauwa emailed Mr. Merriweather on 7 April 2011, stating that he planned to move to withdraw and that the case should be continued. The day before trial, on 10 April 2011, Mr. Nwauwa again emailed Mr. Merriweather to indicate that, in the event Mr. Nwauwa was not allowed to withdraw from representation of Defendant, Mr. Nwauwa would need a witness from the Department of Correction brought to court.

At trial on 11 April 2011, Mr. Nwauwa moved to withdraw from representation and, in the alternative, asked for a continuance citing his unpreparedness for trial. The trial court asked Defendant to comment on his motion to substitute counsel, and Defendant stated: "I would just appreciate it if

you would appoint me a new attorney, because I just don't feel like this attorney is helping me sufficiently." The trial court asked Defendant if there were any additional reasons for his motion, and Defendant responded: "That's all." The trial court denied both of Defendant's motions. On the first day of trial, Mr. Nwauwa untimely objected to chemical analyses being introduced without analyst testimony. Mr. Nwauwa also moved to have the trial court order the State to produce Mr. Chinchilla from the custody of the N.C. Department of Correction, mistakenly asserting that he did not have the authority to obtain the necessary writ. The trial court denied the motion. Additionally, because Mr. Nwauwa had not provided CDs and DVDs to the district attorney's office, he had not viewed a substantial amount of relevant evidence before trial. Mr. Nwauwa viewed the evidence during breaks and overnight.

II. Issues on Appeal

Defendant raises on appeal the issues of whether: (1) the trial court erred by denying Defendant's motion to continue; (2) the trial court erred by denying Defendant's motion to substitute counsel; (3) the trial court erred in instructing the jury on acting in concert; and (4) Mr. Nwauwa's actions amounted to ineffective assistance of counsel under ***Strickland v. Washington***.

II. Motion to Continue

Defendant argues that the trial court erred by denying his motion to continue. We review the trial court's denial of a motion to continue for abuse of discretion. *State v. Smith*, 310 N.C. 108, 111, 310 S.E.2d 320, 323 (1984) ("A motion for a continuance is ordinarily addressed to the sound discretion of the trial court. Therefore, the ruling is not reversible on appeal absent an abuse of discretion."). Defendant contends that *de novo* review is required because the trial court's denial implicates Defendant's constitutional right to assistance of counsel. *See id.* at 112, 310 S.E.2d at 323 ("[If] a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal."). "Prejudice due to ineffective assistance of counsel is presumed without inquiry into the actual conduct of the trial when the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote." *State v. Morgan,* 359 N.C. 131, 143-44, 604 S.E.2d 886, 894 (2004) (internal quotations and citations omitted).

In the present case, Defendant's motion to continue did not demonstrate that Mr. Nwauwa's unpreparedness was a result of circumstances making it impossible for any attorney to adequately prepare for trial. Furthermore, "[t]o 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." *Morgan*, 359 N.C. at 144, 604 S.E.2d at 894 (internal quotations and citations omitted); *see e.g. State v.* Rogers, 352 N.C. 119, 125, 529 S.E.2d 671, 675-76 (2000) ("It is unreasonable to expect that any attorney, no matter his or her level of experience, could be adequately prepared to conduct a bifurcated capital trial for a case as complex and involving as many witnesses as the instant case."). Mr. Nwauwa was appointed as defense counsel roughly nine months prior to trial, and a pre-trial conference was held two months prior to trial. Defendant's motion to continue presented no constitutional issue, and thus is reviewed only for abuse of discretion.

N.C. Gen. Stat. § 15A-952(g) directs the trial court on how to consider a motion for continuance. It states:

> In superior or district court, the judge shall consider at least the following factors in determining whether to grant a continuance:
>
> (1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice;
>
> (2) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation[.]

N.C. Gen. Stat. § 15A-952(g) (2011). Our Supreme Court has

stated that "[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. Stepney*, 280 N.C. 306, 312, 185 S.E.2d 844, 848 (1972). Defendant's motion was made orally on the day of trial. In presenting the motion, Mr. Nwauwa stated that "[Defendant] was not working with [him][,]" that Defendant was not "trying to prepare for his trial," and that Mr. Nwauwa had "not adequately prepared for [trial] because of [a] disagreement" over an offered plea agreement. Our Supreme Court has held that the trial court does not abuse discretion by denying an oral motion for continuance "made on the date set for trial" and "not supported by some form of detailed proof indicating sufficient grounds for further delay." *State v. Searles*, 304 N.C. 149, 155, 282 S.E.2d 430, 434 (1981).

Defendant's motion for continuance cited only general concerns regarding Mr. Nwaua's preparedness and disagreement with Defendant. Defendant did not support the motion with "detailed proof indicating sufficient grounds for further delay" and, therefore, the motion was properly dismissed. *Id.*; *c.f.*, *State v. Jones*, 342 N.C. 523, 530, 467 S.E.2d 12, 16 (1996) (holding that defendant's contentions that "she needed more time to prepare for trial and that another psychiatric evaluation taking into account the allegations of abuse would help to

determine whether defendant possessed the necessary intent to commit the alleged offenses" were not sufficient to show grounds for further delay). The trial court did not abuse its discretion by denying Defendant's motion to continue.

IV. Motion to Substitute Counsel

Defendant also argues that the trial court erred by denying his motion to substitute counsel. Defendant contends that the trial court was under a constitutional duty to appoint new counsel because it had reason to doubt Mr. Nwauwa's "competency as an advocate" and reason to suspect "that the relationship between [Defendant and counsel] had deteriorated to such an extent that the presentation of his defense would be prejudiced[.]" *State v. Thacker*, 301 N.C. 348, 353, 271 S.E.2d 252, 255 (1980). We find that the decision whether to grant Defendant's motion to substitute counsel was within the sound discretion of the trial court and, as such, should be reviewed only for abuse of discretion by this Court.

This Court normally reviews a trial court's denial of a motion to substitute counsel for abuse of discretion. *State v. Sweezy*, 291 N.C. 366, 371-72, 230 S.E.2d 524, 529 (1976) ("[W]hether to appoint a different lawyer for an indigent criminal defendant who expresses dissatisfaction with his court-appointed counsel is a matter committed to the sound discretion of the district court." (citations omitted)).

However, the trial court must inquire into the reasons for the motion. *Id.* at 372, 230 S.E.2d at 529.

> If a court refuses to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the bona fides of the defendant, or if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right.

Id. (citations omitted). In *Thacker*, our Supreme Court stated that "when faced with a claim of conflict and a request for appointment of substitute counsel, the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective." *Thacker*, 301 N.C. at 353, 271 S.E.2d at 256.

In the present case, Defendant argues that the trial court made an inadequate inquiry into his reasons for requesting substitute counsel. Upon presenting Defendant's motion for substitute counsel, Mr. Nwauwa explained that his client had "expressed some concern about getting another attorney" and that "[Defendant] was not working with [Mr. Nwauwa] and trying to prepare for trial." Mr. Nwauwa also presented to the trial court a letter from Defendant in which Defendant explained that he felt Mr. Nwauwa had treated him in an "unprofessional way." Upon hearing the motion and viewing the evidence, the trial

court asked Defendant the following:

> THE COURT: . . . . Since your client is requesting new counsel, does he have anything that he wishes to state?
>
> MR. NWAUWA: Yes, your Honor, he does.
>
> THE COURT: Go ahead, sir.
>
> THE DEFENDANT: I would just appreciate it if you would appoint me a new attorney, because I just don't feel like this attorney is helping me sufficiently.
>
> THE COURT: Anything else?
>
> THE DEFENDANT: That's all.

It is clear the trial court inquired into Defendant's motivations for requesting substitute counsel and that, based on that inquiry, the reasons stated by Defendant raised no justifiable dissatisfaction. The inquiry in this case is similar to one made in *State v. House*, 194 N.C. App. 373, 671 S.E.2d 595, 2008 WL 5223003 (2008) (unpublished opinion). Though unpublished, we find the reasoning in *House* to be sound and the analysis helpful. In *House*, when the trial court questioned the defendant regarding the reasons for his motion to substitute counsel, the following exchange occurred:

> THE DEFENDANT: You know, due to, you know, Mr. Kevin Mauney, he says he did talk to [the prosecutor] and he did all [he] could. To my knowledge, I don't think that he did.

> So I am asking the court to restate [sic] me another attorney.
>
> THE COURT: Do you want to give me something besides your conclusion that Mr. Mauney has not done all he should have done?
>
> THE DEFENDANT: Not to my knowledge, sir.
>
> THE COURT: You don't know anything in particular that he's been deficient [sic]?
>
> THE DEFENDANT: I'd just ask the court to restate [me] another attorney.
>
> THE COURT: Anything else you want to say about that?
>
> THE DEFENDANT: (Shakes head negatively.)

Id. at *3. In *House*, this Court found that the trial court's "inquiry into defendant's request for substitute counsel was sufficient to ensure that [defense counsel] could provide effective representation for defendant." *Id.* at *4. In the present case, the trial court, as in *House*, made an adequate inquiry into Defendant's reasons for his motion for substitute counsel and through that inquiry, has "[satisfied] itself . . . that present counsel is able to render competent assistance[.]" *Thacker*, 301 N.C. at 353, 271 S.E.2d at 256. The trial court's denial of Defendant's motion to substitute counsel raised no constitutional concerns and will be reviewed for abuse of discretion.

Defendant argues in the alternative that the trial court abused its discretion by denying Defendant's motion to substitute counsel. "In order to be granted substitute counsel, 'the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust verdict.'" *State v. Gary*, 348 N.C. 510, 516, 501 S.E.2d 57, 62 (1998) (quoting *Sweezy*, 291 N.C. at 372, 230 S.E.2d at 528-29). Simply being dissatisfied with his attorney's services is not adequate grounds to merit appointment of new counsel for Defendant. *State v. Hammonds*, 105 N.C. App. 594, 596-97, 414 S.E.2d 55, 56-57 (1992). In the present cases, the reasons Defendant gave for his motion to substitute counsel did not present good cause as outlined in *Gary*. *See Gary*, 348 N.C. at 516, 501 S.E.2d at 62. Defendant provided only generalized concerns of unprofessionalism, difficulty in preparation, and disagreement over plea strategies. It is clear that mere disagreements with counsel over trial tactics do not entitle Defendant to new counsel. *Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. The trial court's adequate inquiry uncovered no reasons that Defendant's motion to substitute counsel should be granted. The trial court did not abuse its discretion by denying Defendant's motion.

V. Acting in Concert

Defendant next argues that the trial court erred by instructing the jury on "acting in concert" in such a way that forced the jury to find Defendant guilty. Defendant contends that the issue should be reviewed *de novo* by this Court.

We must first determine whether this issue has been properly preserved for appeal. The North Carolina Rules of Appellate Procedure state the following:

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C.R. App. P. 10(a)(2). However, when the trial court draws the parties' attention to the pattern instructions at the charge conference and discusses whether any varying language should be used, the defendant has no reason to request that the pattern instruction or a variation thereof be used. *See State v. Jaynes*, 353 N.C. 534, 556, 549 S.E.2d 179, 196 (2001). Our Supreme Court has held that, under such circumstances, "when the instruction actually given by the trial court varie[s] from the pattern language, defendant [is] not required to object in order to preserve this question for appellate review." *Id.*

In the present case, the trial court indicated at the charge conference that it would give the jury the pattern instruction on acting in concert. The acting in concert pattern instruction reads:

> For a person to be guilty of a crime, it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit (***name crime***), each of them, if actually or constructively present, is (not only) guilty of that crime if the other person commits the crime and (but) also guilty of any other crime committed by the other in pursuance of the common purpose to commit (***name crime***), or as a natural or probable consequence thereof.
>
> FINAL MANDATE
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant acting either by himself or acting together with (***other persons***) . . . (***continue with appropriate mandate***).

N.C.P.I. 202.10 (footnotes omitted). At trial, following pattern instructions on each of the charges against Defendant, the trial court gave the following acting in concert instructions to the jury:

> For a person to be guilty of a crime it is not necessary that he personally do all the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit trafficking in cocaine by

possession, being Level III, or trafficking in cocaine by transportation being Level II, or conspiring to traffic in cocaine by sale Level III, or trafficking in cocaine by possession Level II, or possession with intent to sell and deliver cocaine or conspiring to traffic cocaine by possession Level II, or also again conspire to traffic in cocaine by possession of Level II, each of them, if actually or constructively present, is not only guilty of that crime if the other person commits the crime but also guilty of any other crime committed by the other person in the pursuance of the common purpose to commit trafficking in cocaine by possession Level III, trafficking in cocaine by transportation Level III, conspiring to traffic cocaine by sale Level III, trafficking in cocaine by possession Level II, possession with intent to sell and deliver cocaine, conspiring to traffic cocaine by possession Level II, or conspiring to traffic cocaine by possession of Level II or as a natural and probable consequence thereof.

Therefore, if you find from the evidence beyond a reasonable doubt that on or about the alleged dates of June 21st or June 30th the Defendant acting either by himself or acting together with [Mr.] Chinchilla did commit the above named crimes for which you have been instructed as to the elements which are felonious conspiracy to traffic in cocaine by sale two counts, felonious conspiracy to traffic cocaine by possession, possession of a controlled substance with intent to manufacture, sell or deliver -- with intent to sell or deliver, drug trafficking in cocaine by possession, or finally drug tracking [sic] in cocaine by

> transportation, then you are to consider that the individual - that one or more persons were acting for the common purpose thereof.

At trial, Defendant did not object to the acting in concert jury instruction. However, he contends that the issue is preserved for appeal under *Jaynes* because the given instruction differed from the pattern instruction discussed at the charge conference. We disagree.

"Word for word conformity of the jury instructions to the pattern instructions is not required; substantial conformity is all that is required." *State v. Spencer*, 192 N.C. App. 143, 151, 664 S.E.2d 601, 606 (2008); *see also State v. Brewington*, 352 N.C. 489, 523, 532 S.E.2d 496, 516 (2000) ("Even though the trial court's instructions were not precisely identical to the pattern jury instructions, they were substantially so, and defendant cannot show how the trial court's instruction prejudiced him."). The trial court's acting in concert instruction was substantially similar to the pattern instruction. In the present case, the situation contemplated in *Jaynes* did not occur and, as such, Defendant was required to object to the jury instructions to preserve the issue for appeal, per N.C.R. App. P. 10(a)(2). Thus, we review the instructions only for plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (holding that errors

without objection are reviewed on appeal for plain error).

Defendant argues that the acting in concert instructions constituted plain error because they "removed the issue of *mens rea* from the jury, expressed an opinion on [Defendant's] *mens rea*, and did not inform the jury that they could find [Defendant] not guilty, effectively forcing the jury to find [Defendant] guilty of trafficking by transportation." We will address each of these arguments in turn.

First, Defendant argues that "the final mandate created a mandatory presumption of *mens rea*" in Defendant's actions "because the instructions informed the jury that even if they found that [Defendant] *unknowingly* acted with [Mr.] Chinchilla to commit any of the listed crimes . . . they were still mandated to find that [Defendant] and [Mr.] Chinchilla *were acting for the common purpose to commit that crime*." We do not find Defendant's argument to be convincing. Our Supreme Court has held that an acting in concert instruction does not allow the jury to find a defendant guilty without a finding of requisite intent to commit the crime. *See State v. Golphin*, 352 N.C. 364, 456-58, 533 S.E.2d 168, 228-29 (2000) ("Defendants contend the instruction permitted the jury to find them guilty of first-degree murder and robbery with a dangerous weapon without finding the required intent to commit the crimes, in violation of their constitutional rights. . . . . [T]he trial

court's acting in concert instructions comported in all respects with our previous case law. Therefore, defendants' arguments in this regard are without merit."). The acting in concert instruction in the present case required the jury to find that Defendant had the requisite intent to commit the charged crimes before they returned a guilty verdict. The instructions stated:

> Therefore, if you find from the evidence beyond a reasonable doubt that on or about the alleged dates of June 21st or June 30th the Defendant acting either by himself or acting together with [Mr.] Chinchilla did commit the above named crimes *for which you have been instructed as to the elements*[.]

(emphasis added). The instructions required that Defendant meet the elements of each listed crime. Those elements were listed in earlier instructions given to the jury on each charge, and each of those instructions included a stated element of *mens rea*. The acting in concert instruction, then, implies that only after the jury had determined that Defendant had the requisite intent to commit the crime could the acts of Mr. Chinchilla, engaged in the common purpose to commit that crime with Defendant, be imputed to Defendant. The acting in concert instructions created no mandatory presumption as to Defendant's state of mind.

Second, Defendant contends that "the instructions were a judicial opinion that[,] because [Defendant] [lent] [Mr.] Chinchilla his car and acted as a driver for the drug

transaction on June 30 and [Defendant] was present, [Defendant] necessarily possessed a common purpose with [Mr.] Chinchilla to traffick [sic] in cocaine." As discussed above, the acting in concert instruction charged the jury to decide if Defendant possessed the requisite intent necessary to be found guilty of each of the stated charges. The instruction did not equate presence with a culpable mind, and properly left the issue of *mens rea* to the jury.

Finally, Defendant argues that the acting in concert instruction was erroneous for not including a not guilty option in its final mandate. In support of his claim, Defendant cites *State v. Overman*, where the trial court "failed to give the converse or alternative view and to tell the jury that if they were not satisfied beyond a reasonable doubt . . . they would acquit the defendant." 257 N.C. 464, 468, 125 S.E.2d 920, 924 (1962). However, in *Overman*, the trial court failed to provide a not guilty instruction as to the instruction on the actual charge. In the present case, the trial court provided a not guilty option after each of the seven charge instructions. The acting in concert instruction did not explain a charge under which Defendant might be convicted, but rather a theory by which Defendant could be found guilty of charges previously instructed upon. Clearly, the jury understood this distinction, as they returned a verdict of not guilty on six of the seven charges.

The trial court's instructions, substantially similar to the pattern instructions, did not constitute plain error.

VI. Ineffective Assistance of Counsel

Finally, Defendant argues that Mr. Nwauwa's actions at trial amount to ineffective assistance of counsel. However, as Defendant's brief correctly contends, "the record is inadequate to fully and fairly litigate these claims." An ineffective assistance of counsel claim may be brought on direct review "when the cold record reveals that no further investigation is required, i.e., [when] claims . . . may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). "[S]hould the reviewing court determine that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's rights to reassert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525. Consequently, we dismiss this assignment of error without prejudice to Defendant's right to file a motion for appropriate relief.

No error in part, no plain error in part, dismissed in part.

Judges STEPHENS and HUNTER, Jr. concur.

Report per Rule 30(e).