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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 20-133

Filed: 15 December 2020

Mecklenburg County, Nos. 18CRS238246-47

STATE OF NORTH CAROLINA

v.

TAFARI VAUGHN HIGGINS, Defendant.

Appeal by Defendant from judgment entered 25 July 2019 by Judge Todd Pomeroy in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 September 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Tiffany Y. Lucas, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for Defendant.*

INMAN, Judge.

Defendant Tafari Vaughn Higgins (“Defendant”) appeals his conviction on two counts of being a sex offender unlawfully on premises. We hold that the trial court did not abuse its discretion in denying his motion to continue his trial, nor did it commit plain error in admitting documentary, photographic, and video evidence presented by the State. We dismiss Defendant’s claim for ineffective assistance of

counsel without prejudice to his right to assert it in a motion for appropriate relief before the trial court.

### I. FACTUAL AND PROCEDURAL HISTORY

The evidence presented at trial tended to show the following:

In 2014, Defendant was convicted of two counts of indecent liberties with a child. He was ordered to register as a sex offender and barred from places where children are likely to be found, including schools.

On 5 October 2018, Jeanne Riek (“Riek”), a secretary at Hornet’s Nest Elementary School in Charlotte (“Hornet’s Nest”), saw a man she recognized as Defendant in the school building. She knew Defendant because he had worked at Hornet’s Nest prior to his 2014 convictions, and she was aware that he was on the sex offender registry. Keyshaun Stevens, a Safe Schools coordinator for Charlotte-Mecklenburg Schools police, received a notification through Hornet’s Nest’s Lobby Guard system to check for potential sex offender registry matches to a visitor. The visitor had provided the name Patrick Dangote. Later, school officials requested that she run Defendant’s name through the system.

On 24 October 2018, Riek again encountered Defendant entering the school building with a child. Another staff member also saw Defendant twice on school grounds.

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Charlotte-Mecklenburg Schools Police began investigating on 25 October 2018. Defendant was arrested on 20 November 2018 and charged with two counts of being a sex offender unlawfully on the premises of Hornet’s Nest. On 11 December 2018, the trial court appointed Denzil Forrester (“Forrester”) to represent Defendant.

On 29 May 2019, the trial court held a pretrial conference and set Defendant’s case for trial on 22 July 2019. During the conference, according to Forrester, Defendant indicated to the court that he wished to retain private counsel.<sup>1</sup> Forrester remained assigned to represent Defendant “in case that didn’t come to fruition.” Despite this, Forrester signed an “Expedited Pretrial Readiness Conference Order” indicating that he was aware of the trial date, that there were no known conflicts that would prevent the trial from proceeding, and that “[c]ontinuances will not be granted, even if all parties agree, unless for a circumstance that could not have been reasonably foreseen and/or the fair administration of justice requires a continuance.”

On 8 July 2019, the Mecklenburg County Grand Jury issued superseding indictments on Defendant’s charges. Four days later, Forrester filed a motion to continue Defendant’s trial. This motion was heard on the morning of Defendant’s trial on 22 July. Forrester stated to the court that he had “suspended any sort of preparation” between the pretrial conference and the issuance of the superseding indictments because Defendant had “asked [him] to dismiss [himself] off the case.”

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<sup>1</sup> The record on appeal includes no transcript of the pretrial conference.

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Forrester had asked Defendant for a theory of defense following the arraignment on the superseding indictments and requested a narrative and witness list from him via email on 15 July 2019, seven days before trial. Forrester indicated to the court that more time was required to retain an investigator to research Defendant's alibi defense.

The court asked Forrester whether it was Defendant's choice not to communicate with him in preparation for trial, and Forrester said that it was. The court expressed concern about defendants manipulating the system by "playing games with attorneys." Defendant did not address the trial court during this hearing. The trial court denied the motion to continue, finding that "the defendant in this case has chosen not to participate in his defense."

Defendant testified that he had not been on school grounds and that on the two dates witnesses testified they had seen him there, he had been at work. The jury convicted Defendant on both counts. The trial court sentenced Defendant to two consecutive sentences of 8 to 19 months imprisonment, suspended for 36 months of supervised probation. Defendant appeals.

II. ANALYSIS

Defendant argues that the trial court erred by denying his motion to continue the trial and by admitting into evidence videos, documents, and a yearbook photograph despite the State's failure to lay a proper foundation. Defendant also

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argues that he received ineffective assistance of counsel. We address each argument in turn.

A. Motion to Continue

In general, we review the denial of a motion to continue for an abuse of the trial court's discretion. *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001). A trial court abuses its discretion when its ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Defendant argues that the denial of the motion to continue violated his right to due process and that we should therefore review the trial court's ruling *de novo*. "[W]hen a motion for a continuance is based on a constitutional right, the issue presented is an issue of law and the trial court's conclusions of law are fully reviewable on appeal." *State v. Tunstall*, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993). If the motion raises a constitutional issue, the defendant must show that the denial was erroneous and that he suffered prejudice as a result of the error. *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001).

We note that the motion to continue before the trial court did not explicitly raise any constitutional concerns. *See State v. Gentry*, 227 N.C. App. 583, 594-95, 743 S.E.2d 235, 243 (2013) (applying an abuse of discretion standard because the continuance motion "did not mention and was not 'based on' any alleged deprivation

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of a constitutional right” and rejecting the defendant’s argument that *de novo* review is appropriate “when a defendant’s constitutional rights are implicated”). Nor does Defendant argue that he was not allowed sufficient time to prepare his defense such that “the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote.” *Tunstall*, 344 N.C. at 329, 432 S.E.2d at 336 (citing *United States v. Chronic*, 466 U.S. 648, 658, 80 L.Ed.2d 657, 667 (1984)). Accordingly, we review the trial court’s decision for abuse of discretion.

When determining if a trial court erred in denying a motion to continue, we consider factors including

- (1) the diligence of the defendant in preparing for trial and requesting the continuance,
- (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony,
- (3) the materiality of the expected evidence to the defendant’s case, and
- (4) the gravity of the harm defendant might suffer as a result of the denial of the continuance.

*State v. Barlowe*, 157 N.C. App. 249, 254, 578 S.E.2d 660, 663 (2003) (citations omitted). We have previously held that trial courts should also consider whether the failure to grant a continuance would be likely to result in a miscarriage of justice. *Gentry*, 227 N.C. App. at 595, 743 S.E.2d at 243-44 (citing N.C. Gen. Stat. § 15A-952(g)). In *Gentry*, although the defendant’s trial counsel asserted he did not have adequate opportunity to prepare for trial because of the defendant’s animosity toward him and failure to provide him with a list of witnesses, we held that counsel had failed

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to describe any specific preparatory activities he had been unable to undertake due to the difficulties in communicating with the defendant. *Id.* We also noted that most or all limitations on the ability of counsel to prepare in that case seemed to stem from the defendant's own conduct, and we held that the trial court did not err in denying the motion. *Id.*

In this case, Forrester informed the trial court that Defendant had stopped communicating with him while searching for substitute counsel. While Forrester did identify to the court a specific preparatory activity that he had failed to complete—investigation into Defendant's alibi—the trial court found that Defendant was the cause of the lack of communication with his counsel. Like *Gentry*, this was a relatively simple case, and the time available was adequate to prepare for trial: Forrester was appointed on 11 December 2018, the pretrial readiness conference was held on 29 May 2019, and trial was set for 22 July 2019.

Defendant argues that the trial court abused its discretion by denying the motion to continue without giving Defendant an opportunity to be heard individually, comparing this case to *State v. Friend*, 257 N.C. App. 516, 809 S.E.2d 902 (2018). In *Friend* we held that, before entering a money judgment for attorney's fees against a defendant, the trial court must ask the defendant—personally, not through counsel—whether they wish to be heard on that issue. 257 N.C. App. at 523, 809 S.E.2d at 907.

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In reaching this holding we observed that notice to counsel that the court is taking up an issue ordinarily satisfies the requirement that the defendant be given notice and an opportunity to be heard. *Id.* at 522, 809 S.E.2d at 907. In the case of attorney’s fees, however, accepting counsel’s silence as the defendant’s assent can lead to injustice. *Id.* Unlike most substantive and procedural decisions at trial, when the court contemplates attorney’s fees “the interests of the defendant and trial counsel are not necessarily aligned.” *Id.* at 522-23, 809 S.E.2d at 907. We held in *Friend* that the trial court must give the defendant notice and an opportunity to speak on their own behalf before entering a money judgment for attorney’s fees.

In this case, the inquiries of the trial court and Forrester’s responses indicate a potential conflict between Defendant’s interest and that of his counsel. When asked if proceeding to trial would prejudice Defendant, Forrester told the court that Defendant “was not necessarily the most cooperative” while searching for replacement counsel. The court then asked:

THE COURT: In front of Judge Phillips—did Judge Phillips instruct—I mean, that was the defendant’s choice in choosing not to communicate with you. Would that be accurate?

MR. FORRESTER: That is accurate.

By asking this question, the court required Forrester to choose between two options: laying the blame for lack of preparation at his client’s feet or admitting to failing to fulfill his duties as an attorney to communicate with his client and properly prepare



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for trial. As the hearing continued, counsel and the trial court continued to focus on Defendant's individual fault in being unprepared. The State asserted that "it was the defendant's choice not to participate" and argued that "lack of preparation seeming to be the defendant's fault [is] not a reason for continuance." The court interjected:

THE COURT: Not to interrupt, but I guess my question is, is when does this stop when the Defendant says I'm going to retain an attorney, I don't want an attorney, I'm going to stick with court appointed, when does that end? At what point does that end? Because what ends up happening is—I'm not saying this about this particular defendant—but you have defendants manipulate the system on continuing case by simply playing games with attorneys, back and forth. That's why I asked if he was participating in his defense. If he's choosing not to, that's a choice that he's made. He's making a conscious decision not to participate knowing that he'll appear in front of another judge.

Defendant's comparison to *Friend* is compelling, and the trial court's decision may have been better informed had Defendant been given the opportunity to speak. There are factual differences in this case, though: unlike in *Friend*, which concerned the trial court's order requiring a defendant to pay attorney's fees, this case does not involve a direct financial conflict of interest between counsel and Defendant. A court's decision regarding a motion to continue is complex and "heavily fact-based" and involves the weighing of a number of factors, *State v. Worrell*, 190 N.C. App. 387, 392, 660 S.E.2d 183, 187 (2008), and holding that the trial court must embark on specific lines of inquiry risks infringing upon the trial court's discretion.

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In this case, we do not have to determine whether the trial court abused its discretion because we are unable to ascertain from the record that Defendant was prejudiced by the denial of his motion to continue. “The denial of a motion to continue . . . is grounds for a new trial only 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. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). In making our determination upon the facts of a case “we can judicially only know what appears of record on appeal and will not speculate as to matters outside the record.” *Id.*

In the motion to the trial court and on appeal, Defendant specifically argues that more time was needed to investigate a potential alibi defense. It is not possible to know on appeal what evidence that investigation would have yielded, and whether the absence of that evidence prejudiced Defendant. Additionally, any error in the trial court’s evaluation that Defendant was the cause of this lack of preparation would be due to being misled by Forrester, Defendant’s appointed counsel, but without further inquiry we cannot determine if that occurred. Accordingly, Defendant’s argument, which requires further factual development, is better suited to a claim for ineffective assistance of counsel. We discuss that claim *infra*.

### B. Evidentiary Issues

Defendant argues that the trial court erred by admitting photographs and videos into evidence that were not properly authenticated by the State’s witnesses.

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Defendant did not object to the admission of any of this evidence at trial and concedes that our review is for plain error. Under plain error review, Defendant must show that “after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Defendant contests the admission into evidence of school surveillance videos, printouts of electronic database records, and a yearbook photo used to illustrate witness testimony. Because Defendant has not shown that the State could not have supplied additional foundational prerequisites, if any, in response to a timely objection or that the evidence in question is inaccurate or flawed, we conclude that the trial court did not commit plain error in admitting the evidence.

*i. Surveillance Videos*

The State introduced surveillance videos from Hornet’s Nest recorded on the day of each incident. Authentication of surveillance video requires evidence that “the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process.” *State v. Moore*, 254 N.C. App. 544, 564, 803 S.E.2d 196, 210 (2017). The proponent of the videotape establishes its foundation by showing that: (1) the camera and video system were properly maintained and properly operating at the time of recording; (2) the video accurately presents the

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events depicted; and (3) there is an unbroken chain of custody. *State v. Mason*, 144 N.C. App. 20, 26, 550 S.E.2d 10, 15 (2001).

In *State v. Jones* we reviewed the admission of surveillance video for which the State had failed to lay a proper foundation but to which Defendant failed to object at trial. 176 N.C. App. 678, 683, 627 S.E.2d 265, 268 (2006). We noted that we could not find any case in which our courts had found inadequacy in the foundation for the admission of a videotape to rise to the level of plain error. *Id.* Because the defendant made no showing that the foundational prerequisites could not have been supplied upon objection and identified nothing suggesting the video was inaccurate or otherwise flawed, we held that the omissions did not amount to plain error. *Id.* at 684, 627 S.E.2d at 269.

Defendant has not shown any reason the State could not meet the foundational requirements regarding the videos, nor does he contend that the videos were inaccurate or flawed. As in *Jones*, Defendant has failed to demonstrate plain error.

*ii. Business records*

Defendant also contests the admission of two sets of computerized business records: State's Exhibit 12, a printout from the "Lobby Guard" system that showed information related to the notification logged by the system on 5 October, and State's Exhibit 14: a "customer summary" from CJ Leads, a database maintained by North

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Carolina law enforcement to log arrest records and driver's license and vehicle information.

Defendant contends the State failed to lay a proper foundation to show that either printout was trustworthy evidence. Defendant's trial counsel failed to object to the admission of this evidence. As is the case with the video evidence, Defendant has failed to demonstrate that the State would have been unable to provide additional foundation upon an objection by Defendant. In *State v. Howard* we recognized that the logic of our holding in *Davis* extended to our review of authentication of other forms of evidence when the defendant did not object at trial. 215 N.C. App. 318, 327, 715 S.E.2d 573, 579 (2011).<sup>2</sup> Even if foundational prerequisites beyond those supplied by the State are required to authenticate these documents, Defendant has made no showing that upon objection they "could not have been supplied and has pointed to nothing suggesting that the evidence in question is inaccurate or otherwise flawed." *Id.* The trial court did not commit plain error in admitting the printouts.

*iii. Yearbook Photograph*

Defendant also argues that the trial court erred in admitting State's Exhibit 13, a school yearbook photo of Defendant captioned "Vaughn Higgins/Technology Associate," because it was not properly authenticated. Stevens, the Safe Schools coordinator who conducted a database search at the request of the school, identified

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<sup>2</sup> Specifically, we addressed the failure of the State to lay foundation as required by Rule 901(a) and Rule 1002, known as the "best evidence rule."

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Exhibit 12 as the yearbook photograph sent to her when she was asked to run the name “Vaughn Higgins” against the sex offender registry in connection with the 5 October Lobby Guard alert.

Defendant does not contend that this photograph is in any way inaccurate, but simply argues that the proper foundation was not laid because the testifying witness had no personal knowledge of the yearbook or whether the photo actually came from any yearbook. We note that, as with the surveillance videos and business records, had Defendant objected to this photograph at trial, the State would have had the opportunity to provide further foundation. *State v. Young*, 248 N.C. App. 815, 825, 790 S.E.2d 182, 189 (2016).

Exhibit 12 was not used by Stevens or any witness to identify Defendant or the person captured on surveillance video. It was only presented to illustrate Stevens’s testimony that the photograph was sent to her so that she could run the name “Vaughn Higgins” against the sex offender registry. She effectively testified that “the evidence is in fact what it purports to be,” *State v. Lee*, 335 N.C. 244, 270, 439 S.E.2d 547, 560 (1994), which is the photograph and name that were sent to her. The trial court did not err in admitting the photograph and caption.

C. Ineffective Assistance of Counsel

Defendant last argues that he received ineffective assistance of counsel because his court-appointed counsel failed to prepare for trial. To show that he

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received ineffective assistance of counsel, Defendant must show that (1) his counsel's conduct fell below an objective standard of reasonableness and (2) that he was actually prejudiced by counsel's deficient conduct. *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L.Ed.2d 674, 693-94; *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). If the record reveals that the factual issues require further development, we dismiss the appeal without prejudice to the defendant's right to raise a claim for ineffective assistance of counsel in a motion for appropriate relief made to the trial court. *State v. Davis*, 158 N.C. App. 1, 15, 582 S.E.2d 289, 298 (2003).

The record on appeal includes time sheets prepared by Forrester, Defendant's court-appointed counsel, in connection with this case. These show only limited preparation by Forrester until the night before trial, including a complete gap in preparations between the pretrial conference and Defendant's arraignment on superseding indictments. Defendant also argues that Forrester's failure to object to evidence on foundational grounds and stipulation to facts worse than required on the underlying sex offense convictions fell below an objective standard of reasonableness. The State argues that Defendant was given ample time to prepare for trial and presents Forrester's trial performance, including cross examinations and objections, to show that he was displaying the "reasonable competence" by criminal defense

counsel required by the United States Constitution. *Yarborough v. Gentry*, 540 U.S. 1, 8, 157 L.Ed.2d 1, 9 (2003).

We cannot resolve this argument based on the record on appeal. Assuming that Forrester's conduct fell below an objective standard of reasonableness, we cannot determine from the record that Defendant was prejudiced such that "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698. In particular, further factual development is needed regarding what information would have been revealed by diligent investigation into Defendant's alibi. A post-conviction proceeding would also provide Defendant an opportunity to address the court regarding his and Forrester's communications between the pretrial conference and trial. Accordingly, we do not address the merits of Defendant's claim for ineffective assistance of counsel, but we dismiss it without prejudice to his right to raise this issue in a subsequent motion for appropriate relief.

### III. CONCLUSION

For the above reasons, we hold that the trial court did not err in denying defendant's motion to continue and did not commit plain error in admitting the surveillance videos, business records, or yearbook photograph. Defendant's ineffective assistance of counsel claim is dismissed without prejudice to his right to file a motion for appropriate relief with the trial court.



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NO ERROR.

Judges DILLON and YOUNG concur.

Report per Rule 30(e).