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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-462

Filed: 20 December 2016

Mecklenburg County, Nos. 14 CRS 221522, 35556

STATE OF NORTH CAROLINA

v.

JEROME L. PATTON

Appeal by Defendant from judgment entered 16 November 2015 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 12 December 2016.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for the State.

Charlotte Gail Blake for Defendant-Appellant.

McGEE, Chief Judge.

Jerome L. Patton (“Defendant”) appeals from judgment entered upon a jury verdict finding him guilty of felony possession of cocaine and his guilty plea to attaining habitual felon status. For the following reasons, we find no error.

I. Background

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Officer Peter Rangolan and Officer Aaron Bubans with the Charlotte-Mecklenburg Police Department arrested Defendant on 3 June 2014 for having a fictitious tag on his vehicle. Defendant initially cooperated, but became extremely agitated when he was placed in the back of the patrol vehicle. On the way to the jail, Defendant slammed his head into the divider between the front and back seat of the patrol vehicle and the bars on the window, and kicked the divider. Defendant repeatedly said “they gonna kill me,” and claimed that he could not breathe and could not see. However, the officers did not observe any signs of respiratory distress.

After arriving at the jail, the officers took several minutes to remove Defendant from the back of the patrol vehicle because Defendant was “thrashing about” and “kept hollering and screaming, shaking his head back and forth.” The officers initially placed Defendant in a wheelchair but, due to his behavior, had to move him to a restraint chair. Officer Buban informed jail personnel that, due to Defendant’s actions, he suspected Defendant might have narcotics on his person. Jail personnel searched Defendant and found “a bag filled with a white powdery, rocky substance,” which was later determined to be cocaine, underneath Defendant’s underwear. Defendant was transported by ambulance to the hospital for evaluation, where he remained uncooperative with doctors and had to be sedated.

A grand jury indicted Defendant on felony possession of cocaine and for attaining habitual felon status on 8 September 2014. The trial was initially set for

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16 March 2015, but was delayed several times due to Defendant's disruptive conduct. Defendant was ordered to Central Regional Hospital on 16 September 2015 for a forensic evaluation to determine his capacity to proceed. When Defendant's case came on for trial on 10 November 2015, Defendant was initially absent from the courtroom. Defendant's trial counsel informed the court that Defendant was out in the hallway "having an emotional meltdown" and was lying under a bench "seizing up." After a short break, Defendant appeared in the courtroom and the case was continued until the next court day.

Defendant's case resumed on 12 November 2015, and Defendant appeared in court. The forensic evaluation report was admitted into evidence and the court declared Defendant competent to stand trial. During jury selection, Defendant began to complain of chest pains and was taken by ambulance to the hospital where he "was so disruptive that he had to be chemically restrained."

During the afternoon session of court on 12 November 2015, Defendant's counsel reported to the trial court that the charge nurse at the hospital had informed him Defendant was not going to be held overnight and "the best they can tell there's no medical problems at this point." The court entered an order requesting Defendant's medical records from that hospital visit. The trial court continued the matter until the next morning, but noted that if Defendant was not in court the next day "he gives up his right to be present for the trial." The trial court also stated that

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“in the event this happens again, it is my expectation that we will continue” as Defendant’s behavior was voluntary and he was “malingering,” a term the court said was used in Defendant’s forensic evaluation report.

Defendant was present in court the next morning, 13 November 2015, and jury selection continued. During the completion of jury selection, Defendant collapsed on the floor of the courtroom. Out of the presence of the jury, Defendant’s girlfriend “told [Defendant] to ‘stop it’ and that it was ‘his life’ and that the ‘trial would proceed with or without him there.’” Defendant again was transported to the hospital and the trial court decided to resume the trial without Defendant. Defendant’s counsel objected to the court proceeding without Defendant being present, stating that, without a “finding that this is not a legitimate medical emergency[,]” counsel did not feel Defendant had waived his right to be present. The trial court stated that it “will be making some findings later” and proceeded with the trial.

At the close of the State’s evidence later that day, Defendant was still absent from the courtroom. Defendant’s counsel informed the court that Defendant would have been the only witness for the defense, and moved to continue the matter in order to allow counsel the opportunity to discuss with Defendant whether Defendant wished to testify. The court denied Defendant’s motion. The jury found Defendant guilty of felony possession of cocaine.

The trial resumed on 16 November 2015 on Defendant's habitual felon indictment. Defendant appeared in court and admitted to attaining habitual felon status. The trial court sentenced Defendant to a term of 36 to 56 months in prison. Defendant appeals.

II. Analysis

Defendant's sole argument on appeal is that the trial court abused its discretion in denying his motions to continue. Specifically, Defendant contends that conducting the trial in his absence, despite knowing he was at the hospital, violated his constitutional rights to be present at trial and to testify. We do not agree.

A motion for continuance "is ordinarily addressed to the sound discretion of the trial court and its ruling is not subject to review absent abuse of discretion." *State v. Smith*, 152 N.C. App. 514, 530, 568 S.E.2d 289, 299 (2002) (internal quotation marks omitted). "When, however, the motion implicates a constitutional right, the trial court's ruling involves a question of law which is fully reviewable by an examination of the particular circumstances of the case." *State v. Blackwell*, 228 N.C. App. 439, 446, 747 S.E.2d 137, 143 (2013) (citation, internal quotation marks, and brackets omitted). "Even when the motion raises a constitutional issue, denial of the motion is grounds for a new trial only upon a showing that the denial was erroneous and also that defendant was prejudiced as a result of the error." *State v. Williams*, 355 N.C.

501, 540, 565 S.E.2d 609, 632 (2002) (citation, internal quotation marks, and brackets omitted).

Defendant argues that he did not waive his right to be present at trial because his absence was not unexplained as the trial court knew he was at the hospital and Defendant's medical records show he was treated for a specific medical diagnosis of "hyperventilation syndrome and panic attack." "It is well settled that a defendant in a criminal prosecution has the right to be present throughout his trial, and that right may be waived only in prosecutions for less than capital offenses." *State v. Mulwee*, 27 N.C. App. 366, 367, 219 S.E.2d 304, 305 (1975). "A defendant's voluntary and unexplained absence from court subsequent to the commencement of trial constitutes such a waiver." *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991). "Once trial has commenced, the burden is on the defendant to explain his or her absence; if this burden is not met, waiver is to be inferred." *State v. Russell*, 188 N.C. App. 625, 627, 655 S.E.2d 887, 889 (2008).

In this case, Defendant provided no argument or evidence upon his return to court on 16 November 2015 that his "visit to the hospital the morning of November 13, 2015 was, in fact, necessitated by any real or material physical or mental health condition." Additionally, the medical records provided with the record on appeal correspond with Defendant's 12 November 2015 hospital visit. Defendant was released from the hospital in good health on 12 November 2015, and returned to court

the next day. There is no evidence in the record of what transpired at Defendant's 13 November 2015 hospital visit.

Relying on its observations of Defendant and a forensic report admitted into evidence, the trial court determined that Defendant's actions of collapsing in court and causing emergency services to be called were knowing and volitional and that Defendant was "malingering." Thus, the court concluded Defendant waived his right to be present at his trial. However, Defendant failed to provide a copy of the forensic report relied upon by the trial court in the record on appeal. It is Defendant's responsibility to ensure that the record on appeal is complete and adequate to conduct a proper review. *See e.g., State v. Brown*, 142 N.C. App. 491, 492-93, 543 S.E.2d 192, 193 (2001); *see also* N.C.R. App. P. 9. Without a copy of the forensic report relied upon by the trial court, we cannot determine that the court abused its discretion in concluding Defendant was malingering and that his actions were voluntary.

Thus, although Defendant's absence was explained in that the court was aware Defendant was at the hospital, based on the trial court's determination that Defendant was feigning illness and the absence of evidence that the hospital visit was necessitated by a medical condition requiring immediate treatment, his absence was not lawfully excused. *See Russell*, 188 N.C. App. at 628, 655 S.E.2d at 889 ("Although the letter [from a doctor] did, in fact, confirm Defendant's location, it was insufficient to show that his absence was involuntary or due to immediately necessary medical

treatment; thus, it explained his absence without lawfully excusing it.”). On this record, we find the trial court did not err in its determination that Defendant’s absence constituted a voluntary waiver of his right to be present.

Defendant also argues the trial court erred in denying his second motion to continue at the close of the State’s evidence in order to allow his counsel time to discuss with Defendant his right to testify. Defendant argues that, because the State rested its case around 3:30 p.m. on a Friday, it would not have significantly delayed the trial to continue the case to the following Monday to allow Defendant to be present and have the opportunity to testify. However, because Defendant waived his right to be present by being voluntarily absent for the duration of the trial, he cannot now argue that the court violated his right to testify by proceeding in his absence.

To the extent Defendant also challenges findings of fact in the Order on Capacity entered 3 December 2015, *nunc pro tunc*, 16 November 2015, Defendant did not appeal from this order and any arguments pertaining to that order are not properly before this Court. *See Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (failure to file proper notice of appeal as to a judgment or order prevents this Court from acquiring jurisdiction over an appeal from that judgment or order).

III. Conclusion

For the reasons set out above, we find no error.

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NO ERROR.

Judges CALABRIA and DILLON concur.

Report per Rule 30(e).