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NO. COA14-678
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 10 CRS 078869-70

MICHAEL A. BULLABOUGH

Appeal by defendant from judgments entered 13 September 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Kenneth A. Sack, for the State.

Mary March Exum for defendant-appellant.

HUNTER, Robert C., Judge.

Michael Bullabough ("defendant") appeals from judgments entered after a jury convicted him of misdemeanor assault with a deadly weapon and communicating threats. On appeal, defendant argues: (1) the trial court erred by denying defendant's motion to dismiss the charge of communicating threats where there was a fatal variance between the indictment and the State's evidence; (2) defendant is entitled to a new trial because the trial court

denied his motion to continue after rejecting a plea arrangement in violation of N.C. Gen. Stat. § 15A-1023(b) (2013); and (3) the trial court erred by denying defendant's motion to dismiss because the failure of the State to prosecute the case for almost three years violated defendant's constitutional right to a speedy trial.

After careful review, we remand this matter to the trial court for an evidentiary hearing on the issue of whether defendant was denied his right to a speedy trial. If the trial court answers this question in the negative, defendant is to be granted a new trial on the crimes charged.

Background

Defendant was charged with first degree burglary, second degree kidnapping, assault with a deadly weapon, and communicating threats based upon conduct that was alleged to have occurred on 22 April 2010. On 8 March 2013, a jury found defendant guilty of misdemeanor assault with a deadly weapon and communicating threats. The trial court sentenced defendant to 120 days imprisonment for communicating threats and 150 days imprisonment for assault, both of which were satisfied by credit for time served. The issues on appeal revolve around the

pretrial plea negotiations and the lengthy delay between the issuance of the indictments and trial.

Before trial commenced, defense counsel first addressed a proposed plea agreement. The trial court stated that it would not accept the proposed agreement because it included termination of defendant's probation. However, the trial court offered an alternative arrangement where defendant would be credited with 34 months of time served but serve an additional 12 months of imprisonment if he pled guilty to second degree kidnapping. Defendant rejected this plea arrangement. Defense counsel then moved for a continuance on the basis that "there was a plea offer made by the State" and the trial court "rejected it." The trial court denied defendant's motion to continue.

Defense counsel also renewed a motion to dismiss on the ground that defendant was denied the right to a speedy trial. According to defense counsel, defendant was initially arrested on 23 April 2010 and imprisoned until 2 December 2010 based on the same charges that he faced in the current case. Defendant was allegedly released for two weeks but was reindicted and incarcerated on the exact same charges because the State was able to locate a witness that it previously could not find.

Defense counsel stated that at some point in 2011, defendant moved to dismiss the charges on speedy trial grounds, but could not identify a specific date for the motion. Defendant released his initial trial counsel at some point in 2011, but again no specific dates were provided. Additionally, defense counsel claimed that defendant's lone alibi witness, a man named Mr. Shipman, died during the pendency of the trial. However, the substance of Mr. Shipman's proposed testimony was unknown. Defense counsel attributed the delay in the case to the State. Because defendant was brought to trial during "habitual felon week" even though he was not an habitual felon, defense counsel asserted that the State had the power to calendar cases at their discretion.

The State's attorney conceded that there had been a "miscommunication" between his office and the detectives working the case, which led to defendant's release and subsequent reincarceration in December 2010. But he also claimed that the delays in the case were caused by congestion in the administrative system rather than prosecutorial negligence. The State's attorney also attributed some of the delay to the fact that defendant switched counsel during the pendency of the action. After hearing the parties on this matter, the trial

court denied defendant's motion to dismiss and empaneled the jury for trial.

The State's evidence tended to show the following: On the night of 22 April 2010, Jenny Roberts ("Ms. Roberts") was asleep in the bedroom of a trailer she shared with William Moran ("Moran"). She claimed that defendant entered the bedroom and said that he wanted to have sex with her. Ms. Roberts became afraid when defendant kept pressing the issue. Defendant pulled out a knife and Ms. Roberts ran out of the trailer to try to use a neighbor's phone. Defendant followed Ms. Roberts out of the trailer, tackled her, pulled up her hair, put the knife to her throat, and forced her to go back inside. She testified that she thought defendant was going to hurt her, kill her, or rape her. Defendant threatened to kill everybody in the trailer, apparently because Ms. Roberts would not have sex with him. She testified that she believed he was capable of carrying out that threat and that he was going to rape her. Ultimately, Ms. Roberts was able to escape to a neighbor's residence to call the police.

The jury acquitted defendant on the charges of second degree kidnapping and first degree burglary but found him guilty of misdemeanor assault with a deadly weapon and communicating

threats. Defendant failed to timely appeal from the trial court's judgment. North Carolina Prisoner Legal Services, Inc. filed a petition for writ of certiorari on defendant's behalf, which this Court granted on 20 November 2013.

Discussion

I. Indictment Variance

Defendant first argues that the trial court erred by failing to dismiss the charge of communicating threats where the indictment fatally varied from the evidence presented by the State on this charge. We disagree.

"It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) (internal quotation marks omitted). Lack of jurisdiction in the trial court due to a fatally defective indictment requires this Court to "arrest judgment or vacate any order entered without authority." *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993) (citation omitted). The subject matter jurisdiction of the trial court is a question of law, which this Court reviews *de novo* on appeal. *State v. Barnett*, ___ N.C. App. ___, ___, 733 S.E.2d 95, 98 (2012).

Pursuant to N.C. Gen. Stat. § 15A-924(a)(5) (2013), an indictment must contain:

A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

Thus, in order to be valid and confer subject matter jurisdiction upon the trial court, "[a]n indictment charging a statutory offense must allege all of the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). The indictment will be held sufficient if it "charges the offense in a plain, intelligible and explicit manner," *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972), and "an indictment couched in the language of the statute is generally sufficient to charge the statutory offense," *State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987).

Here, defendant was charged with communicating threats under N.C. Gen. Stat. § 14-277.1 (2013). An individual is guilty of a Class 1 misdemeanor under this statute when:

- (1) He willfully threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully

- threatens to damage the property of another;
- (2) The threat is communicated to the other person, orally, in writing, or by any other means;
 - (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
 - (4) The person threatened believes that the threat will be carried out.

The indictment charged defendant with violation of section 14-277.1 as follows:

[O]n or about the 22nd day of April, 2010, in Mecklenburg County, Michael Anthony Bullabough did unlawfully and willfully threaten to physically injure the person of [Ms. Roberts]. The threat was communicated to [Ms. Roberts] by orally stating it to [Ms. Roberts], and the threat was made in a manner and under circumstances which would cause a reasonable person to believe that the threat was likely to be carried out and the person threatened believed that the threat would be carried out.

Defendant argues that the indictment is fatally defective because it fails to state with specificity what the "threat" was. Defendant claims that Ms. Roberts's testimony that defendant claimed "he was going to kill everyone in the house, including the dogs" varied fatally from the indictment which merely stated that defendant "did unlawfully and willfully threaten to physically injure the person of [Ms. Roberts]." Furthermore, defendant argues that the State presented no

evidence that Ms. Roberts believed that the threats would be carried out. We find these arguments unpersuasive. First, although defendant claims in his brief that Ms. Roberts testified that "she believed that [defendant] was *not* going to force her to have sex with him," the opposite is true. When asked "did you believe that [defendant] was going to force you to have sex with him?" Ms. Roberts answered "Yes." The indictment alleged every element of the crime charged, and the State subsequently produced evidence supporting each of those elements. Thus, the indictment was not fatally defective. See *Singleton*, 85 N.C. App. at 126, 354 S.E.2d at 262. Defendant's argument is overruled.

II. Motion to Continue

Defendant's next argument on appeal is that the trial court erred by denying his motion to continue after it rejected a proposed plea agreement made between defendant and the State. We agree.

Where a motion to continue is based on a constitutional right, the motion presents a question of law which is reviewed *de novo* on appeal. *State v. Smith*, 310 N.C. 108, 112, 310 S.E.2d 320, 323 (1984). "Denial of a motion for a continuance, regardless of its nature, is, nevertheless, grounds for a new

trial only upon a showing by defendant that the denial was erroneous and that his case was prejudiced thereby." *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981).

N.C. Gen. Stat. § 15A-1023(b) (2013) provides in pertinent part that:

Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. . . . Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court.

In *State v. Tyndall*, 55 N.C. App. 57, 62-63, 284 S.E.2d 575, 578 (1981), the Court interpreted this provision and held that the General Assembly "clearly" granted defendants an absolute right of continuance upon rejection of a proposed plea agreement. Where the trial court erroneously denies a motion to continue in such cases, the trial court commits prejudicial error and the defendant is entitled to a new trial. *Id.*

Although the State disputes whether an actual plea agreement was reached with defendant, we find that the record demonstrates a plea agreement was proposed and then altered due to the trial court's initial rejection of its sentencing terms.

When defense counsel first raised the issue, the following colloquy took place:

MR. DAVIS [DEFENSE COUNSEL]: On the other matter - and I discussed a plea offer the State had made to [defendant] in reference to this case to hopefully resolve the case and would resolve a [sic] outstanding probation matter. And after conferencing with the Court, I told [defendant] the Court was not willing to accept what I think the State and probation officer might have agreed to and that you were -

THE COURT: Well, it's not that I wouldn't accept it. I mean, I will accept it; but I'm not going to terminate the probation.

MR. DAVIS: Okay. And if he pled guilty that he would have to serve an additional period of time in jail pursuant to that in order for you to accept the terms that we wanted. So I just want him to know that on the record that that would be essentially as much as two more years in custody.

THE COURT: That's correct.

The trial court's statement that it would accept an agreement but would not terminate probation indicates that a plea agreement between the State and defendant had been reached. Later, the trial court conducted an off-the-record conference with counsel and proposed an arrangement whereby defendant would plead guilty to second degree kidnapping in exchange for serving 12 more months in prison. Defendant rejected this arrangement.

Defense counsel then moved for a continuance, which the trial court denied. The conversation between defense counsel and the State further demonstrates that an earlier agreement had been reached but was revoked after proposing the agreement to the trial court:

MR. DAVIS: I guess I'm a little - it's totally off the table right now with everything without the probation violation?

MS. ELLEDGE [THE STATE]: I mean, the Judge rejected that plea.

MR. DAVIS: Right. That's what I'm saying. If you offered it, are you still offering it?

MS. ELLEDGE: No.

MR. DAVIS: If he's rejecting it, then I would argue that [defendant] should be able to get it continued.

MS. ELLEDGE: No. The State is ready to proceed today. That offer is now off the table. You conferenced with the Judge. He made you the offer that he's willing to give you today. And that's where the State stands.

MR. DAVIS: Well, the Judge rejected the State's plea. He would have went with what the State - he was going to take the plea.

THE COURT: I think that's true. But it's only good today.

MR. DAVIS: Wow. Okay.

THE COURT: I'll note your exception. Bring the jury in.

Thus, the record demonstrates that defendant and the State had reached an agreement, proposed it to the trial court, and the trial court rejected it. Because this Court has held that section 15A-1023(b) confers an absolute right of continuance "upon rejection of a *proposed* plea agreement," *Tyndall*, 55 N.C. App. at 63, 284 S.E.2d at 578 (emphasis added), the trial court committed prejudicial error by denying defendant's motion to continue, and defendant is entitled to a new trial. *Id.*

III. Speedy Trial

Defendant's final argument is that the trial court erred by denying his motion to dismiss brought on the ground that he was denied the right to a speedy trial. After careful review, we remand this matter to the trial court for an evidentiary hearing.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend VI. Similarly, Article 1, Section 18 of the North Carolina Constitution provides that "[a]ll courts shall be open[] [to] every person . . . without favor, denial, or delay." N.C. Cont. art. 1, § 18. The same analysis is conducted to review speedy trial claims under both constitutions. *State v.*

Flowers, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997). "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

In *Barker v. Wingo*, 407 U.S. 514, 533, 33 L. Ed. 2d 101, 118 (1972), the United States Supreme Court set out a four-factor test to determine whether a defendant's right to a speedy trial has been violated. The factors are: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay. *Id.*; see also *State v. Groves*, 324 N.C. 360, 365, 378 S.E.2d 763, 767 (1989) (applying the four-factor *Barker* test to a speedy trial claim in North Carolina). "No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978). "The burden is, nonetheless, on the defendant to show that his constitutional rights have been violated" and a defendant who has "caused or acquiesced in the delay will not be allowed to use it as a vehicle in which to escape justice." *State v. Chaplin*, 122 N.C. App. 659, 663, 471 S.E.2d 653, 655 (1996) (internal quotation marks omitted).

When the evidence regarding the four *Barker* factors is undisputed, the failure of the trial court to make findings of fact does not prevent our appellate courts from conducting review. *Id.* at 663-64, 471 S.E.2d at 655. However, "when the motion to dismiss for denial of a speedy trial is based on allegations not conjectural and conclusory [in] nature, an evidentiary hearing is required and the trial court must enter findings to resolve any factual disputes and make conclusions in support of its order." *Id.* at 663, 471 S.E.2d at 655 (quotation marks omitted).

In *State v. Roberts*, 18 N.C. App. 388, 391, 197 S.E.2d 54, 56 (1973), the trial court summarily denied defendant's motion to dismiss based on a speedy trial claim without hearing arguments from the parties. This Court noted that "[f]rom the record before us, it is impossible to tell whether the State caused the delay of a year in getting defendant's case to trial; and, if so, whether such delay was justified. It is likewise impossible to tell whether the delay was caused by defendant's conduct." *Id.* Thus, the Court remanded the matter back to the trial court for it to "hold a sufficient hearing to allow him to determine the facts and balance the equities in accordance with [*Barker*]." *Id.* at 391, 197 S.E.2d at 57.

Here, although the trial court heard arguments on defendant's motion, it is impossible to assess the four-factor *Barker* test in light of the record before us. The trial court ruled on defendant's motion orally without entering a written order setting out findings of fact or conclusions of law "weighing the equities" in accordance with *Barker*. See *id.* at 391, 197 S.E.2d at 57. The arguments proffered by both defendant and the State at the hearing are unsupported by sufficient documentation in the record. Specifically, defense counsel argued that defendant was incarcerated from 23 April 2010 to 2 December 2010, released for two weeks, then brought back into the criminal justice system based on the same charges. The record is silent as to the existence of the initial incarceration and whether the charges were actually the same, as defense counsel argued. In its brief, the State notes that "[t]here is confusion between the transcript and [d]efendant's brief as to what crime his original incarceration was for, how long he served, what charges he was re-indicted for, and when he was returned to jail." Defendant concedes in his reply brief that "[i]t is unclear from the record exactly what are the answers to those four issues." Furthermore, although defense counsel claimed that defendant asserted his right to a speedy

trial in 2011, there is no support in the record for this assertion. As to defendant's change of counsel, it was stated before trial that "[a]t some point in 2011," defendant released his initial trial counsel. However, as the State notes, "[t]here is no definitive date cited in either the transcript or the record of when [d]efendant and his prior counsel parted ways[.]" Finally, although defense counsel claimed that the death of Mr. Shipman deprived defendant of his sole material alibi witness, there is nothing in the record regarding the nature of Mr. Shipman's proposed testimony. Defendant himself admits that "[i]t is not clear from the record exactly what Mr. Shipman was going to say during his testimony[.]"

Thus, the record is either silent or unclear as to each element of the *Barker* test: how long defendant was incarcerated, at what point he asserted his right to a speedy trial, the reason for the delay between indictment and trial, and any prejudice that may have resulted. Accordingly, pursuant to *Roberts*, we remand this matter to the trial court with instructions to conduct an evidentiary hearing and enter an order with findings of fact and conclusions of law in accordance with *Barker*. Should the trial court determine that defendant's right to a speedy trial was violated, then it shall "enter an

order vacating judgment[s], setting aside the verdict[s], and dismissing the indictment[s]" as to all charges. *Roberts*, 18 N.C. App. at 392, 197 S.E.2d at 57.

Conclusion

Because the record is insufficient to assess the merits of defendant's claim that he was denied the right to a speedy trial, we remand this matter to the trial court for an evidentiary hearing sufficient to make findings of fact and conclusions of law in accordance with *Barker*. If the trial court determines that defendant's right to a speedy trial was violated, it is to enter an order vacating judgments, setting aside the verdicts, and dismissing the charges. However, if it determines that defendant was not denied the right to a speedy trial, the trial court shall enter an appropriate order and proceed to a new trial on the crimes charged.

NEW TRIAL IN PART; REMANDED WITH INSTRUCTIONS IN PART.

Judges DILLON and DAVIS concur.

Report per Rule 30(e).