IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-797

Filed: 16 April 2019

Mecklenburg County, Nos. 16 CRS 218286-87; 218290; 218296

STATE OF NORTH CAROLINA

v.

MARCUS PULLEY

Appeal by defendant from judgments entered 2 March 2018 by Judge Martin B. McGee in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Gilda C. Rodriguez for defendant-appellant.

TYSON, Judge.

Marcus Pulley ("Defendant") appeals from judgments entered following a jury's verdicts, which found him guilty of two counts of discharging a weapon into an occupied dwelling, assault on a female, and possession of a firearm by a felon. We find no error.

I. Background

On 14 May 2016, at 11:23 p.m., the Charlotte-Mecklenburg Police Department received a 911 call involving a report of an assault at a house on Remington Street in Charlotte. Charlotte-Mecklenburg Police Officer Wayne Goode responded to the call and he received further updates that shots had been fired into the house. When Officer Goode arrived at the reported address, he found the 911 caller and alleged victim, Jetoya Grier, and her three minor children.

Officer Goode described Grier as "very upset" and "hysterical at points." Grier displayed visible injuries, including a cut on her neck and a swollen wrist. Grier accused Defendant of assaulting and firing shots at her.

Officer Goode observed two spots on the interior and exterior of the backdoor of the house that appeared to be bullet holes, and found shell casings on the exterior of the house, and a live round inside the kitchen. A knife was recovered on the dining room floor of the house.

Defendant was located by police officers at a residence located on Celia Avenue, close to Grier's home, and less than an hour after Grier's 911 call. Defendant was brought to the Charlotte-Mecklenburg Police Department Metro Division Office. Officer Goode asked a crime scene technician to test Defendant for gunshot residue. This gunshot residue test was positive.

On 31 May 2016, Defendant was indicted by a grand jury on two counts of discharging a firearm into an occupied dwelling, assault on a female, assault with a

deadly weapon with intent to kill, possession of a firearm by a felon, and having attained habitual felon status. A superseding indictment for possession of a firearm by a felon was filed on 5 September 2017.

A. State's Evidence

At trial, the State presented Grier's 911 call, in which she can be heard identifying Defendant as her assailant. Officer Goode corroborated the 911 call and testified Grier had identified Defendant as her assailant. Michael Gurdziel, a forensic scientist with the North Carolina State Crime Laboratory, testified that swab samples of Defendant's hands tested positive for gunshot residue particles.

B. Victim's Absence

At the beginning of the first day of trial, the prosecutor notified the court that "The victim is not cooperating, will not be joining us this week." On the morning of the second day of trial, Defendant served an amended witness list on the State to include the victim, Jetoya Grier. The prosecutor stated: "The State would be objecting to her testifying in this case at this point." In response to the State's objection, defense counsel stated, in part: "The first opportunity I had to speak with her was last night where she indicated that *she may like to testify*. So as soon as I received that information, I provided it to the State." (emphasis supplied).

In evaluating the request to allow Grier to testify, the trial court conducted the following colloquy with defense counsel:

> THE COURT: Well, I think probably in fairness, I'd like to hear from her as to why she wasn't here and what the change is and make some decision based on that. So I'll be happy to consider that. Can she be made available this morning?
>
> [Defense Counsel]: I think the earliest – last time I spoke with her, earliest she can be here will be at 12:30. But I can try to contact her and see if she can be available this morning.
>
> THE COURT: Well, how long does the State anticipate their case going this morning?
>
> [The Prosecutor]: I don't know how long [Defense Counsel's] cross-examination is going to be but both of the next witnesses will be as short as Detective Goode. So I would expect just a couple of hours and the State would rest.
>
> THE COURT: Well, I would want to hear before the State rests. Let me put it that way. So I certainly – I mean, it depends – I think that will be appropriate.

Approximately an hour later, after the presentation of more evidence by the State, the trial court conducted another colloquy with the prosecutor and defense counsel outside the presence of the jury. The trial court stated, in relevant part:

> THE COURT: . . . It looks like the issue concerning adding a witness by the defense will be covered by [N.C. Gen. Stat. § 15A-905(c)(3)], requires a good faith showing. After considering it, I have indicated at the bench that I'm not going to require that the absent – the State's – witness be called. That will be up to the defense whether or not they wish to do that. But I did say I think that's important information why she did not appear.
>
> As I understand it, you all have exchanged discovery . . . .

> The State was aware I understand that she was not cooperating with them prior to trial. So I would advise her of her rights if you – if the defense chooses to call her and be happy to hear what she has to say. But that will be up to the defense whether or not they wish to call her and present that information.
>
> As part of the good faith basis, I think doing it before the State rests would be probably the fairest way to do it, but ultimately it's going to be up to the defense when they wish to present their motion. I'd be happy to hear it prior to the close of the State's evidence if the witness is indeed present.
>
> And I understand we're in the middle of the trial so defense counsel is probably not aware of whether or not she's present or not in the courthouse. So we're going to take a 15-minute break now.

Following the break, the State presented its last witness, and at approximately 11:35 a.m., the following colloquy occurred outside the presence of the jury:

> THE COURT: . . . Does the defense have any motions?
>
> [Defense Counsel]: Well, there are two matters, Your Honor. There is the motion again to add the witness to the witness list. I think you wanted to address that prior to the State's closing. I thought. I know you wanted to hear from her. I don't know if she's outside. I have to check.
>
> THE COURT: If you'll check and see if she's present.
>
> [Defense Counsel]: If I could – If she's not, I'm going to call and at least I can report to the Court.
>
> THE COURT: Yes. And for the record, it's 11:36.
>
> (Brief pause in the proceedings.)

[Defense Counsel]: I was unable to reach that witness, Your Honor. So, I mean – well, I would like to have – if the Court would allow, I would like to have some additional time to get that witness here 'cause we would like to put – we would at least like to have her available to put her on the stand. I can speak with my client about whether he'd like to put on evidence but we need to know if the Court is going to permit that.

THE COURT: Well, why don't we take a five-minute recess. I would say, if she's not here – it's 11:30 – the State indicates it wishes to rest. I'm not inclined to wait very long under these circumstance. If you get any additional information this morning, you indicated that she'd be here at 11:30, I ask that she be here earlier and she's still not here. She should have been here obviously when she was subpoenaed to be here and has not done that, so –

[Defense Counsel]: I'm not sure if she was subpoenaed.

[The Prosecutor]: And I will give the Court my update. She was subpoenaed in October when this case was last on for trial. She called and was so combative with the district attorney saying, I will not come, you will have to arrest me before I cooperate, and so I told the Court before we started this case, I called her myself the night before we started to inquire if maybe she had a change of heart. Sometimes people change their mind after a few months. She was combative with me and hung up the phone on me. So I think that's a clear indication that she didn't want to cooperate, at least with the State.

I would like to add, Your Honor, for the record, that her not wanting to cooperate was made known to the Court and defense counsel even before we started. I said we're proceeding without her. She didn't want to come. This case is not a three-week case that there's been a huge change of circumstances. [Defense counsel] could have very easily put her on the list yesterday but instead, he waited through jury selection, through opening statements, and the State

to finish its case without her before he told us that he wanted her to be here. He could have very easily just listed her name yesterday on the witness list.

THE COURT: Well, I will say, it's my understanding that she had been subpoenaed. I was mistaken in that. Apparently she was subpoenaed earlier.

We're going to take five minutes and see where we are. See what information you can gather for me.
. . .

(Off the record, recess 11:41 – 11:50 a.m.)

THE COURT: All right. Thank you all. Any update on the witness?

[Defense Counsel]: I have been unable to reach that witness, Your Honor. I will just like it on the record. We will renew my request to wait until at least until after lunch to see if she can arrive.

THE COURT: I think probably the fairest way to do it is if you want to provide me information about the nature of the contact you've had with her, if you're willing to do that, the nature your client has had with her, how it resulted with her contacting you yesterday, how much notice have you had that she's coming. I think all those details are important for me to decide whether I want to wait any further for the witness.

[Defense Counsel]: Sure.

So I spoke with this witness – I mean, obviously the witness has been named in the discovery since the beginning. I spoke with the witness for the first time yesterday, yesterday evening. She contacted my office. Left my secretary her phone number. My secretary put her on my calendar to speak with her at 6 p.m. yesterday evening.

The reason she was not included on my witness list until this morning is because that witness list requires us, at least the way I read the rules, to include only those names of people that we reasonably expect to call. And until – I'm not sure if the State reasonably expected to call her but she was certainly included on the State's witness list. But I did not reasonably expect to call her until after I spoke with her yesterday evening. And that's why I didn't think it was appropriate for me to just put her on the list.

The only contact I've had with her was yesterday evening. And I spoke with her again this morning. The timing that we spoke about this morning was I expected the State's case to go through the morning, was for her to be here at 12:30 so that she'd be available to us or to the Court, if necessary, over the lunch period.

THE COURT: All right.

[Defense Counsel]: That has been my contact with her.

THE COURT: And I certainly respect that. That's the contact that you've had. But it's not just I think your contact. How did she know to get in touch with you, how did she decide to get in touch with you at that point after we've heard the motion that we heard? That sort of information is important too. And you may or may not have that information and there may or may not be anyone in this courtroom that can provide that information, but seems to me that's a critical part of it as well.

[Defense Counsel]: You mean how she came to call me?

THE COURT: Yes, sir.

[Defense Counsel]: Well, I didn't ask her that. I mean, my only question for her when she contacted me was, I just wanted to talk to you about exactly what happened.

THE COURT: Do you want to provide me anybody that can

provide that information to me? That might be something that would be important. And that's entirely up to you whether or not you wish to talk to your client, if he knows, or if there's anybody that you know that could provide that information. That seems to me to be an important part of whether or not it makes sense to wait.

[Defense Counsel]: Yes. I can't say that I know why she contacted me.

THE COURT: And there's no information you wish to offer at this time?

[Defense Counsel]: There is not. That's the only information I recall.

THE COURT: Yes, ma'am.

[The Prosecutor]: I have information, if Your Honor wants to hear from the State.

THE COURT: Yes. If you wish to be heard, that's entirely up to you.

[The Prosecutor]: I do. I will give you an outline. I had our office assistant go back. We keep a record of victim contact and we start contacting victims very early on. It likes like back in May of 2016 when this happened, she was cooperative and was speaking with our office. That has progressively changed.

I mentioned October when she was subpoenaed. There's notes indicating that she was subpoenaed by a deputy. She made it clear to our office that she is not going to cooperate, that her and the Defendant are doing fine now and she did not want to be involved.

Again, she knew about this case, I suspect not only from the Defendant because they have a child together, but from me. I told her we were proceeding with or without her. The

> case was going forward.
>
> So I certainly expect that she has had multiple ongoing conversations – and I'm not saying with defense counsel – but the Defendant. He has certainly been keeping her up to date on how this case is developing.
>
> THE COURT: All right. After considering all of the information before the Court, in my discretion I'm not going to delay the matter. It's 11:55, by my clock.

The trial court denied Defendant's motion to continue and his motion to add Grier to the list of defense witnesses.

At the close of the evidence, the State dismissed the indictment for attaining habitual felon status. The jury returned verdicts finding Defendant guilty on two counts of discharging a firearm into an occupied dwelling, assault on a female, and possession of a firearm by a felon, and not guilty on the charge of assault of with a deadly weapon with intent to kill. Defendant gave notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court abused its discretion by denying Defendant's request to admit Grier as a witness. Defendant also argues the trial court abused its discretion by denying Defendant's motion to continue. In the alternative, Defendant

argues the trial court's denial of his motion to continue deprived him of his constitutional right to present a defense.

IV. Analysis

A. Motion to Admit Witness

1. *Standard of Review*

We review a trial court's decision "to deny [a] defendant's request to allow an undisclosed witness to testify during the trial" for an abuse of discretion. *State v. Leyva*, 181 N.C. App. 491, 502, 640 S.E.2d 394, 400, *disc. review denied and appeal dismissed*, 361 N.C. 573, 651 S.E.2d 370 (2007). A trial court abuses its discretion only where its ruling was "manifestly unsupported by reason" or was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Peterson*, 361 N.C. 587, 602-03, 652 S.E.2d 216, 227 (2007), *cert. denied*, 552 U.S. 1271, 170 L. Ed. 2d 377 (2008).

2. *No Abuse of Discretion*

Under N.C. Gen. Stat. § 15A-905(c)(3) (2018), "If there are witnesses that the defendant did not reasonably expect to call at the time of the provision of the witness list, and as a result are not listed, the court upon a good faith showing shall allow the witnesses to be called."

Here, the trial court cited N.C. Gen. Stat. § 15A-905(c)(3) and gave Defendant an opportunity to make "a good faith showing" of why Grier should be allowed to

testify. Defendant was indicted on 31 May 2016. His trial began on 28 February 2018, over a year and a half later. Defense counsel did not give the trial court any indication he had attempted to contact Grier prior to trial. The phone call he received at 6:00 p.m. after the first day of trial was the first time he had spoken with her.

The trial transcript shows that defense counsel did not establish whether Grier was going to be available to testify, whether she would testify even if she came to court, whether her testimony would be favorable or unfavorable to Defendant, or whether her testimony would tend to rebut or contradict the State's evidence. Defense counsel was also unable to explain how or why she came to contact him in the middle of trial.

Defendant has failed to show the trial court's ruling to deny his motion to allow Grier to testify was "manifestly unsupported by reason" or "could not have been the result of a reasoned decision" to be an abuse of discretion. *Peterson*, 361 N.C. 587, 602-03, 652 S.E.2d 216, 227. Defendant's argument is overruled.

B. Motion to Continue

The trial transcript indicates that when Defendant made his oral motion to continue, he did not mention the Constitutions of the United States or North Carolina, or make any argument concerning his constitutional right to present a defense. This Court has previously held:

> "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request,

> objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." Constitutional issues, which are not raised and ruled upon at trial, will not be considered for the first time on appeal . . . . Nowhere in his motion to continue did defendant contend that his constitutional rights were violated or implicated. Pursuant to our Rules of Appellate Procedure, defendant has not preserved the issue of whether the denial of his motion to continue violated his constitutional rights.

State v. Ellis, 205 N.C. App. 650, 654, 696 S.E.2d 536, 539 (2010) (quoting N.C. R. App. P. 10(a)(1)) (other citation omitted). Defendant has failed to preserve his constitutional argument by not raising it before the trial court and providing it the opportunity to hear and address the issue. *Id.* Defendant's constitutional argument is dismissed.

1. *Standard of Review*

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001).

Our Supreme Court has held that "[c]ontinuances should not be granted unless the reasons therefor are fully established." *State v. Rigsbee*, 285 N.C. 708, 711, 208 S.E.2d 656, 658-59 (1974). Our Supreme Court has also held:

> A continuance ought to be granted if there is an apparent probability that it will further the ends of justice. Consequently, a postponement is proper where there is a belief that material evidence will come to light and such

> belief is reasonably grounded on known facts. *But a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial to a later term.*

State v. Gibson, 229 N.C. 497, 502, 50 S.E.2d 520, 524 (1948) (emphasis supplied). "Generally, the denial of a motion to continue, whether a constitutional issue is raised or not, is sufficient grounds for the granting of a new trial only when the defendant is able to show that the denial was erroneous and that he suffered prejudice as a result of the error." *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000).

2. *No Abuse of Discretion*

Defense counsel was unable to provide the trial court with any information concerning the substance of Grier's potential testimony, or whether it would even be beneficial to Defendant. After the State announced at the beginning of the trial that Grier was unavailable and not going to testify, Defendant made no effort to subpoena her or even verify if she was going to testify on Defendant's behalf. Defense counsel's statements to the trial court only indicate Grier may have wanted to testify and the earliest she *could* be available at trial was after 12:30 p.m. on the second day. Defense counsel was unable to state whether Grier was even going to appear. Based upon the limited and speculative information provided by defense counsel, Defendant has not shown the trial court abused its discretion by denying Defendant's motion to continue. *See Gibson,* 229 N.C. at 502, 50 S.E.2d at 524.

Were we to agree the trial court erred by denying Defendant's motion to continue, Defendant is unable to demonstrate any prejudice. The State played Grier's 911 call to the jury in which she identified Defendant as her attacker. The State presented evidence of the bullet holes in the backdoor of Grier's house, shell casings in Grier's yard, the unspent shell inside Grier's kitchen, Officer Goode's testimony that Grier stated Defendant was her attacker, and the positive gunshot residue test of Defendant's hands.

Defendant failed to take precautions or issue a subpoena to secure Grier's attendance at court, presented no information concerning whether Grier would even testify, or the substance of Grier's potential testimony or the probative value thereof. The State presented overwhelming evidence against Defendant of the crimes charged. *See Rigsbee*, 285 N.C. at 712, 208 S.E.2d at 659 (holding trial court did not abuse its discretion by denying a motion for continuance so that defense could locate witness where defendant did not inform court what witness would have testified to despite having talked to witness three days before trial).

Defendant has failed to demonstrate the trial court abused its discretion by denying his motion to continue. *Id.* Defendant's argument is overruled.

V. Conclusion

Defendant has failed to show any abuse of discretion by the trial court in its denial of his motion to add Grier to the witness list on the second day of trial or its

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

NO ERROR.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).