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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1231

Filed: 15 May 2018

Davidson County, Nos. 15 CRS 51334, 1548

STATE OF NORTH CAROLINA

v.

JAMES FRANKLIN McCLELLAND

Appeal by defendant from judgment entered 21 March 2017 by Judge Joe Crosswhite in Davidson County Superior Court. Heard in the Court of Appeals 7 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason R. Rosser, for the State.

James R. Parish for defendant-appellant.

TYSON, Judge.

James Franklin McClelland ("Defendant") appeals from the trial court's judgment entered upon a jury verdict finding him guilty of felony speeding to elude arrest and his guilty plea to attaining habitual felon status. We find no error.

I. Factual Background

In early 2015, Catherine Freeman ("Ms. Freeman") was in need of a place to live and her friend suggested she move in with Defendant, who needed a roommate. Ms. Freeman and Defendant lived together for about two months. They were not in a romantic relationship, but engaged in sexual activity one time during those two months.

On 7 March 2015, Defendant invited Ms. Freeman to accompany him to the sweepstakes and offered to give her a ride. Defendant met Ms. Freeman at the house driving a red Fiat he had borrowed from his brother. Ms. Freeman told Defendant that her cousin had called and asked for a ride, and Defendant agreed to give him one.

Defendant and Ms. Freeman picked up Ms. Freeman's cousin, drove him to get his bag from another house, and then drove him back home. Upon arriving back at the cousin's home, Ms. Freeman stepped out of the vehicle to let the cousin out of the backseat. The cousin kissed Ms. Freeman on the forehead and said, "Thank you cuz" and left.

When Ms. Freeman got back into the vehicle, Defendant's demeanor had changed. Defendant appeared angry and in a "rage" and cursed at Ms. Freeman. Defendant began speeding in the vehicle causing Ms. Freeman to become scared. Defendant continued to curse at Ms. Freeman while driving, calling her a "lying bitch." When Defendant slowed down while approaching a stop sign, Ms. Freeman

opened the door and jumped out of the vehicle, landing in the road. Defendant turned the vehicle around, picked Ms. Freeman up, and put her back into the vehicle. Ms. Freeman called 911 and put her phone on speaker mode so the dispatcher could hear what was occurring in the vehicle without alerting Defendant. Ms. Freeman asked Defendant to drive her to the hospital because she had hurt herself when she jumped out of the vehicle. Defendant eventually dropped her off at the emergency room.

Officer Michael Sweeney with the Lexington Police Department was on duty on 7 March 2015 and responded to a call for a 911 hang up. He was advised to be on the lookout for a red Fiat. Officer Sweeney located the vehicle sometime after Defendant had dropped off Ms. Freeman and began to follow it. Shortly thereafter, Officer Sweeney activated his blue lights but Defendant did not respond and accelerated the speed of the vehicle. Officer Sweeney then turned on his siren, but again Defendant failed to respond. Officer Sweeney continued his pursuit of the vehicle, reporting speeds of "50 miles per hour" and "in excess of 50 miles an hour" to his supervisor.

Defendant attempted to make a right turn onto a street and struck a utility pole head-on that was located on the other side of the road. Defendant jumped out of the vehicle and fled the scene. Officers apprehended Defendant twenty minutes later. On 6 July 2015, Defendant was indicted on charges of felonious restraint, attaining habitual felon status, and felony speeding to elude arrest based on the aggravating

factors of reckless driving and speeding in excess of 15 miles per hour over the posted speed limit. *See* N.C. Gen. Stat. § 20-141.5 (2017).

At the close of the State's evidence, Defendant moved to dismiss the charges of felonious restraint and felony speeding to elude arrest. The trial court denied the motions. Defendant did not present any evidence and renewed his motions to dismiss, which the trial court denied. The jury found Defendant guilty of felony speeding to elude arrest and not guilty of felonious restraint. Defendant pled guilty to attaining habitual felon status. The trial court consolidated the offenses for judgment and sentenced Defendant to a term of 103 to 136 months of imprisonment. Defendant gave oral notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court on appeal from a final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017) and N.C. Gen. Stat. § 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court erred in denying his motion to continue in order to allow his counsel sufficient time to prepare his defense and in denying his motion to dismiss the felony speeding to elude arrest charge.

IV. Standards of Review

A trial court's ruling on whether to grant or deny a motion for a continuance is ordinarily reviewed under an abuse of discretion standard. *State v. Taylor,* 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001), *cert. denied,* 535 U.S. 934, 152 L. Ed. 2d 221 (2002). 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. Searles,* 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). "The denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial . . . 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. Walston*, 193 N.C. App. 134, 137, 666 S.E.2d 872, 874 (2008) (citation omitted).

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). "In making its determination, the trial court must

consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

V. Analysis

A. Motion to Continue

Three days prior to trial, Defendant informed counsel that he wished to pursue an insanity defense, because he previously had been diagnosed with, and was on medication for, "various mental health disabilities," and failed to take his prescribed medication on the day of the alleged incident. On 20 March 2017, the day of the trial, counsel sought a continuance at Defendant's request, which the trial court denied.

In support of the motion, counsel stated that Defendant was in custody for approximately two years, while these matters were pending, and during that time, he had demanded multiple times that the case be tried as quickly as possible. Defendant had since been released and Defendant believed he was now in a better position to assist his counsel in preparing for the case.

Counsel admitted that he was aware Defendant was receiving mental health services while in custody, but he only first heard of Defendant's interest in proceeding with an insanity defense 48 hours prior to the scheduled trial, and he had not

requested nor had he been provided any records from the Department of Corrections. Counsel further stated:

> [W]ith the information that I have, I, personally, am ready to proceed. However, I think [Defendant's] argument would be, essentially, that now that he has an opportunity to be out and help with his defense, he feels that he should be afforded that opportunity. I think that's the crux of this argument.

Defendant argues the trial court's denial of his motion to continue violated his constitutional right to present a defense by denying defense counsel adequate time to investigate, prepare, and present the defense of insanity. To establish a constitutional violation, Defendant must show that he did not have adequate time to prepare his defense of insanity. *See State v. Williams,* 355 N.C. 501, 540, 565 S.E.2d 609, 632 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). The reasonable time in which to prepare a defense is based upon the facts and circumstances presented in each case. *Searles,* 304 N.C. at 153-54, 282 S.E.2d at 433.

"To demonstrate that the time allowed to present a defense was inadequate, the defendant must 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. Tunstall,* 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993) (quoting *State v. Covington,* 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986)). Further, "a motion for a continuance should be supported by an affidavit showing sufficient grounds for

the continuance." *State v. Kuplen,* 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986) (citations omitted).

> A postponement is proper if there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts. Continuances should not be granted unless the reasons therefor are fully established. Hence, a motion for a continuance should be supported by an affidavit showing sufficient grounds.

State v. Jones, 342 N.C. 523, 531, 467 S.E.2d 12, 17 (1996) (citations, quotation marks, brackets, and ellipses omitted).

Here, Defendant has not shown a constitutional violation by the trial court's denial of his motion to continue. Defendant waited until the Friday before his trial, nearly two years after he was indicted, before indicating to defense counsel for the first time that he wished to pursue an insanity defense. The record shows Defendant was indicted on 6 July 2015 and was appointed counsel.

In October 2016, Defendant requested to represent himself and the court permitted him to do so. During that time, Defendant filed multiple *pro se* motions seeking to have the matter tried. Then, in January 2017, Defendant indicated he wished to have court-appointed counsel again, and Defendant's trial counsel was appointed on 13 January 2017. The case was continued from 30 January 2017 until 20 March 2017 in order to allow his counsel sufficient time to prepare the case. During that time, counsel investigated issues with Defendant's prior record level and

possible witnesses per Defendant's requests. Defendant waited until 48 hours before trial to first raise the issue of a possible insanity defense with his counsel.

Defendant did not present any affidavits in support of his oral motion to continue made on the day of trial. Further, Defendant failed to describe in detail any evidence pertaining to what possible mental health disabilities he was diagnosed with, what medications he was prescribed, or what evidence he expected to obtain from the Department of Corrections' records in order to show sufficient grounds for the continuance.

Without articulating any specific facts about his mental health issues and medications, what the Department of Corrections' records would show, or how his failure to take his medication would support an insanity defense, Defendant failed to 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 to continue.

Defendant has failed to show the trial court erred in denying the motion. *State v. Morgan*, 359 N.C. 131, 145, 604 S.E.2d 886, 895 (2004) (holding the trial court did not err in denying the defendant's motions to continue because the "defendant . . . failed to demonstrate he suffered material prejudice by the denial of his motions to continue"), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005); *see also Jones*, 342 N.C. at 532, 467 S.E.2d at 18 (rejecting the defendant's argument that the denial of his motion to continue denied him adequate time to prepare for trial because the oral

motion to continue made on the day of trial was not supported by an affidavit and did not set forth any form of "detailed proof indicating sufficient grounds for further delay") (internal quotation marks omitted)). Defendant's arguments are overruled.

B. Motion to Dismiss

Defendant next challenges the trial court's denial of his motion to dismiss the felony fleeing to elude arrest charge for insufficient evidence.

Defendant was convicted of fleeing to elude arrest pursuant to N.C. Gen. Stat. § 20-141.5, which provides, in pertinent part:

> (a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.
>
> (b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.
>
> (1) Speeding in excess of 15 miles per hour over the legal speed limit. . . .
>
> (3) Reckless driving as proscribed by G.S. 20-140.

N.C. Gen. Stat. § 20-141.5(a)-(b).

Defendant contends the State failed to present sufficient evidence necessary to support the aggravating factor that he was speeding in excess of 15 miles per hour

over the posted speed limit to support a conviction for felony fleeing to elude arrest. He does not challenge any evidence to support the reckless driving factor.

Defendant discounts Officer Sweeney's testimony that he was going in excess of 50 miles per hour in a 35 miles per hour zone by arguing: (1) Officer Sweeney testified he relied both on his speedometer and observations in estimating Defendant's speed, but Officer Sweeney did not know whether his speedometer was accurate or when it was last calibrated, and (2) Officer Sweeney testified that the radar certification course only requires officers to estimate within 14 miles per hour of the actual speed in order to pass.

Defendant's arguments are misplaced as they challenge the credibility and weight of Officer Sweeney's testimony, which are questions "for the jury to resolve and not for the trial court." *State v. Kelly*, 221 N.C. App. 643, 647, 727 S.E.2d 912, 914 (2012) (citation omitted). "[I]t is not the function of this Court to pass on the credibility of witnesses or to weigh the testimony." *State v. Buckom*, 126 N.C. App. 368, 375, 485 S.E.2d 319, 323 (1997) (citation omitted).

Defendant also contends that Officer Sweeney's testimony necessitated the court allowing his motion to dismiss because at the end of both his cross-examination and redirect, Officer Sweeney testified Defendant was going "50 miles per hour" in 35 miles per hour zones. Thus, he contends the State failed to present sufficient evidence that he was going *in excess* of 15 miles per hour over the posted speed limit.

Officer Sweeney testified that he first reported Defendant's speed at 50 miles per hour to his supervisor early in the pursuit, and later, after turning on a different road, he reported Defendant was going "in excess of 50 miles an hour." Officer Sweeney further testified that Defendant was going "[f]ifty plus miles an hour" because when Officer Sweeney was going 50 miles per hour, Defendant was "[g]aining distance" on him and his speed was accelerating. During cross-examination the following exchange occurred:

> [DEFENSE COUNSEL]. Can you give this jury an accurate number of miles per hour that the Fiat was going?
>
> [OFFICER SWEENEY]. Fifty miles per hour.
>
> [DEFENSE COUNSEL]. Exactly 50?
>
> [OFFICER SWEENEY]. He was in excess of 50, but to throw an exact number out there, it was 50 miles per hour.

On redirect, Officer Sweeney testified that, in his opinion, Defendant was going fifty miles per hour.

Viewing the evidence in the light most favorable to the State and resolving any contradictions in its favor, the State presented sufficient evidence that Defendant sped in excess of 15 miles per hour over the posted speed limit of 35 miles per hour. Officer Sweeney testified Defendant was going "in excess of 50 miles an hour" and "[f]ifty plus miles an hour" based upon the Officer's observations that while he was going 50 miles per hour, Defendant was "[g]aining distance" on him and accelerating.

Any contradictions or discrepancies in Officer Sweeney's testimony regarding Defendant's speed were properly disregarded by the trial court in ruling on Defendant's motion to dismiss. *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E.2d 822, 826 (1977) (In ruling on a motion to dismiss, "discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom."); *see also State v. Herring*, 55 N.C. App. 230, 232, 284 S.E.2d 764, 766 (1981) (stating that "[t]he equivocation in the testimony identifying the stolen property constituted 'discrepancies and contradictions' which the court properly disregarded in passing on the motions to dismiss"). We hold the trial court did not err in denying Defendant's motion to dismiss. Defendant's arguments are overruled.

VI. Conclusion

Defendant received a fair trial, free of prejudicial errors he preserved and argued. We find no error in the jury's convictions or in the judgments entered thereon. *It is so ordered*.

NO ERROR.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).