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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-511

Filed 6 February 2024

Buncombe County, Nos. 20 CRS 86132, 21 CRS 416

STATE OF NORTH CAROLINA

v.

TRAVUS AMAHD MCCANTS

Appeal by defendant from judgment entered 2 November 2022 by Judge R. Gregory Horne in Buncombe County Superior Court. Heard in the Court of Appeals 14 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Rebecca E. Lem, for the State.

John W. Moss for defendant-appellant.

ZACHARY, Judge.

Defendant Travus Amahd McCants appeals from the judgment entered upon a jury's verdicts finding him guilty of assault on a law enforcement officer inflicting injury and attaining the status of a habitual felon. After careful review, we conclude that Defendant received a fair trial, free from error.

I. Background

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On 23 June 2020, Defendant was arrested after engaging in a physical altercation with two uniformed police officers. Defendant was subsequently charged with two counts of assault on a law enforcement officer causing physical injury. On 1 November 2021, a Buncombe County grand jury additionally returned a true bill of indictment charging Defendant with attaining the status of a habitual felon.¹

On 31 October 2022, the matter came on for trial in Buncombe County Superior Court. The parties had been unsuccessfully engaged in plea negotiations. Then, just prior to jury selection, the State offered Defendant a renegotiated plea deal, which Defendant rejected. Defense counsel asked the trial court “to review with [Defendant] the offer of plea to make sure he understands what he turned down,” which the trial court did. As the trial court discussed the plea with Defendant, Defendant announced that he would accept the deal. The trial court went off the record for five minutes as the parties discussed the acceptance of the plea deal, but when the matter resumed on the record, Defendant declared: “Let’s do a trial.” Jury selection commenced and occupied the rest of the day.

At the commencement of the second day of trial, Defendant was not present in the courtroom. On the record, the trial court explained that Captain Reems² of the Buncombe County Sheriff’s Office “advised [the court] that [Defendant] was refusing

¹ The transcript suggests that Defendant was also charged with assault inflicting serious bodily injury, and that the State elected not to proceed on that charge.

² Captain Reems is not identified by his full name in the record on appeal.

to come out of his cell”: Defendant “wasn’t going to participate in the proceedings and [the Captain asked] for direction with regard to whether the [c]ourt wanted him forcibly brought to the courtroom.” The trial judge stated that it was not his “general practice in these situations to require a defendant to be forcibly brought into the courtroom. This is not a capital case and, therefore, his appearance is voluntary. If he is refusing to come in for whatever reason, then the [c]ourt would treat that as a waiver.”

In the presence of counsel for Defendant and the State, the trial court asked Captain Reems “to advise [Defendant] that the [c]ourt is going to proceed if he chooses not to be here. . . . [T]hat is his voluntary choice.” The trial court added that it would “make sure that we have frequent contact with [Defendant] to make sure that he hasn’t changed his mind with regard to that.”

When the bailiff informed the court that Captain Reems had sent a text message and was “still trying to talk [Defendant] into coming into the courtroom[.]” the trial court asked the bailiff to “text [Captain Reems] back and indicate that if [Defendant has] decided he’s not coming, that [Captain Reems] can cease those efforts and we’re going to resume.” The trial court also directed the bailiff “to immediately notify us” if Defendant “at any point indicates in the interim that he wants to be present[.]”

Defendant’s counsel moved to withdraw, but before the trial court could consider the motion, Captain Reems returned to the courtroom and explained his

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conversation with Defendant:

[Defendant] was upset due to being offered a plea by his attorney and, you know, his attorney saying that he should -- you know, feels that he should take that plea, and [Defendant] felt like he didn't want to take that plea. Given his attorney, you know, has been doing this for a very long time, giving him his advice, [Defendant] felt upset.

When I went to speak with him this morning, he stated that due to his anxiety and his mental health history, he feels like he can't sit in this courtroom. That he feels like that he may have an outburst that will not go in his favor, and that he feels like it would be the best decision to stay in that cell. I told him that we will -- that the judge has indicated that the trial will continue without him whether he stays in this cell or he's up here in the trial. He said that's fine, that he -- that if he loses his trial, he plans to file an appeal, and that was his statement.

Captain Reems additionally asked Defendant to contact him if he decided to attend the trial:

I said if you feel better in your mental health state and if you change your mind, reach out. Everybody in the detention center knows my number, and [if] you want to be present in the trial, reach out and let me know and I'll let the [c]ourt know, and he said, "I will."

After receiving this report from Captain Reems, the trial court concluded that Defendant "is voluntarily waiving his presence here at trial." The trial court further explained:

I had the opportunity to talk with [Defendant] in open court about various things yesterday, to observe his demeanor. While I did find that [Defendant] was at least initially indecisive about the plea, I did provide additional time to talk to counsel. I had no indication that there [were]

any competency issues. Clearly he understood what I was asking him. He did respond appropriately to that. He was oriented as to time, person and place. So I have no capacity or competency issues with regard to that.

Defense counsel restated his motion to withdraw, acknowledging that his “plea discussions with [Defendant] . . . impacted his willingness to participate.” The trial court denied the motion, reasoning that Defendant did not “indicate in any way, other than disagreeing with regard to your belief with regard to the plea offer, that he’s otherwise dissatisfied with your services.” The trial court added that “in light of [Defendant’s] refusal to come into the courtroom, . . . it would do him a disservice not to have able counsel here representing his interests.”

In addition, the trial court stated that it would instruct the jury regarding Defendant’s absence from trial: “It is not to create any presumption against him in any way. It is not to influence your decision in any way, nor should it act to lessen the State’s required burden of proof beyond a reasonable doubt.” With that, the trial resumed in Defendant’s absence, with the jury receiving the promised instruction.

At the trial court’s request, defense counsel attempted to meet with Defendant at the jail during the lunch break, but Defendant declined to speak with counsel. Defendant remained absent from the courtroom for the entirety of the State’s presentation of evidence. After the State rested its case, the trial court asked the bailiff to contact Captain Reems “so that another effort can be made to see if [Defendant] has changed his mind with regard to his appearance or needs to

communicate anything further to us.” The trial court was advised that Defendant had changed his mind and would be appearing in court.

Upon Defendant’s return, the trial court conducted a colloquy with him regarding his right to testify on his own behalf. Defendant indicated that he would “plead the 5th.” The trial court concluded that Defendant had chosen to exercise his right to remain silent, and the trial resumed.

On 1 November 2022, the jury returned its verdicts, finding Defendant guilty of one of the charges of assault on a law enforcement officer inflicting injury but not guilty of the other. The trial proceeded to the habitual felon phase, and on 2 November 2022, the jury returned its verdict finding Defendant guilty of attaining the status of a habitual felon. Then, the trial court consolidated the convictions into a single judgment, and sentenced Defendant to a term of 29 to 47 months in the custody of the North Carolina Division of Adult Correction. Defendant gave timely notice of appeal in open court.

II. Discussion

Defendant argues that the trial court erred by finding that he waived his right to be present for trial. We disagree.

As an initial matter, Defendant concedes that his counsel did not preserve this issue by objection at trial. “When a party fails to timely object at trial, he has the burden of establishing his right to appellate review by showing that the exception was preserved by rule or law or that the error alleged constitutes plain error.” *State*

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v. Jefferson, 288 N.C. App. 257, 261, 886 S.E.2d 180, 183 (2023). Defendant contends that this issue is preserved by rule of law. *See* N.C. Gen. Stat. § 15A-1446(d)(15) (2021) (providing for automatic preservation of the issue of whether “[t]he defendant was not present at any proceeding at which the defendant’s presence was required.”).

“In noncapital cases, however, a defendant’s constitutional right to be present at all stages of the trial is a purely personal right that can be waived expressly or by his failure to assert it.” *State v. Christian*, 150 N.C. App. 77, 81, 562 S.E.2d 568, 571 (cleaned up), *disc. review denied*, 356 N.C. 168, 568 S.E.2d 618 (2002). “Additionally, in a non-capital case counsel may waive [a] defendant’s right to be present through failure to assert it just as he may waive [a] defendant’s right to exclude inadmissible evidence by failing to object.” *Id.* (cleaned up). “Further, a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.” *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982).

In this case, Defendant’s counsel did not object when the trial court ruled that Defendant had voluntarily absented himself from the trial. This issue has thus been waived and is subject to dismissal on appeal.

Recognizing that his argument may have been waived by his counsel’s failure to object below, Defendant requests that this Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure to review this issue. Rule 2 allows this Court to suspend the Rules of Appellate Procedure “[t]o prevent manifest injustice to a party[.]” N.C.R. App. P. 2. “However, the authority to invoke Rule 2 is discretionary,

and this discretion should only be exercised in exceptional circumstances in which a fundamental purpose of the appellate rules is at stake.” *State v. Pender*, 243 N.C. App. 142, 149, 776 S.E.2d 352, 358 (2015) (cleaned up).

Defendant argues that “declining to review the trial court’s determination that [his] absence was voluntary, which was made outside of his presence, and without competent evidence as to his mental state at the time, and without sufficient evidence of a knowing, intelligent, and voluntary waiver would be manifestly unjust.” Defendant further compares this case to our recent decision in *Jefferson*, in which the defendant similarly refused to leave his cell after the trial began, and the trial court asked the defendant’s counsel to take a cell phone to the defendant so that the trial court could address the defendant directly. 288 N.C. App. at 258, 886 S.E.2d at 181. Defendant acknowledges that “[t]he trial court was not required to take every step taken in *Jefferson*”; nevertheless, Defendant maintains that, “under the facts and circumstances present here, the trial court should have established direct communication with [Defendant] at least once before determining he waived his right to be present.”

However, as detailed above, the trial court was properly cautious about proceeding in Defendant’s absence, and continually provided Defendant with an open channel of communication should he change his mind about appearing in court, which Defendant ultimately did. Further, although defense counsel did not speak with Defendant on the morning of the second day of trial, when Defendant’s absence was

initially determined to be voluntary, he attempted to speak with Defendant at the jail during the lunch break, and Defendant refused to meet with counsel. Moreover, once Defendant returned to the trial, at no point did he object or otherwise complain of the trial proceeding in his absence. Finally, the trial court instructed the jury that Defendant’s “absence must not create any presumption against him, and is not to influence your decision in any way in this case. Nor does his absence lessen the State’s burden of proof.” And as our Supreme Court has often noted, “[j]urors are presumed to follow the instructions given to them by the court.” *State v. Parker*, 377 N.C. 466, 474, 858 S.E.2d 595, 600 (2021) (citation omitted).

For all these reasons, we conclude that this case does not present an “exceptional circumstance[] in which a fundamental purpose of the appellate rules is at stake.” *Pender*, 243 N.C. App. at 149, 776 S.E.2d at 358 (cleaned up). Accordingly, and in our discretion, we decline to invoke Rule 2 to review this issue.

III. Conclusion

For the foregoing reasons, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Chief Judge DILLON and Judge STROUD concur.

Report per Rule 30(e).