IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 17-1331

Filed: 7 August 2018

Mecklenburg County, Nos. 15-CRS-217713, 15-CRS-218746

STATE OF NORTH CAROLINA

v.

DAVONN JEROME BELK, Defendant.

Appeal by defendant from judgments entered 23 May 2017 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas H. Moore, for the State.

Jarvis John Edgerton IV for defendant-appellant.

BERGER, Judge.

Davonn Jerome Belk ("Defendant") appeals from judgments entered upon his convictions for two counts of robbery with a dangerous weapon, one count of first-degree sexual offense, one count of felonious possession of cocaine, and one count of speeding to elude arrest. Defendant identifies his brief absence from trial as a constitutional violation. We disagree.

On May 19, 2015, V.R.[1] was sitting at a bus stop when she noticed a "strange" car drive past her several times. V.R. saw a male driving the car, and the driver looked at her as he drove by. V.R. identified Defendant at trial as the person driving the car. Eventually, Defendant approached V.R., and V.R. smelled marijuana coming from his car. V.R. asked Defendant if he knew where she could get some marijuana, and Defendant told her he had some and to get in his car. Defendant drove V.R. to a house where he pointed a gun at her chest and forced her to perform oral sex on him. Afterwards, Defendant removed the battery from V.R.'s phone and left the house.

Later that same afternoon, Maria Rodriguez was waiting at a bus stop when she noticed a car drive by several times. Soon thereafter, Defendant approached her, sat down, and asked her what time the bus would be there. Defendant pulled out a handgun and hit Ms. Rodriguez several times on the head, face, and abdomen with the gun. Defendant took Ms. Rodriguez's tote bag, which contained money, a cell phone, and a pair of shoes. A witness chased Defendant to his vehicle. As Defendant sped off in his vehicle, two Charlotte-Mecklenburg police officers soon began pursuit. Defendant eventually surrendered, and police took him into custody. Upon searching Defendant's vehicle, officers found a bottle containing a white substance, which was later determined to be cocaine.

The matter was tried at the May 15, 2017 session of Mecklenburg County

[1] A pseudonym is used to protect the identity of the victim.

Superior Court. At the charge conference, Defendant requested that the trial court instruct the jury on lesser-included offenses for the armed robbery charges. The trial court held its decision in abeyance and stated it would rule on the request the following day. When court reconvened the following morning, counsel was present, but Defendant was not. The trial court noted that Defendant had suffered a reoccurrence of a medical issue, and counsel stated that Defendant had sent him a text and was on his way to the courthouse. Counsel did not request a delay, and the court resumed the charge conference in Defendant's absence. Defendant arrived less than fifteen minutes after court resumed and was present when the trial court instructed the jury. Neither Defendant nor his counsel objected at any time to the jury charge or the fact that Defendant was not present for a portion of the charge conference.

The jury found Defendant guilty of two counts of robbery with a dangerous weapon, one count of first-degree sexual offense, one count of felonious possession of cocaine, one count of speeding to elude arrest, and one count of first-degree kidnapping. The trial court arrested judgment on the first-degree kidnapping charge, consolidated the remaining convictions into two judgments, and sentenced Defendant to consecutive terms of 300 to 420 and 80 to 108 months of imprisonment. Defendant gave oral notice of appeal.

Defendant contends the trial court erred when it conducted a portion of the

jury charge conference without him being present. For the reasons set forth herein, we conclude the trial court committed no error.

"It is well-established that under both the federal and North Carolina constitutions a criminal defendant has the right . . . to be present in person at every stage of the trial." *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985) (citation omitted). This right is "a purely personal right that could be waived expressly or by his failure to assert it." *State v. Wise*, 326 N.C. 421, 433, 390 S.E.2d 142, 149 (citing *Braswell*, 312 N.C. at 559, 324 S.E.2d at 246), *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990). "The right to be present at all critical stages of the prosecution is subject to harmless error analysis." *Id.*

The facts here are similar to those presented in *State v. Wise*. In *Wise*, the defendant was likewise absent from the charge conference. *Id.* at 432, 390 S.E.2d at 149. Our Supreme Court determined that defendant's absence constituted harmless error because

> [d]efendant's counsel was present during the conference, and the trial court subsequently announced the proposed instructions on the record and gave defense counsel the opportunity to be heard. Furthermore, defendant was present when the actual charge was given to the jury and did not object to its contents.

Id. at 433, 390 S.E.2d at 149-50; *see also Braswell*, 312 N.C. at 559, 324 S.E.2d at 246 (holding defendant implicitly waived his right to be present during a *voir dire* hearing because he knew or should have known that the hearing would be held, neither he

nor his counsel asserted his right to attend, and his counsel was present at the hearing).

Here, as in *Wise*, although Defendant was absent from part of the charge conference, his attorney was present. Additionally, the trial court announced the proposed instructions on the record, gave defense counsel several opportunities to object, and Defendant was present when the jury received the instructions. Furthermore, Defendant knew of the conference, and neither he nor his counsel asserted his right to attend, or otherwise objected. Accordingly, we conclude Defendant waived his right to attend the charge conference, and any error was harmless beyond a reasonable doubt.

NO ERROR.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).