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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-723

No. COA20-852

Filed 21 December 2021

Mecklenburg County, No. 17CRS203146

STATE OF NORTH CAROLINA

v.

DONTAVIUS KAREIM NEWTON, Defendant.

Appeal by Defendant from judgment entered on 27 March 2019 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State.

Jeffrey William Gillette for the Defendant.

JACKSON, Judge.

¶ 1 Dontavius Kareim Newton (“Defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of robbery with a dangerous weapon. We hold that Defendant has failed to demonstrate any error.

I. Background

¶ 2 In the evening hours of 24 January 2017, Ms. W. Robbins was working at the

Family Dollar at 4500 North Tryon Street, in Charlotte, North Carolina. As she discussed various closing tasks with another employee on duty that evening, two masked men “came in and jumped over the counter with guns[.]” The men aimed their guns at Ms. Robbins and her colleague and demanded that they open the cash registers and the store safe. Two of the three cash registers were opened, and the men dumped the contents of the cash registers into a backpack. Ms. Robbins unsuccessfully attempted to open the safe while one of the men “pok[ed] [a] gun in the back of her head[.]” The men then grabbed four or five packs of cigarettes before leaving the store.

¶ 3 After the men left and Ms. Robbins called the police, Investigator M. Pohlheber of the Charlotte-Mecklenburg Police Department (“CMPD”) responded to the scene. Investigator Pohlheber photographed the scene and retrieved the store’s surveillance video. As he reviewed the video, Investigator Pohlheber noticed that the perpetrators of the robbery were not wearing gloves and had come into contact with the checkout counter and cash register drawers during the robbery. Investigator Pohlheber dusted the cash register drawers and the checkout counter for latent fingerprints, collecting several.

¶ 4 Ms. N. Kearns, CMPD’s latent fingerprint examiner, reviewed the fingerprints collected by Investigator Pohlheber and entered the prints of value into AFIS, the State’s Automated Fingerprint Identification System. Based on Ms. Kearns’s

comparison of potential candidates in AFIS to the fingerprints collected by Investigator Pohlheber, Ms. Kearns found a match to Defendant's left thumb.

¶ 5

On 25 January 2017, a warrant was issued for Defendant's arrest. After he was taken into custody, Ms. Kearns took confirmation fingerprints from him. On the basis of these confirmation prints, Ms. Kearns found additional matches between Defendant's known prints and the latent prints collected by Investigator Pohlheber at the Family Dollar. After Defendant was placed under arrest, he denied any involvement in the robbery, but admitted that he was homeless and had been wearing the same clothes for several days—clothes that appeared from the surveillance video of the robbery to be the same clothes worn by one of the perpetrators of the robbery.

¶ 6

On 6 February 2017, Defendant was indicted with robbery with a dangerous weapon in Mecklenburg County Superior Court. He was also indicted with conspiracy to commit robbery with a dangerous weapon. He pleaded not guilty, and the case came on for trial before the Honorable Gregory R. Hayes on 25 March 2019. The trial court presided over a two-day trial. The other perpetrator of the robbery did not testify. The jury returned a verdict of guilty on the robbery with a dangerous weapon charge and not guilty on the conspiracy charge. The trial court determined Defendant to be a prior record level III offender and sentenced him to 84 to 113 months in prison.

¶ 7

Defendant entered timely written notice of appeal on 1 April 2019.

II. Analysis

¶ 8 On appeal, Defendant argues that his trial counsel’s failure to obtain a continuance to retain a fingerprint expert constituted ineffective assistance of counsel. We disagree.

¶ 9 “Traditionally, the decision to grant or deny a continuance rests within the discretion of the trial court[.]” *State v. Tunstall*, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993) (citation omitted), and “the trial judge[s] ruling thereon is not subject to review absent an abuse of [] discretion[.]” *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982) (citation omitted). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation omitted).

¶ 10 A motion for a continuance based on the constitutional right to effective assistance of counsel is “fully reviewable as a question of law.” *State v. Maher*, 305 N.C. 544, 547, 290 S.E.2d 694, 696 (1982). Where a trial court commits constitutional error in denying a request for a continuance, the error is subject to harmless error review. *State v. Cook*, 362 N.C. 285, 296, 661 S.E.2d 874, 881 (2008). Under this standard, an error “is presumed to be prejudicial, and the burden is [] on the State to show that it was harmless beyond a reasonable doubt.” *State v. Lyles*, 94 N.C. App. 240, 248, 380 S.E.2d 390, 395 (1989). An error is only harmless beyond a reasonable doubt if “the court can declare a belief that there is no reasonable possibility that the

[error] might have contributed to the conviction.” *Id.* at 249, 380 S.E.2d at 396.

¶ 11 The right to assistance of counsel under the United States and North Carolina Constitutions includes the right to effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985). To succeed on a claim for ineffective assistance of counsel, a defendant must do the following:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

Braswell, 312 N.C. at 562, 324 S.E.2d 248 (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)).

¶ 12 The United States Supreme Court, further elaborating on the prejudice prong, has explained that “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

Because of the difficulties inherent in making the [prejudice] evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’

Id. at 689 (citation omitted).

¶ 13

However,

ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing [the] defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 123, 604 S.E.2d 850, 881 (2004) (internal marks and citation omitted).

¶ 14

The following colloquy transpired when Defendant's case was called for trial:

[PROSECUTOR]: The next matter for the Court's attention would be we call the case of Dontavius Newton for trial. Before we bring the jury in, I understand from defense counsel that he may have a request for the Court, so I'll just let him do that.

THE COURT: Okay.

Yes, sir. Mr. [Defense Counsel].

[DEFENSE COUNSEL]: Thank you, your Honor. . . . Mr. Newton is asking that I move for a continuance, your Honor. I am going to be attending that CLE on Thursday and Friday, but Mr. Newton wants a continuance in his case because I haven't had the case all that long, your Honor.

. . . Mr. Newton asked that I, that I – he wants me to move

that we can get our defense expert, a fingerprint expert, in this case.

I haven't done that to this point, your Honor. He asked that I move for a continuance and file a motion for an expert witness.

...

THE COURT: But that request came when; today?

[DEFENSE COUNSEL]: Yes.

THE COURT: Okay. So other than that, do you feel like you're prepared for trial?

[DEFENSE COUNSEL]: Yes, your Honor.

¶ 15 The timesheets of Defendant's trial counsel included in the record on appeal reflect his counsel receiving and reviewing discovery shortly after being appointed on 28 and 29 December 2018 and again on 8 and 13 February 2019, as well as one final time on 21 March 2019, four days before trial. During this three-month period, Defendant's counsel had the opportunity to determine if it was possible to retain an expert to controvert the conclusions reached by the State's expert regarding the latent fingerprints collected from the cash register and the nearby area that matched Defendant's fingerprints. Accordingly, the record reflects that Defendant had adequate time "to review the evidence against him and to procure the assistance of an expert, but simply failed to do so in time." *State v. King*, 227 N.C. App. 390, 394, 742 S.E.2d 315, 318 (2013).

¶ 16 That said, the record is not adequate to assess whether Defendant was prejudiced by his trial counsel's failure to retain a fingerprint expert, and Defendant's remaining claim for ineffective assistance of counsel is premature. Specifically, we cannot say based on the record before us whether Defendant was prejudiced by his trial counsel's failure to retain a defense fingerprint expert because we do not know whether an expert Defendant could have retained would have had a materially differing opinion from the State's expert in fingerprint analysis. At a hearing on a motion for appropriate relief, Defendant would have the opportunity to show what testimony or evidence another fingerprint expert would have added to the proceedings, had trial counsel retained one in the first instance. Accordingly, we dismiss Defendant's ineffective assistance of counsel claim without prejudice to any motion for appropriate relief on the basis of ineffective assistance of counsel Defendant may later file in the trial court.

III. Conclusion

¶ 17 For the reasons stated above, we hold that Defendant has failed to demonstrate any error occurred during his trial.

NO ERROR.

Judges INMAN and WOOD concur.

Report per Rule 30(e).