

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-437

Filed 19 September 2023

Duplin County, Nos. 20CRS50271-72, 20CRS50908-09

STATE OF NORTH CAROLINA

v.

JIMMY RAY REGISTER, Defendant.

Appeal by defendant from judgment entered 21 July 2021 by Judge Henry L. Stevens in Duplin County Superior Court. Heard in the Court of Appeals 23 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Haley Ann Cooper, for the State.

Law Offices of Bill Ward & Kirby Smith, P.A., by Kirby H. Smith, III for the Defendant.

DILLON, Judge.

Defendant Jimmy Ray Register appeals from judgment entered upon a jury's verdict convicting him of Felonious Breaking or Entering to Terrorize, two counts of Felonious Assault, and two counts of Misdemeanor Injury to Personal Property.

I. Background

Defendant was convicted of various crimes associated with his break-in at the residence of his ex-girlfriend (“Julie”) and his subsequent assault of Julie and another man who was there at the time. The evidence at trial showed as follows:

On the evening of 9 February 2020, Defendant called Julie’s ex-husband (“Cameron”) to tell him that he was on the way to Julie’s residence because he was frustrated with her and that he planned to “kick the doors down” and release her “demons”. Fearing for Julie’s safety, Cameron attempted to calm Defendant down. Unable to do so, Cameron contacted the Wallace Police Department and requested a welfare check on Julie.

When Defendant arrived at Julie’s residence, Julie was there eating dinner with her new boyfriend and another man. Defendant gained entry by busting through the glass of the side door with a large object, such as a pole or a pipe. Julie’s new boyfriend escaped. The other man attempted to leave, but Defendant struck him across the back with the large object and continued beating him. Defendant then chased the man outside and began punching him with his fists. The two fought in the front yard for approximately five minutes, before Defendant abruptly left the man lying on the lawn and walked inside to where Julie was alone.

STATE V. REGISTER

Opinion of the Court

When paramedics arrived at the scene, they found Julie to be “very nervous” and “scared,” and that she had suffered blunt force trauma to the head. The extent of Julie’s injuries made her unrecognizable, with her head beaten so badly it appeared square shaped and her eyes almost swollen shut.

Further, during the assault, Defendant destroyed property inside Julie’s home, with the following damage noted by emergency personnel: the glass in the door was busted and bloody, there was shattered glass and a broken drawer in the refrigerator, the fryer was overturned, the television was busted, her boyfriend’s iPhone was destroyed and thrown in a trash can, and Julie’s phone was destroyed and left under the carport.

For the year leading up to the date of trial, Defendant was granted three continuances to allow him to obtain private counsel. Defendant was initially appointed counsel but declined it and repeatedly expressed that he wanted to be represented by private counsel.

Defendant’s case was eventually tried *pro se* at the 19 July 2021 session of court, after his request for yet another continuance was denied. He was sentenced to 10-21 months incarceration for the Felonious Assault charge, and the remaining charges were consolidated into one sentence of 10-21 months suspended for 24 months with supervised probation. Defendant appeals.

II. Analysis

Defendant makes two arguments on appeal, which we address in turn.

STATE V. REGISTER

Opinion of the Court

A. Waiver of Counsel

Defendant argues that the trial court erred when it denied his request for another continuance, thus requiring him to proceed without counsel. Because the right to assistance of counsel is guaranteed by both our state and federal constitutions, we conduct a *de novo* review of the trial court's decision to deny Defendant's motion to continue the case in order to find an attorney. *See, e.g., State v. Atwell*, 383 N.C. 437, 446, 881 S.E.2d 124, 130-31 (2022).

Our courts have held that a criminal defendant may waive his constitutional right to counsel in the event of (1) voluntary waiver, (2) forfeiture, or (3) waiver by conduct. *See Atwell*, 383 N.C. at 446-54, 881 S.E.2d at 131-35; *State v. Blakeney*, 245 N.C. App. 452, 782 S.E.2d 88 (2016). For the reasoning below, we conclude that Defendant waived his right to counsel by his conduct.

Waiver by conduct occurs:

[o]nce a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel. . . . "waiver by conduct" could be based on conduct less severe than that sufficient to warrant a forfeiture.

Blakeney, 245 N.C. App. at 464-65, 782 S.E.2d at 96 (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100-1101 (3d. Cir. Pa. 1995)).

Our courts have held that to constitute waiver by conduct, a trial court must conduct the inquiry mandated in N.C. Gen. Stat. § 15A-1242 to comply with the

STATE V. REGISTER

Opinion of the Court

constitutional requirement that waiver is made “knowingly, intelligently, and voluntarily”. *State v. Harvin*, 268 N.C. App. 572, 593, 836 S.E.2d 899, 911 (2019); *State v. Curlee*, 251 N.C. App. 249, 253-54, 795 S.E.2d 266, 270 (2016). The colloquy in § 15A-1242 requires a trial court to ensure that a defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2021).

During the 25 May 2021 hearing, Defendant requested another continuance. During this time, the trial court engaged in colloquy with Defendant that we conclude satisfied the requirements of § 15A-1242.

First, the trial court clearly advised Defendant of his right to appointed counsel when it confirmed, on multiple occasions, that Defendant did indeed want to waive his right to a court-appointed attorney. The trial court also explained to Defendant that he may have difficulty finding an attorney given the closeness of the trial date, and once again asked Defendant if he was sure he wanted to waive his right to a court-appointed attorney. The trial court also referenced Defendant’s right to an attorney when it referenced previous court appearances in which Defendant waived

STATE V. REGISTER

Opinion of the Court

his right to appointed counsel.

Next, the trial court informed Defendant of the consequences of waiver:

THE COURT: But I would be inclined to give you one opportunity to try to hire an attorney. But if you're unable to hire an attorney, it's still going to go forward at the next court date.

THE DEFENDANT: Well, if you'll give me that opportunity, sir, I'd be gracious of it.

THE COURT: So you understand you would be representing yourself at that time moving forward?

THE DEFENDANT: Yes, sir.

THE COURT: Looking at the possibility each of those, again, carries a maximum sentence of 39 months.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. You're sure that's what you want to do?

THE DEFENDANT: Yes, sir.

Last, the trial court ensured that Defendant understood the weight of the charges against him. In addition to the colloquy above, in which the trial court reminded Defendant that his charges carried a maximum sentence of 39 months each, the trial court also informed Defendant of the following:

THE COURT: Okay. I understand that you're charged with three Class H felonies, based on what she said.

THE DEFENDANT: Yes, sir.

THE COURT: And, obviously, each of those carries a

STATE V. REGISTER

Opinion of the Court

maximum sentence of 39 months.

Thus, we are satisfied that the trial court clearly apprised Defendant of the consequences of his waiver by conduct, in accordance with the requirements of § 15A-1242. This waiver “is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him.” *State v. Sexton*, 141 N.C. App. 344, 346-47, 539 S.E.2d 675, 676-77 (2000); *Curlee*, 251 N.C. App. at 253, 795 S.E.2d at 269. As a result, because Defendant was “warned about the consequences of his conduct, including the risks of proceeding *pro se*”, and still arrived at trial without an attorney, we conclude that Defendant waived his right to counsel. *Blakeney*, 245 N.C. App. at 465, 782 S.E.2d at 96.

Further, we conclude that the trial court gave Defendant an adequate amount of time to obtain an attorney. Here, Defendant waived his right to appointed counsel, instead opting to find his own private counsel, at an appearance in July 2020. His trial did not occur until a year later. During this time, he was granted three continuances and repeatedly expressed to the court his desire to be represented by a private attorney. Defendant had 12 months to retain private counsel, nearly two of which he was not incarcerated for. We have reviewed the record and Defendant’s arguments on this issue and conclude that he was given sufficient opportunity to retain private counsel, and that granting the motion was not essential to afford Defendant “a fair opportunity to secure counsel of his own choice.” *Powell v. Alabama*,

287 U.S. 45, 53 (1932); *State v. Sampley*, 60 N.C. App. 493, 495, 299 S.E.2d 460, 462 (1983) (wherein our Court concluded that a one-month period was sufficient to allow the defendant to retain private counsel).

B. Admission of Julie's Statements

Defendant challenges the admission of several statements made by Julie prior to trial, which were introduced during the testimonies of the male victim who saw Defendant re-enter the house after being attacked, Julie's parents, as well as two officers who arrived at the scene of the crime, Deputy Jarvis Rogers and Sergeant Jerry Wood. Each portion of the challenged testimony identified Defendant as the party responsible for the violence. Julie did not testify at trial.

Defendant also challenges the trial court's decision to allow an employee from the clerk's office to read into evidence Julie's allegations and the trial court's findings and conclusions made in support of an *ex parte* domestic violence order ("DVPO") entered against Defendant.

Defendant argues that the admission of these statements violated his Sixth Amendment right to confront the witnesses against him. U.S. Const. amend. VI; N.C. Const. art. I, Section 23.

Here, Defendant failed to object to the testimony given by any of the testifying witnesses, except that he objected to the admission of the DVPO, but only on the ground of relevance, never raising the constitutional argument he makes on appeal.

"It is well settled that an error, even one of constitutional magnitude, that

STATE V. REGISTER

Opinion of the Court

defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Bell*, 359 N.C. 1, 28, 603 S.E.2d 93, 112 (2004); *see also* N.C.R. App. P. 10(a)(1) (2021). Further, "a defendant loses his remaining opportunity for appellate review when he fails to argue in the Court of Appeals that the trial court's admission of the evidence amounted to plain error," even for constitutional evidentiary issues. *State v. Brent*, 367 N.C. 73, 76, 743 S.E.2d 152, 154 (2013) (holding that the defendant was not entitled to appellate review of his challenge to the admission of a forensic report on Confrontation Clause grounds when the defendant did not object at trial and failed to assert plain error before the Court of Appeals).

As Defendant failed to properly object to admission of the challenged testimony at trial, he asks for plain error review by our Court. However, Defendant has failed to meet his burden of showing reversible error. Given the abundance of unchallenged evidence tending to show Defendant's guilt, we conclude that the trial court did not commit plain error. *See State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983) (plain error is an error that "had a probable impact on the jury's finding of guilt.")

Specifically, the jury heard testimony from Julie's ex-husband, regarding his phone call with Defendant prior to the crime, describing that Defendant planned to:

kick down the doors and the demons were going to be released, and... it was a threat towards her, that he was going over there to hurt her is the way I took it. But I do remember -- and he, at the end of it... he says, "Well, I got to go, man." He said, "I'm here and I'm about to go kick down the door and release the demons," or something to that nature.

The jury also heard from the male victim at trial. Specifically, he testified that Julie had no injuries prior to Defendant's arrival; Julie's home had no notable damage prior to Defendant's arrival; Defendant violently broke into Julie's home by busting through the glass door; Defendant brutally attacked him causing him significant injuries; Defendant went inside Julie's home after assaulting him; Julie was inside alone when Defendant went inside; Defendant exited just minutes later when officers arrived; Julie had significant injuries that she did not have prior to Defendant's arrival; and no one else was on the scene.

Finally, we note the testimony of one of the investigating officers who arrived on the scene shortly after the attack. The officer testified that Julie "indicated that [Defendant] was the party that had broke in and beat everybody up," a statement Defendant did not object to at trial.¹ Thus, in addition to all of the evidence discussed above, the jury had ample opportunity—from multiple different sources—to hear Defendant identified as the perpetrator of the crime. Thus, Defendant cannot show that the alleged error was "fundamental" such that "justice cannot have been done."

¹ Although this statement may appear on its face to implicate the same Confrontation Clause issue raised in this appeal, this statement, if challenged, would likely fit under the "present sense impression" exception to the hearsay rule. *State v. Jackson*, 348 N.C. 644, 654, 503 S.E.2d 101, 107 (1998) ("where hearsay proffered by the prosecution comes within a firmly rooted exception to the hearsay rule, the Confrontation Clause of the North Carolina Constitution is not violated.") The "present sense impression" hearsay exception permits the admission of statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." N.C. Gen. Stat. § 8C-1, Rule 803(1) (2021). Here, Julie's statement was made immediately upon the officers' initial encounter with her while she was still "shaken and scared" that "she may still be in danger."

Odom, 307 N.C. at 660, 300 S.E.2d at 378.

III. Conclusion

We conclude the trial court did not err in refusing to grant yet another continuance, though the denial resulted in Defendant having to defend himself *pro se*. He had expressly waived his right to appointed counsel well prior to trial and had otherwise waived his right to counsel by his conduct. We further conclude Defendant has failed to show reversible error by the admission of out-of-court statements made by Julie.

NO ERROR.

Judges ZACHARY and WOOD concur.

Report per Rule 30(e).