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NO. COA11-463
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 08 CRS 255465-67,
08 CRS 255469-70

DONALD RAY OAKS, JR.

Appeal by defendant from judgment entered on 25 October 2010 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General K.D. Sturgis, for the State.

C. Scott Holmes for defendant-appellant.

BRYANT, Judge.

Donald Ray Oaks, Jr., (defendant) appeals from a judgment entered following jury verdicts finding defendant guilty of five counts of attempted murder. We find no error.

Facts and Procedural History

On 20 November 2008, defendant was driving a white conversion van down North Tryon Street in Charlotte, North

Carolina. Two Charlotte Mecklenburg Police Department (CMPD) officers attempted to initiate a traffic stop because defendant was not wearing a seatbelt, his tag light was out, and his van had a fictitious license plate. Although the officers activated their blue lights and siren, the van did not pull over. When the van did not stop, officers deactivated their blue lights and siren, kept the dashboard camera on, and radioed that they had a vehicle that was not stopping. When they reactivated their blue lights and siren to attempt another stop, the van continued to travel at 30-35 miles per hour. Other CMPD officers then joined the pursuit of the van. As the van continued down North Tryon Street, officers noticed defendant place something over his neck or his body. Defendant drove into a gas station and parked the van.

While the officers prepared to give chase, defendant emerged from the passenger side of the van firing a gun at responding police cars entering the parking lot. Defendant started walking quickly toward the officers while firing his weapon, a 40 caliber handgun, at them. Defendant fired more than six rounds of ammunition from his handgun in the direction of the officers. The officers meanwhile fired 25 rounds at defendant.

After officers arrested defendant, they discovered defendant was wearing a bullet-proof vest. In the van, they found two knives, a .32 caliber handgun, 34 rounds of ammunition for a .38 caliber handgun, 45 rounds for a .40 caliber handgun, and 186 rounds for a .22 caliber handgun, an AK47 rifle, a black ski mask, a belt with a holster, a stun gun, and a marijuana pipe. On 10 December 2008, CMPD officers interviewed defendant who admitted that he initially refused to stop for the police because he had items in his possession that were unlawful and he did not want to go to jail.

Defendant was charged with six counts of attempted murder. On 25 October 2010, the jury found defendant guilty of five of the six counts of attempted murder. The following sentences were entered against defendant to run consecutively: three counts (08 CRS 255465-67) were consolidated under one judgment for a sentence from 345 to 423 months; the remaining two counts (08 CRS 255469-70) were consolidated under one judgment for a sentence from 308 to 379 months. Defendant appeals.

Defendant presents the following issues on appeal: whether the trial court erred by (I) denying his motion to continue; (II) denying his motion for change of venue; (III) denying his

motion in limine to redact references to his status as a convicted felon; (IV) admitting evidence of other weapons and contraband; (V) denying his motion to dismiss; and, (VI) failing to intervene *ex mero motu* when the prosecutor commented on defendant's silence during closing argument.

I

Defendant argues that the trial court erred by denying his motion to continue. Defendant contends a continuance was necessary, first, because his jury pool was "likely tainted by a recent case involving the . . . killing [of] two police officers[,] " and, second, because he was denied the opportunity to present evidence from a newly discovered material witness. We disagree.

"Granting or denying a motion for continuance rests in the sound discretion of the presiding judge and his decision will not be disturbed on appeal, except for abuse of discretion or a showing the defendant has been deprived of a fair trial." *State v. Ferebee*, 266 N.C. 606, 609, 146 S.E.2d 666, 668 (1966) (citation omitted). "However, if the motion to continue is based on a constitutional right, the trial court's ruling thereon presents a question of law that is fully reviewable on appeal." *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700,

708 (1998) (citation omitted). "Whether a defendant bases his appeal upon an abuse of judicial discretion, or a denial of his constitutional rights, to entitle him to a new trial because his motion to continue was not allowed, he must show both error and prejudice." *State v. Moses*, 272 N.C. 509, 512, 158 S.E.2d 617, 619 (1968).

"If the error amounts to a violation of defendant's constitutional rights, it is prejudicial unless the State shows the error was harmless beyond a reasonable doubt." *State v. Barlowe*, 157 N.C. App. 249, 253, 578 S.E.2d 660, 662-63 (2003) (citations omitted).

The right to present evidence in one's own defense is protected under both the United States and North Carolina Constitutions. As noted by the United States Supreme Court . . . "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."

Id. at 253, 578 S.E.2d at 663 (citations omitted). Improper denial of a motion to continue in order to prepare a defense may also constitute violation of a defendant's Sixth Amendment right to effective assistance of counsel. *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000).

Our Supreme Court has summarized the analysis applied by federal courts in reviewing refusals to grant a continuance where a constitutional right is implicated:

A continuance in a criminal trial essentially involves a question of procedural due process. Implicitly, the courts balance the private interest that will be affected and the risk of erroneous deprivation of that interest through the procedures used against the government interest in fiscal and administrative efficiency. When the individual interest at stake is the defendant's life or liberty, the individual interest is especially compelling. An interest such as . . . defendant's life is factored heavily into the analysis. On the other side of the scale, the government has an interest in procuring testimony within a reasonable time.

State v. Roper, 328 N.C. 337, 349, 402 S.E.2d 600, 607 (1991) (citations omitted). In determining whether a trial court erred in denying a motion to continue, North Carolina courts have considered several different 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 a denial of the continuance.

Barlowe, 157 N.C. App. at 254, 578 S.E.2d at 663.

In the case *sub judice*, the record indicates that defendant was arrested on 10 December 2008 and, thereafter, charged with six counts of attempted murder. On 5 April 2010, Chiege Okwara was appointed to represent defendant at his trial scheduled for 11 October 2010. The record also indicates that defendant had dismissed two previous attorneys before Okwara was appointed and consequently delayed the trial court proceedings. Okwara indicated that she had met with defendant at least twice a month since being appointed and had familiarized herself with the case. Given these facts, defendant had ample time to prepare his defense for trial.

When the first motion for a continuance was made, defendant argued that he would not be able to get a fair trial in Mecklenburg County because of a recent case involving two Charlotte-Mecklenburg Police Officers that were killed. However, defendant provided no evidence before the trial court to prove or substantiate this claim. Further, as defendant sets forth no authority in support of this portion of his argument, we deem it abandoned. N.C. R. App. P. 28(b)(6) (2011)¹.

Immediately preceding the charge hearing and closing arguments, defendant renewed his motion for a continuance when a

¹ See Issue II. Defendant argues these same facts in support of his "change of venue" argument.

potential defense witness was located in the midst of the trial. Defendant had prior knowledge of the potential witness, identified simply as "Jay," but failed to provide the potential witness' name to the State. Pursuant to N.C. Gen. Stat. § 15A-905(c)(3), defendant, upon motion made by the State, must provide the State with a list of witnesses that he reasonably expected to call at the beginning of jury selection. N.C. Gen. Stat. § 15A-905(c)(3)(2011). Defendant did not include "Jay" on his list of witnesses that he reasonably expected to call. Although the trial court denied the motion for a continuance, it allowed defendant a short recess to present the witness. Defendant failed to present the witness in the allocated time. Although defendant contends that "Jay" was with him prior to the incident and could testify as to defendant's state of mind, defendant does not indicate what the actual testimony would have revealed vis-à-vis his state of mind. Further, defendant cannot show that his state of mind, long before he got in his van and was followed by police, is relevant and material. Given defendant's actions, his statement reflects that he refused to stop for police because he knew he had contraband in his van and did not want to go to jail. Therefore, defendant cannot show

harm as a result of the trial court's denial of his motion to continue. Defendant's argument is overruled.

II

Next, defendant contends that the trial court erred by denying his motion for a change of venue. Specifically, defendant argues that "a recent trial involving the death of [police] officers had just resulted in the conviction of a person for killing two officers," and the publicity surrounding that case "tainted potential jurors" in the instant case. We disagree.

"On a motion for change of venue pursuant to [N.C.G.S. §] 15A-957, the burden is on the defendant to prove prejudice so great that he cannot obtain a fair and impartial trial." *State v. Gardner*, 311 N.C. 489, 497, 319 S.E.2d 591, 597 (1984) (citations omitted). Defendant must demonstrate that

it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. The determination of whether the defendant has met this burden of proof rests in the sound discretion of the trial judge and his ruling will not be overturned on appeal absent a showing of gross abuse of discretion.

Id. at 497, 319 S.E.2d at 597-98 (citations omitted).

In the instant case, defendant cites *State v. Robinson*, 355 N.C. 320, 561 S.E.2d 245 (2002), and *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983), to support his contention that the recent publicity regarding another case would taint potential jurors in this case. However, in *Robinson* and in *Jerrett*, the newspaper articles and radio broadcasts involved the particular case in question, not a completely separate case. Even assuming *arguendo* that publicity from another trial could taint potential jurors in the case *sub judice*, neither the record nor defendant provides any authority that directly supports this contention. Accordingly, the trial court did not abuse its discretion in denying the motion for change of venue, and defendant's argument is overruled.

III

In his next argument, defendant contends the trial court erred in denying defendant's motion in limine to redact references to his status as a convicted felon when he did not take the stand. Defendant argues that his character for truthfulness was never an issue for the jury and admitting the evidence of his status as a convicted felon was prejudicial error. The state counters that the evidence was offered to show

defendant's motive and intent, not as character evidence or evidence of propensity.

We review rulings on the admission of evidence *de novo*. *State v. Johnson*, __ N.C. App. __, __, 706 S.E.2d 790, 797 (2011). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation and internal quotation marks omitted).

North Carolina Rule of Evidence 609 provides, in pertinent part, "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." N.C. Gen. Stat. § 8C-1, Rule 609(a) (2011). Rule 404 provides, in pertinent part, that "[e]vidence of other crimes . . . is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011).

In the instant case, in his statement to police, defendant admitted that he was a convicted felon. This evidence was not admitted to prove defendant's character and was not admitted to show that he acted in conformity therewith. Instead, defendant's testimony that he initially refused to stop for the police officers because he was afraid, knowing that he had items in his possession that were unlawful, was offered to show his motive and intent. Because defendant was a convicted felon who was in possession of firearms when police tried to stop his vehicle for traffic violations, his prior conviction could properly be used to establish his motive or intent to prevent being taken into custody for unlawful possession of contraband by shooting at police after being stopped. See N.C.G.S. § 8C-1, Rule 404(b). Therefore, the trial court did not err in denying defendant's motion in limine.

IV

Next, defendant contends that the trial court erred in admitting evidence of other weapons and contraband that were not relevant to the charges against him. Particularly, defendant asserts that the admission of such evidence constitutes plain error. We disagree.

As previously stated, we review rulings on the admission of evidence *de novo*. *Johnson*, ___ N.C. App. at ___, 706 S.E.2d at 797.

In the instant case, testimony about several items, including knives, a stun gun, a .32 caliber handgun (not used in the offense), ammunition, a black ski mask, a marijuana pipe, and bootleg DVDs and CDs, was admitted over the objection of defendant. Relying on *State v. Patterson*, 59 N.C. App. 650, 297 S.E.2d 628 (1982), defendant contends that "[e]vidence of other weapons and contraband that are not involved in the commission of the offense are not relevant, and such evidence is not admissible." In *Patterson*, this Court held that a sawed-off shotgun was "erroneously admitted into evidence" because it was "not connected to the robbery and [] was clearly not relevant to any issues in the case." *Id.* at 653, 297 S.E.2d at 630. Unlike *Patterson*, the items admitted in the case at bar are relevant and admissible to prove the motive or intent of defendant, i.e. to avoid being arrested and to prevent confiscation of the items. Accordingly, the trial court did not err in admitting these items into evidence.

In his next argument, defendant contends the trial court erred in denying his motion to dismiss on the grounds that there was insufficient evidence of premeditation, deliberation, and specific intent to kill. Further, defendant contends specific intent to kill had to be formed for each officer involved. This argument is without merit.

In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Barnes, 334 N.C. 67, 75-76, 430 S.E.2d 914, 918-19 (1993) (internal quotation marks and citations omitted). "Premeditation means that defendant formed the specific intent to kill the victim for some period of time, however short,

before the actual killing." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981).

Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. An unlawful killing is deliberate and premeditated if done as part of a fixed design to kill[.]

State v. Hunt, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991).

In the instant case, defendant, in his interview with police, expressly states, "my intent basically . . . was . . . to shoot uh . . . anybody that you know, if I saw somebody that . . . [had] a gun pointed at me ready to shoot[.]" On appeal, defendant argues he was shooting above the cars; however, in his statement, defendant says his intent was to shoot anyone who was pointing a gun at him. Direct evidence in the form of defendant's own statement to police proves his intent to shoot the police who were aiming their guns at him. Additional evidence of defendant exiting the van wearing a bullet proof vest and firing more than six rounds of ammunition from a Smith & Wesson .40 caliber handgun further demonstrates defendant's intent toward the police officers. Given the totality of facts in the instant case, the evidence is sufficient for a jury to

determine that defendant was acting with premeditation and deliberation and with a specific intent to kill the police officers. Therefore, the trial court did not err in denying the motion to dismiss for insufficiency of the evidence.

VI

Finally, defendant contends the trial court erred in failing to intervene *ex mero motu* when the prosecutor commented on defendant's silence during closing arguments. Defendant contends the prosecutor's direct reference to his right to remain silent was grossly improper and in violation of his constitutional rights. This argument is erroneous.

It is well established that "[a] criminal defendant may not be compelled to testify, and any reference by the State regarding his failure to testify is violative of his constitutional right to remain silent." *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994) (citation omitted).

When the State directly comments on a defendant's failure to testify, the improper comment is not cured by subsequent inclusion in the jury charge of an instruction on a defendant's right not to testify. Rather, [Our Supreme Court] has held the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness. We consistently have held that when the trial

court fails to give a curative instruction to the jury concerning the prosecution's improper comment on a defendant's failure to testify, the prejudicial effect of such an uncured, improper reference mandates the granting of a new trial.

State v. Reid, 334 N.C. 551, 556, 434 S.E.2d 193, 197

(1993) (citations omitted).

In the case *sub judice*, the prosecutor made the following statements in her closing argument:

Then he says to Detective Santiago and Detective Brandon at the hospital, this is a big case, high profile, I want to do it right. High profile, that's what he was going for, Ladies and Gentlemen. He was going for high profile. He wanted to shoot to kill six Charlotte Mecklenburg police officers because it was high profile. . . .

We also know from his silence. You know from his silence he had the gun in his lap, wearing the bullet proof vest . . . we know from his silence, from what he had on his body, what he was trying to do that night. We don't just know from his words. We know from his silence.

And you'll hear from Ms. Okwara he doesn't even say anything when he gets out of the car. He didn't even say anything while the officers - when he was shooting at the officers. He didn't even say anything when he was on the ground.

Here, the prosecutor referenced defendant's silence at the time the offenses were committed. However, the prosecutor made no reference to defendant's silence in the context of

defendant's failure to testify. Therefore, defendant cannot show a violation of his constitutional right. This argument is overruled.

No error.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).