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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. 16-99

Filed: 6 September 2016

Johnston County, No. 12CRS55220

STATE OF NORTH CAROLINA

v.

BOBBY LAY BRITT, JR.

Appeal by defendant from judgment entered 30 April 2015 by Judge Gale M. Adams in Johnston County Superior Court. Heard in the Court of Appeals 10 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Ellen A. Newby, for the State.

Levinson Law Firm, P.A., by Scarlett M. VanStory, for defendant.

DIETZ, Judge.

Defendant Bobby Lay Britt, Jr. appeals his conviction and sentence for driving while impaired and failing to reduce speed. Britt first argues that the trial court erred by proceeding with the second day of trial in his absence. We reject this argument. Britt was nearly an hour late for the first day of trial without excuse and thus the court was well within its sound discretion to proceed with the second day of

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trial in his absence. On appeal, Britt has not presented sufficient evidence to show his absence was involuntary.

Britt also challenges allegedly improper remarks by the prosecutor at closing argument. According to Britt, the prosecutor improperly highlighted his absence and prejudiced the jury. Britt failed to provide a transcript of the closing argument and his unsworn recollection of closing argument in his appellate brief is insufficient to show the prosecutor's actions were so grossly improper that the trial court should have intervened on its own initiative.

Finally, Britt challenges the court's decision to sentence him in absentia and to consider his absence from trial as a factor at sentencing. These arguments are moot because, after that sentencing, Britt moved for appropriate relief and the trial court granted the motion, vacated his original sentence, and resentenced Britt while he was present. Accordingly, we find no error in the trial court's judgment.

Facts and Procedural History

On 28 August 2012, Britt hit another vehicle while driving his truck. Law enforcement arrived at the scene and, after indications that Britt likely was drunk, arrested him. After arriving at a nearby jail, law enforcement measured Britt's blood alcohol level using a breath device and it registered at .14.

Britt went to trial on charges of driving while impaired and failing to reduce speed. On the first day of trial, Britt arrived almost an hour late for court. Britt did

not show up for the second day of trial at all. The trial court, after observing that Britt previously had been late for court, opted to proceed with the trial despite Britt's absence. The jury found Britt guilty, and the trial court sentenced Britt in absentia.

Britt later moved for appropriate relief on the ground that the trial court lacked authority to sentence him when he was not present. The trial court granted the motion, vacated his sentence, and held a new sentencing with Britt present. Britt timely appealed his conviction and sentence to this Court.

Analysis

I. Proceeding With Trial in Britt's Absence

Britt first argues that the trial court abused its discretion by proceeding with the second day of trial despite his absence. Ordinarily, a criminal defendant has a right to be present for his trial in order to confront the witnesses and evidence against him. *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985). But the defendant can waive that right through a voluntary and unexplained absence from court after the trial begins. *State v. Wilson*, 31 N.C. App. 323, 326-27, 229 S.E.2d 314, 317 (1976). In this circumstance, the burden is on the defendant to explain the absence; if this burden is not met, waiver may be inferred. *State v. Austin*, 75 N.C. App. 338, 341, 330 S.E.2d 661, 663 (1985). The determination of waiver is a discretionary decision by the trial court, and our State's appellate courts repeatedly have upheld trial court decisions to proceed with an ongoing trial where the evidence

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suggested the absence likely was voluntary. *State v. Richardson*, 330 N.C. 174, 179, 410 S.E.2d 61, 63 (1991).

Here, Britt was present for the first day of trial but arrived late. On the second day of trial, when Britt failed to appear, the trial court asked his counsel for an explanation. Counsel responded that Britt “told me [he] would be [present].” The trial court then observed that Britt was “almost an hour late yesterday for court” and concluded that Britt’s absence was voluntary.

On appeal, Britt argues that he suffered from syncope, which he describes as a “common but poorly understood medical problem” that can cause a temporary loss of consciousness. But Britt does not present any evidence that he actually was diagnosed with this disorder. The record indicates only that he saw a physician (after he already had missed his court appearance) complaining of symptoms consistent with syncope, not that a medical professional concluded he suffered from this condition. More importantly, Britt does not explain why a temporary loss of consciousness would cause him to miss an entire day of court proceedings, or why he failed to immediately contact his counsel or the court to explain what happened once he regained consciousness. Simply put, on this record, Britt failed to meet his burden to show his absence from court was involuntary. Accordingly, the trial court did not abuse its discretion in proceeding with the second day of trial in Britt’s absence.

Britt also challenges the trial court's decision to sentence him in absentia. But Britt moved for appropriate relief on this basis, and the trial court granted the motion and conducted a new sentencing hearing at which Britt was present. Accordingly, Britt's argument concerning his original sentencing is now moot.

II. Highlighting Britt's Absence in Closing Argument

Britt next argues that it was error for the trial court not to intervene *ex mero motu* and strike allegedly improper comments during the prosecutor's closing argument. Specifically, Britt contends that the prosecutor repeatedly referenced Britt's absence to prejudice the jury.

There is no transcript of the prosecutor's closing argument and Britt failed to make a record in the trial court of what the prosecutor said that was objectionable, or what (if anything) he asked the trial court to do in response. Thus, this Court must presume that the prosecutor's argument was proper. *See State v. Hunt*, 37 N.C. App. 315, 322, 246 S.E.2d 159, 164 (1978). Britt's unsworn recollection of the prosecutor's argument in his appellate brief cannot overcome that presumption.

Moreover, even if we assume that Britt's recollection of what occurred during closing arguments is true, the prosecutor's actions—such as stating “he's not even here today” in reference to Britt—were not so grossly improper that the trial court would have been compelled to strike that argument *sua sponte*. *See State v. Call*, 349 N.C. 382, 419, 508 S.E.2d 496, 519 (1998). Accordingly we reject Britt's argument.

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Britt also argues that the prosecutor urged the trial court to impose a harsher sentence because of Britt's absence and that the trial court considered Britt's absence as a factor when it sentenced him in absentia. But as explained above, the trial court granted Britt's motion for appropriate relief, and resented him when he was present. Thus, these arguments are moot.

Conclusion

We find no error in the trial court's judgment.

NO ERROR.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).