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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-429

Filed: 17 October 2017

Columbus County, Nos. 14 CRS 576, 579

STATE OF NORTH CAROLINA

v.

JAMES ISSAC FAULK

Appeal by defendant from judgment entered 17 August 2016 by Judge D. Jack Hooks in Columbus County Superior Court. Heard in the Court of Appeals 20 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

CALABRIA, Judge.

Where a prior order held that defendant forfeited counsel, and defendant presented no evidence of a material change in circumstances, the trial court did not err by declining to modify the prior order. Where the trial court sustained defendant's

objection to testimony and issued a corrective instruction, defendant's argument that the testimony was erroneously admitted necessarily fails.

I. Factual and Procedural Background

On 7 July 2013, James Issac Faulk ("defendant") was visiting his father, Clyde Allen Faulk ("Clyde"). An acquaintance, Jeff Gore ("Gore"), came over that evening. Gore was in need of money, and offered to sell Clyde a "four-wheeler." Clyde responded that he lacked the money, and Gore asked defendant if he knew anyone who would buy the four-wheeler or if defendant was willing to hold it for Gore. Defendant said yes.

Defendant and Gore drove to a house at 6431 Swamp Fox Highway West. They went behind the house, to a trailer, which contained a ride-on lawn mower. They removed the lawn mower, and Gore identified the four-wheeler, which they placed in the trailer. They then hitched the trailer to Gore's truck and drove away. Defendant and Gore sold the four-wheeler for three hundred dollars, and sold the trailer.

The owner of the house at 6431 Swamp Fox Highway West, Robert Hammons ("Hammons"), received a call that someone was at his house removing his trailer. Hammons returned home to find his trailer and four-wheeler missing. Shortly thereafter, Detective Scott Norris of the Columbus County Sheriff's Office ("Det. Norris") received the report of the theft. Around the same time, Captain Jason Soles ("Cpt. Soles") was interviewing Gore in connection with other cases. Gore confessed

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to another theft, and to stealing the items from Hammons. Det. Norris interviewed Gore and took his statement. Gore told Det. Norris that defendant was with him, and agreed to take Det. Norris to the place where Gore sold the four-wheeler, which Det. Norris was able to recover. At some point, the person who bought the trailer contacted law enforcement after reading about the theft.

Defendant was indicted for felony larceny, and for attaining habitual felon status. On 27 February 2015, defendant's appointed counsel, William C. Gore, moved to withdraw as counsel, citing a conflict of interest. On 6 March 2015, attorney C. Byrd was appointed to represent defendant. No motion to withdraw by C. Byrd is present in the record, but on 26 October 2015, attorney Boyd Worley was appointed to represent defendant. As with C. Byrd, no motion to withdraw by Boyd Worley is present in the record. On 27 October 2015, attorney Misty Jorgensen was appointed to represent defendant. On 14 June 2016, Misty Jorgensen filed a motion to withdraw. On 17 June 2016, Judge Douglas B. Sasser ("Judge Sasser"), sitting for the Superior Court of Columbus County, allowed Misty Jorgensen's motion to withdraw, and held that defendant had forfeited his right to counsel. According to the order, defendant would "represent himself with an appointment for provisional counsel." Attorney Fred C. Meekins, Jr. ("Meekins") was appointed as "standby counsel" for the proceedings.

The matter proceeded to trial, and the jury returned a verdict finding defendant guilty of felony larceny. Defendant pleaded guilty to attaining habitual felon status, in exchange for sentencing within the presumptive range. The trial court entered judgment upon felony larceny and habitual felon status, and sentenced defendant in the presumptive range to a minimum of 115 months and a maximum of 150 months in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

II. Forfeiture of Right to Counsel

In his first argument, defendant contends that the trial court erred by failing to reconsider a prior order which found that defendant had forfeited his right to counsel. We disagree.

A. Standard of Review

“The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). “In the absence of a constitutional violation, the decision about whether appointed counsel shall be replaced is a matter solely for the discretion of the trial court.” *State v. Kuplen*, 316 N.C. 387, 396, 343 S.E.2d 793, 798 (1986).

B. Analysis

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Judge Sasser, presiding over a session of superior court, entered an order holding that defendant had forfeited his right to counsel. At trial, defendant raised this issue, requesting to have Meekins appointed as his attorney. Meekins observed that, were he to be appointed counsel, he would be “in no way prepared to go forward with the trial.” Judge Hooks then ruled on the request:

THE COURT: Well, folks, here’s the problem I’ve got. I’m sitting here -- the Senior Resident Judge entered this order. I take it, he set the trial date?

[THE STATE]: We set the trial date during case management one of his sessions. Yes, sir.

THE COURT: One of his sessions. I have no authority to overrule another Superior Court Judge. And whenever it’s a Senior Resident Judge, I’m a little more reluctant to do so.

Judge Hooks then affirmed that defendant would represent himself, with Meekins as standby counsel. He denied defendant’s request.

On appeal, defendant contends that the trial court erred in declining to overturn Judge Sasser’s order. Defendant argues that “[j]udges can and do reconsider appointment of counsel in cases where the defendant has waived his or her right to appointed counsel and there is a change in circumstances[,]” and that a change in circumstances existed in the instant case.

One superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances

since the entry of the prior order. A substantial change in circumstances exists if since the entry of the prior order, there has been an intervention of new facts which bear upon the propriety of the previous order. The burden of showing the change in circumstances is on the party seeking a modification or reversal of an order previously entered by another judge.

Crook v. KRC Mgmt. Corp., 206 N.C. App. 179, 189, 697 S.E.2d 449, 456 (citation and quotation marks omitted) *writ denied, disc. review denied*, 364 N.C. 607, 703 S.E.2d 442 (2010). “In other words, where the trial court fails to find that there has been a material change in circumstances, it has no authority to modify the order of another judge.” *Id.* at 190, 697 S.E.2d at 457.

In the instant case, defendant had the burden of showing a material change in circumstances since the entry of the prior order for the trial court to have the authority to overturn the prior order. The only argument defendant offered was that he did not like his previous attorneys, but wanted Meekins to represent him. We hold that defendant’s change in outlook does not rise to the level of a material change in circumstances, and that therefore the trial court was without authority to modify Judge Sasser’s order.

Defendant relies upon our decision in *State v. Boyd* for the principle that counsel, once waived or forfeited, may be subsequently appointed. However, *Boyd* is inapplicable to this case. In *Boyd*, the defendant forfeited counsel, was found guilty, and appealed the case. Counsel was appointed to represent the defendant on appeal,

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and the matter was subsequently remanded. We held that the defendant's forfeiture of his right to counsel "ended with his first trial and did not continue through the resentencing hearing resulting from our decision stemming from Defendant's prior appeal." *State v. Boyd*, 205 N.C. App. 450, 456, 697 S.E.2d 392, 395-96 (2010). *Boyd* explicitly held that the appointment of counsel on appeal created a "break in the period of forfeiture[.]" *Id.* at 455, 697 S.E.2d at 395. By contrast, in the instant case, there has been no "break in the period of forfeiture" caused by an appeal and the appointment of appellate counsel.

Defendant also relies upon *State v. Kuplen*, but does so to his detriment. In *Kuplen*, the defendant was found to be indigent and was appointed counsel. Counsel moved to withdraw, which the trial court denied. The defendant then sought to waive counsel, wanting no assistance from his attorney. The trial court engaged in a colloquy with the defendant, and ultimately had the defendant sign a waiver of counsel. The trial court then permitted the defendant to proceed with his appointed attorney as standby counsel. On appeal, the defendant held that he was denied his right to appointed counsel. Our Supreme Court examined the record, and held that the trial court's findings on this matter were "fully supported by the record." *Kuplen*, 316 N.C. at 398, 343 S.E.2d at 800. The Court further noted that

An indigent defendant has the right to appointed counsel, but not to the counsel of his choice. If a defendant is dissatisfied with the services of his appointed counsel, but there is no reason to appoint substitute counsel, the

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defendant has the right not to have the services of his unwanted counsel forced on him and to represent himself.

Id. at 399, 343 S.E.2d at 800. The Court ultimately held that the trial court did not err in holding that defendant had waived counsel, and assigning appointed counsel as standby counsel.

Throughout his brief, defendant analogizes waiver of counsel and forfeiture of counsel. Assuming that they are analogous, we find *Kuplen* to be directly on point. Defendant received the benefit of Meekins as standby counsel, but having forfeited counsel previously, was not entitled to the attorney of his choice. Further, *Kuplen* emphasizes that a defendant who has made the decision to waive counsel, or whose actions rise to the level of forfeiture, has not suffered a violation of his constitutional rights. *Id.* (holding that “defendant’s being in the position to have to make that choice is not violative of his constitutional rights”). This matter was therefore within the discretion of the trial court. We hold that the trial court, in being “a little more reluctant” to overrule a Senior Resident Judge, did not abuse its discretion.

III. Hearsay

In his second argument, defendant contends that the trial court erred by failing to remove hearsay from the jury’s consideration concerning defendant’s prior bad acts. We disagree.

A. Standard of Review

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“When preserved by an objection, a trial court’s decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*.” *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011).

When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court’s Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012).

B. Analysis

At trial, on direct examination of Det. Norris by the State, the following exchange occurred:

Q. Now, you said follow all leads. Did you develop a lead in this matter?

A. Yes, ma’am.

Q. All right. And can you tell me about how you developed that lead?

A. The leads -- we had several other cases that were going on. And as we do all the time. Through the investigating process, two suspects’ names -- or two suspects came up in the same cases. Possible suspects in other breaking and enterings around Columbus County.

THE DEFENDANT: Object. Object.

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The jury was sent out of the room while the parties discussed the objection. Meekins was permitted to speak on defendant's behalf, and argued that the testimony the State sought to elicit was hearsay, based upon other investigations. The State specifically acknowledged that it was not offering the evidence pursuant to Rule 404 of the North Carolina Rules of Evidence. After some consideration, the trial court sustained the objection, saying that it would strike the answer, and asked the State to rephrase the question. However, when the jury returned to the room, the trial court did not instruct the jury to disregard Det. Norris' statement. Defendant contends that this oversight was error.

However, later in the proceeding, the trial court asked if defendant required any kind of corrective instruction:

[THE COURT:] What are your thoughts? Do you want me to give a corrective instruction or just caution them and ride herd on it from here forward?

THE DEFENDANT: I would really like for you to, Judge, due to the fact of the matter is I feel like that by him saying that they investigated other crimes -- you understand what I'm saying? -- where my name comes up, I don't know whether or not that would be inflaming the jury, man, because I never been charged with that. You understand what I'm saying? So --

THE COURT: I will if you want to offer an instruction saying that they are to disregard testimony and evidence as to other crimes in determining your guilt or innocence in the charges before the Court, that you are not here, that we have heard no testimony, the Court knows of no evidence -- that is the truth -- indicating that you are guilty

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of those offenses.

The parties agreed, and the trial court issued the following instruction:

Ladies and gentlemen, at this time, I am instructing you that there has been and will not be, as I understand it, any evidence regarding this defendant's involvement in any other crimes than those charged before the Court at this point in time. Therefore, what other investigation does not imply as to his guilt in this case. You are to disregard the statement as to any tools, et cetera, or crimes that were charged or solved as a result of subsequent investigations.

Defendant's argument is, in essence, that Det. Norris' statement was objectionable and that the trial court erred in failing to instruct the jury to disregard it. However, the record demonstrates that the trial court sustained defendant's objection, that the trial court instructed the jury to disregard the statement, and that defendant found the instruction agreeable. Defendant's argument that he was prejudiced by the inclusion of evidence necessarily fails when defendant's objection was sustained and the evidence struck. We hold that the trial court did not err in sustaining defendant's objection and issuing a corrective instruction.

NO ERROR.

Judges DIETZ and ZACHARY concur.

Report per Rule 30(e).