NO. COA13-233
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v. Nash County
Nos. 10 CRS 53168, 53170-71, 53182, 53298

DELASIO TIYEZ WIGGINS

Appeal by defendant from judgments entered 10 October 2012 by Judge Walter H. Godwin, Jr. in Nash County Superior Court. Heard in the Court of Appeals 29 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Benjamin J. Kull, for the State.

Reece & Reece, by Michael J. Reece, for defendant-appellant.

CALABRIA, Judge.

Delasio Tiyez Wiggins ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of five counts of breaking and entering ("B&E"), four counts of larceny after B&E, and larceny of a firearm. We find no error.

I. Background

In May and June 2010, in Nash County, North Carolina, six similar break-ins were reported to the Nash County Sheriff's

Department ("NCSD"). Items were stolen during the break-ins. Among the items stolen were electronics, cash, jewelry, safes, legal documents and firearms.

NCSD questioned Cameron Baines ("Baines"), one of the victims' neighbors. Baines saw a gold Camry ("the Camry") in the driveway of one of her neighbors' homes the morning that break-ins were reported. Baines noticed that the trunk of the Camry was not properly closed, as if it would not close all the way. Baines also saw two "younger" black men, both possibly "over six-foot" getting into the Camry. Baines also noticed one of the men had dreadlocks and the other was clean-cut.

On 16 June 2010, Nash County Sheriff's Deputy Stanley Robbins ("Deputy Robbins") responded to a call regarding a suspicious tannish brown vehicle occupied by two black males. Deputy Robbins located the vehicle and noticed the trunk was not fastened and was flapping. When Deputy Robbins stopped the vehicle because the windows were illegally tinted, the passenger jumped out and ran. Defendant, who was driving, remained in the vehicle. Another officer pursued and detained the passenger. Property was seized from the vehicle and later identified as stolen property from one of the break-ins.

After Deputy Robbins arrested defendant and took him into custody, he was transported to the NCSD interview room. Since Deputy Robbins turned defendant over to Investigator Darrell Land ("Investigator Land") for questioning, he did not read defendant his *Miranda* rights. Subsequently, Investigator A. J. Finch ("Investigator Finch") joined Investigator Land in the interview room. Defendant answered Investigator Finch's questions, did not ask for an attorney, and agreed to go with the investigators to identify the houses. Over a period of two or three hours, defendant provided the investigators with the addresses of the houses and a list of the items he had taken from each house. After questioning defendant, the Nash County Sheriff's Department transferred defendant to officers with the Rocky Mount Police Department.

While defendant was in custody, he was assigned an attorney, David Clapsadl ("Clapsadl"). Before trial, defendant moved to suppress statements made to law enforcement officers since he claimed he was not properly advised of his *Miranda* rights. The trial court denied defendant's motion to suppress his statements. The day after trial began in Nash County Superior Court, Clapsadl met with defendant. During the meeting, defendant became upset, threw a notebook, broke a

chair, turned over a table, and hit Clapsadl in the knee with a chair. Although Clapsadl sustained an injury requiring medical attention, defendant denied flinging a chair at Clapsadl.

Clapsadl moved to withdraw as counsel and requested a mistrial. Although the State did not oppose Clapsadl's motion to withdraw, the State did oppose the motion for a mistrial. The State argued that previous mistrials had delayed the case and that the court should avoid further delay. When the court asked defendant for his thoughts regarding whether the court should grant or deny a mistrial, defendant answered, "What do can [sic] I say? I don't know."

The court found that defendant hit Clapsadl with a chair, granted Clapsadl's motion to withdraw as counsel and concluded that defendant had forfeited his right to appointed counsel through his conduct. The court denied the motion for a mistrial and did not appoint standby counsel. Defendant proceeded *pro se*. The jury returned verdicts finding defendant guilty of five counts of B&E, four counts of larceny after B&E, and larceny of a firearm. The trial court sentenced defendant to ten consecutive sentences of a minimum of fourteen months and a maximum of seventeen months in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

II. Forfeiture of Right to Counsel

Defendant argues that the trial court erred by determining that he had forfeited his right to counsel. We disagree.

As an initial matter, defendant failed to object when the trial court ordered that defendant had forfeited his right to counsel. This Court has held that a defendant does not have to object to a court's ruling when the defendant has forfeited his or her right to counsel in order to preserve the issue for appeal. *See State v. Wray*, 206 N.C. App. 354, 355, 698 S.E.2d 137, 139 (2010). In *Wray*, the Court based part of its decision on the defendant's mental incapacity to properly represent himself. *Id.* at 355-56, 698 S.E.2d at 139. The State contends that since defendant did not suffer from a mental illness, the *Wray* Court's reasoning does not apply here. However, the *Wray* Court recognized that denying appellate review of forfeiture cases would "prevent review by this State's appellate courts of a trial court's decision to deny appointed counsel, even though the right to counsel is a fundamental right under the Sixth Amendment of the United States Constitution and the North Carolina Constitution." *Id.* at 356, 698 S.E.2d at 139 (citation omitted).

Because of this more general concern about the fundamentality of the right to counsel, defendant should not be barred from raising the forfeiture issue on appeal. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Wray*, 206 N.C. App. at 357, 698 S.E.2d at 140 (citation omitted). Therefore, we will address the merits of defendant's appeal.

"The right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution. A part of this right includes the right of an indigent defendant to appointed counsel." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000) (citations omitted). "It is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated." *Wray*, 206 N.C. App. at 356, 698 S.E.2d at 140 (citation omitted).

"A forfeiture results when 'the [S]tate's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying

tactic, combine[ ] to justify a forfeiture of defendant's right to counsel[.]'" *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 (citation omitted). "[T]he federal and state courts that have addressed forfeiture have restricted it to instances of severe misconduct." *Wray*, 206 N.C. App. at 359, 698 S.E.2d at 141. "[A]n accused may forfeit his right to counsel by a course of serious misconduct towards counsel that illustrates that lesser measures to control defendant are insufficient to protect counsel and appointment of successor counsel is futile . . . ." *Id.* at 360, 698 S.E.2d at 142 (citation omitted). Whether a defendant's conduct is characterized as severe misconduct that should result in forfeiture of the right to counsel depends upon the facts of each case.

In the instant case, defendant physically injured Clapsadl in a pre-trial meeting and Clapsadl moved to withdraw as counsel. Defendant denied assaulting Clapsadl. When the court asked defendant what he had to say about Clapsadl withdrawing as his counsel, he responded, "Nothing." The trial court granted Clapsadl's request to withdraw and held that defendant had forfeited his right to appointed counsel through his conduct.

Generally, courts have found that a defendant's assault and battery on their counsel constitutes serious misconduct

resulting in the forfeiture of the right to counsel. *See Montgomery*, 138 N.C. App. at 523, 525, 530 S.E.2d at 68-69 (holding that defendant's assault on his counsel by throwing water on him in court constituted forfeiture and that "[s]uch purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts simply cannot be condoned"). Purposefully delaying trial or otherwise mistreating counsel can also constitute serious misconduct. *See State v. Cureton*, ___ N.C. App. ___, ___, 734 S.E.2d 572, 577-78 (2012) (holding that defendant forfeited his right to counsel by shouting at, threatening, being combative and uncooperative with, and writing angry letters to his three successive attorneys).

Just as this Court determined in *State v. Montgomery* that the defendant's assault constituted severe misconduct, in the instant case, defendant's assault on his counsel can also be characterized as severe misconduct sufficient to support the trial court's decision that he forfeited his right to counsel. Defendant's assault was even more severe than the assault in *Montgomery* because Clapsadl required medical care for his injuries as a result of the assault, whereas the attorney in *Montgomery* did not sustain physical injury from the assault.

Nonetheless, defendant contends that "[f]orfeiture of counsel should be a court's last resort." *Wray*, 206 N.C. App. at 360, 698 S.E.2d at 142. Defendant specifically points to the *Wray* Court's holding that the defendant had not forfeited his right to counsel in part because the defendant had not been given an opportunity to participate in the forfeiture hearing. *See Wray*, 206 N.C. App. at 362-63, 698 S.E.2d at 143. The Court was concerned about the summary nature of the trial court's ruling and particularly the absence of sworn testimony or evidence. *Id.* at 369, 698 S.E.2d at 147. In addition, "[d]efendant had no chance to respond to his counsel's motion to withdraw, and was provided *no* opportunity to testify or otherwise participate in the hearing before the trial court's order." *Id.*; *see also Cureton*, ___ N.C. App. at ___, 734 S.E.2d at 578 (holding that defendant had forfeited right to counsel after counsel testified in a hearing).

In the instant case, defendant's attorney made his motion to withdraw and described to the court the incident between himself and defendant. Defendant was questioned regarding the incident, and he denied hitting his attorney with a chair. The court gave defendant the chance to object to his attorney's withdrawal, to which defendant responded, "Nothing." The court

also asked defendant if he had anything to say about his attorney's motion for a mistrial, but defendant only said, "What do can [sic] I say? I don't know." *Wray* is distinguishable because here defendant had a chance to participate in the hearing on forfeiture. While there was a lack of evidence and a lack of sworn testimony at the hearing, defendant had the opportunity to respond to the court and raise any concerns at the time of his attorney's withdrawal. Therefore, while the better practice would have been for the trial court to take sworn testimony, the trial court did not err by holding that defendant had forfeited his right to counsel.

III. *Miranda* Rights

Defendant also argues that the trial court erred by denying his motion to suppress statements made to law enforcement officers since he claimed he was not properly advised of his *Miranda* rights. Since defendant failed to preserve this issue for appellate review, we will not address this issue.

"An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction[.]" N.C. Gen. Stat. § 15A-979 (2013). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" N.C.R.

App. P. 10(a)(1) (2013). North Carolina courts have consistently interpreted current North Carolina Rule of Appellate Procedure 10(a)(1) "to provide that a trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (discussing former N.C.R. App. P. 10(b)(2), amended 1 Oct. 2009). However, in criminal cases, an issue "not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4) (2013).

In the instant case, the trial court denied defendant's pre-trial motion to suppress his statements to law enforcement, finding defendant had voluntarily waived his *Miranda* rights. During his trial, defendant did not renew his objection to Investigators Land and Finch's testimonies. Therefore, the only way to review the issue on appeal would be for defendant to allege plain error. However, on appeal, defendant failed to allege plain error. Since plain error must be "specifically and

distinctly contended," defendant's statement that "[t]he trial court erred" is insufficient to allege plain error. Therefore, defendant has waived this issue for appeal.

Assuming, *arguendo*, that defendant had properly preserved the issue for appeal, his claim still falls short. Our state Supreme Court has held that testimony from law enforcement officers that the defendant was read his rights and acknowledged understanding those rights was sufficient to support a trial court's finding that the defendant had properly been advised of his rights. *State v. Swift*, 290 N.C. 383, 397-98, 226 S.E.2d 652, 663 (1976). In the instant case, both Investigators Land and Finch testified to the NCSD's policy regarding reading suspects' rights, and Investigator Finch specifically testified suspects were advised of their rights "every time" they were interrogated in custody. Investigator Finch also indicated that during the time defendant identified the houses he had broken into to law enforcement, defendant did not indicate he did not understand his rights or that he wanted to stop answering questions. Investigator Land provided unequivocal testimony that there was no doubt in his mind he had advised defendant of his *Miranda* rights. According to *Swift*, the testimony of Investigators Land and Finch, together with defendant's conduct

indicating his understanding of his rights, is sufficient to support the trial court's finding that defendant had been properly advised of his *Miranda* rights and voluntarily waived them. *Id*.

IV. Conclusion

Since defendant physically injured his attorney and this type of conduct is characterized as severe misconduct, we hold that the trial court did not err by finding that defendant forfeited his right to counsel. Defendant failed to preserve appellate review of the trial court's denial of his motion to suppress and failed to argue plain error on appeal and therefore, he has waived this issue on appeal.

No error.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).