NO. COA14-427
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v. Wayne County
No. 12 CRS 701194

THOMAS WOODROW RICE

Appeal by defendant from judgment entered 19 November 2013 by Judge Timothy S. Kincaid in Wayne County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney General Roy Cooper, by Associate Attorney General Christopher R. McLennan, for the State.

Drew Nelson, for defendant.

ELMORE, Judge.

On 19 November 2013, a jury found Thomas Woodrow Rice (defendant) guilty of driving while license revoked (DWLR). The trial court sentenced defendant to 120 days imprisonment, with defendant receiving credit for 56 days served. On appeal, defendant argues that the trial court erred in: (1) allowing this case to proceed to trial when he had twelve to fourteen

cases calendared for the same day and lacked sufficient notice of which charge was set to be prosecuted, (2) allowing the State to introduce into evidence a certified copy of his driving history which differed from the non-certified copy (the alternate copy) of his driving history contained in his superior court file, and (3) determining that admitting the alternate copy into evidence would constitute the presentation of evidence by defendant. After careful consideration, we hold that defendant received a trial free from error.

I. Background

On 18 and 19 November 2013, defendant was tried on a DWLR charge (12 CR 701194) before the Wayne County Superior Court, Judge Timothy S. Kincaid presiding. At the outset, defense counsel made a motion to continue on the grounds that defendant lacked notice and an opportunity to adequately prepare his defense. In particular, defendant informed the trial court that had he hoped to secure a witness to testify on his behalf. In addition, because he had twelve to fourteen misdemeanor charges calendared on the same day, defendant alleged that he was unsure of which case was called for trial. However, defense counsel told the trial court that the State informed him to be "prepared for every case" because each was "potentially for trial," and

defense counsel admitted he was "most likely ready to proceed." The trial court denied defendant's motion to continue.

The State presented the following evidence at trial: Officer Jay Holland (Officer Holland) of the Goldsboro Police Department testified that he responded to a single-vehicle traffic accident on 2 April 2012 in which defendant was the driver. Officer Holland observed a Chevrolet pickup truck and a dump truck crashed into a utility pole. Defendant indicated to Officer Holland that he had been driving the Chevrolet pickup and towing the dump truck when he lost control of the vehicle. Officer Holland testified that defendant admitted he had been driving despite the fact that his license had been suspended. As such, he charged defendant with DWLR. The State introduced a certified copy of defendant's driving record into evidence at trial.

After the State rested, defendant renewed his motion to continue on the basis that he wanted to secure a witness to testify. Judge Kincaid granted the motion. When defendant returned to the courtroom on 19 November 2013, he reported that the witness was unavailable. Defendant sought to introduce into evidence a non-certified copy of his driving record that was purportedly in his superior court file. When the trial court

informed defendant that such action would constitute the presentation of evidence, causing him to surrender his right to open and close the final arguments, defendant opted to rest his case without presenting any evidence in his defense.

II. Analysis

I. Due Process

Defendant argues that the trial court violated his constitutional rights by forcing him to go to trial without first providing him with notice of the charge against him. We disagree.

"It is implicit in the constitutional guarantee[] of assistance of counsel . . . that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case." *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977). "Ordinarily a motion for a continuance on the ground of a want of time for counsel for accused to prepare for trial is addressed to the sound discretion of the trial judge," and it "is not subject to review on appeal in the absence of circumstances showing that he has grossly abused his discretionary power." *State v. Gibson*, 229

N.C. 497, 500, 50 S.E.2d 520, 523 (1948). However, "[w]hen a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001). "The 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). To establish prejudice, defendant "must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense" and "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. Whitman*, 179 N.C. App. 657, 666, 635 S.E.2d 906, 912 (2006) (citation and quotation omitted).

Defendant argues that the trial court's denial of his motion to continue denied him his constitutional rights by not allowing defense counsel adequate time to prepare for trial. We are not persuaded. *In Gibson*, our Supreme Court held that the trial court did not err in denying defendant's motion to continue when the action involved no complicated factual or

legal questions, the witnesses were few, and counsel had adequate time to consult with the defendant and investigate the case. *Gibson* at 501, 50 S.E.2d at 524. Similar to *Gibson*, this case involved a misdemeanor charge that did not present a complicated legal question and the number of witnesses were small. More importantly, defense counsel's motion to continue was not based on a concern that he had had inadequate time to prepare defendant's case. In fact, counsel admitted that the State had told him to be prepared to proceed on each calendared case. Instead, defense counsel's motion was primarily based on the fact that defendant's witness was unavailable at trial. Defense counsel stated, "Your Honor, the defense would not argue against each case being on the calendar, and defense is most likely ready and prepared, but . . . [i]f I had been told this morning that this case would have been tried, I could have gotten my witness here. But again, I was told that any case [may be called] and be prepared for every case. So . . . [.]"

In the instant case, the record is devoid of evidence that defendant was denied adequate time to prepare for trial merely because he had numerous misdemeanor charges calendared on the same day. Defendant's concern regarding securing his witness was remedied when the trial court granted defendant's renewed

motion to continue—allowing a recess until the following day to allow defendant the opportunity to secure his witness. In addition, defendant has failed to argue that he suffered prejudice because of the alleged error. Because defendant acknowledged his own preparedness and was later granted a continuance in order to secure a witness, we hold that the trial court's initial denial of defendant's motion to continue was neither erroneous nor was it prejudicial to defendant. This argument is overruled.

B. Driving Record

Defendant next argues that the trial court erred in allowing the State to introduce into evidence a certified copy of defendant's driving record, which was materially different from an alternate copy contained in his superior court file. We disagree.

"[T]o preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). An issue not preserved by objection is reviewed for plain error only when

the "judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

At trial, defendant objected to the State's introduction of a certified copy of his driving record on the basis of hearsay. On appeal, defendant objects to the admission of this evidence on alternate grounds—arguing that the certified copy is "materially different" from the alternate driving record contained in defendant's superior court file and constituted an "unfair surprise." This Court would generally be inclined to review this issue for plain error provided defendant "specifically and distinctly" raised such issue in his brief. In his brief, defendant has neglected to do so, and he has therefore waived his right to appellate review.

Assuming *arguendo* defendant had asserted plain error on appeal, we hold that defendant's argument is without merit. Specifically, defendant contends that it was error for the State to introduce an extended or materially different version of his driving record, which included notifications mailed to defendant concerning the status of his driver's license, when the copy of defendant's driving record contained in his superior court file was devoid of such notices. Defendant cites no case law to support his position that the admission of the driving record

was error. Instead, defendant merely asserts that the admission of this evidence constituted an "unfair surprise" that could not have been anticipated by defendant.

We very much doubt that when charged with DWLR, defendant did not anticipate that his driving record, along with any notices regarding his license status, would be admitted into evidence. Should defendant have wished to introduce evidence of the alternate driving record, the trial court provided him with the opportunity to do so. However, defendant elected not to introduce it. Further, defendant has failed to argue that he was prejudiced by the admission of this "surprise" evidence. We hold that the trial court did not err, much less commit plain error, in admitting exhibit 2, a certified copy of defendant's driving record.

C. Procedural Right to Final Closing Argument

Finally, defendant argues that it was error for the trial court to determine that defendant would forfeit his right to open and close the final arguments to the jury if he introduced into evidence the alternate copy of his driving record. Defendant contends that the admission of the alternate driving record would not have constituted the presentation of evidence. We disagree.

"Rule 10 of the General Rules of Practice for the Superior and District Courts confers upon the defendant in a criminal trial the right to both open and close the final arguments to the jury, provided that no evidence is introduced by the defendant[.]" *State v. English*, 194 N.C. App. 314, 317, 669 S.E.2d 869, 871 (2008) (citation and quotation omitted). "[T]he proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness." *State v. Hall*, 57 N.C. App. 561, 564, 291 S.E.2d 812, 814 (1982).

After the State rested, defendant sought to introduce the alternate copy of his driving record that was representative of the driving record contained in the superior court file. The following colloquy occurred:

> DEFENDANT: The certified record that the State entered was one that was different than the one I had seen in the files before the trial. I would just ask that a record have a copy -- the record that I made out of the file, that that be entered along with the certified record that has the notifications that the driving while license was revoked for Mr. Rice and those notifications were mailed to his address. The record that I had seen before did not have these notifications, and I would just

> ask that -- that the differing record be entered along with the [State's] record that was entered yesterday.
>
> TRIAL COURT: That would be a presentation of evidence, you understand that[?]
>
> DEFENDANT: I would just ask it be entered along with his exhibit.
>
> TRIAL COURT: Well, the State has rested, so the State can't introduce it. If you introduce it, you're introducing evidence, you lose your last argument.
>
> . . .
>
> DEFENDANT: If it comes down to me introducing evidence, Your Honor, I won't do that and the defense will rest.

The crux of defendant's argument on appeal is that the trial court erred by "forcing him to choose between his procedural right to open and close the final arguments to the jury and having the jury consider the file version of his driving record." In advancing this argument, defendant relies on *State v. Shuler*, a case in which this Court addressed only the circumstances in which a defendant is deemed to have presented evidence during the cross-examination of a State's witness. 135 N.C. App. 449, 520 S.E.2d 585 (1999). This is not the situation in the case at bar. Here, defendant did not use the document to cross-examine a witness. Certainly, defendant

sought to introduce the evidence of the alternate driving record to attack the credibility of the State's evidence after the State rested its case. As such, the trial court did not err by holding that introducing the driving record into evidence after the State rested would constitute the admission of evidence. *See Hall, supra*. Further, assuming *arguendo* the trial court erred, defendant has failed to argue that he was prejudiced by the trial court's ruling. We overrule defendant's argument.

II. Conclusion

In sum, we conclude that the trial court did not err in denying defendant's motion to continue on constitutional grounds. Further, the trial court was correct in ruling that, should defendant have introduced a copy of his driving record into evidence, this would constitute the presentation of evidence in defendant's case-in-chief. We conclude that defendant received a trial free from error.

No error.

Judges BRYANT and ERVIN concur.

Report per Rule 30(e).