NO. COA10-236

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Wake County
No. 07 CRS 60468

JOHN WESLEY WINTERS,
Defendant.

Appeal by defendant from judgment entered 16 March 2009 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 11 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

S. Hannah Demeritt for defendant-appellant.

ELMORE, Judge.

John Wesley Winters (defendant) appeals from judgment entered upon conviction for felony breaking and entering, misdemeanor breaking and entering, felony larceny, and habitual felon status. He contends the trial court abused its discretion by: (1) joining charges from two separate incidents for trial and (2) failing to adequately answer an inquiry by the jury during deliberations.

On 8 October 2007, defendant was indicted for felony breaking and entering a building on 17 May 2007 with the intent to commit larceny. Also on 8 October 2007, defendant was indicted for felony breaking and entering, felony larceny, and felony possession of

stolen goods based on an incident on 27 August 2007. On 8 January 2008, defendant was indicted for habitual felon status.

Prior to the start of trial, the State moved to join the offenses from 17 May 2007 and the 27 August 2007. Defendant opposed the motion. After hearing arguments by counsel, the trial court allowed the motion for joinder, and the matter proceeded to trial. Defendant moved to suppress evidence obtained as a result of an allegedly illegal stop. After hearing evidence and arguments, the trial court denied the motion to suppress.

The State's evidence tends to show that, on 17 May 2007, Officer Justin Patton of the Raleigh Police Department was conducting surveillance at a construction site in an undeveloped neighborhood. The officer arrived at the site between 10:00 p.m. and 11:00 p.m. and parked behind a large knoll where he could observe persons entering the area. No construction activities were occurring at that time of night. A second officer later joined him. Around midnight, Officer Patton observed an older-model Ford truck enter the development, circle the area at a very slow speed, and finally stop at lot 38 on Cowan Lane, where a new home was being constructed.

The two officers waited about five minutes, and then approached the Ford truck. Officer Patton saw a person inside the garage and noted that the garage door was open. The officers approached the man, ordered him to turn around, and Officer Patton conducted a weapons frisk for safety purposes. There were construction materials, including doors, located in the garage.

Officer Patton identified defendant in court as the man the officers apprehended that night.

Defendant was talkative and appeared nervous. He told the officers that he was going to his girlfriend's house and he had stopped to urinate. He stayed in the garage because he saw a car coming and didn't want to be seen. Then he told officers that his daughter needed tissues for a project, so he was trying to get some for her, but he had to stop to urinate.

The officers checked the other houses under construction in the neighborhood. The house on lot 38 where defendant was found was the only house that appeared to contain construction materials. The officers arrested defendant and took him to the police station.

Upon being questioned, defendant stated that he was on his way to see his girlfriend, that he had stopped at a store to get some aspirin and a cigar, and then he drove around the neighborhood under construction to look at the architecture because he was in the business. He stopped there because he needed to urinate. When asked if he had any information regarding the persons stealing materials from construction sites, defendant stated that everyone was doing it, that was how people got along. However, he denied ever taking anything from a construction site.

On the evening of 27 August 2007, sometime after 7:30 p.m., Robert Yde and his wife were walking in their neighborhood located behind Peace College in Raleigh. It was still light outside. As they were walking, they reached the site of a new home under construction on 1220 North Blount St. Mr. Yde observed that doors

and about fifteen or twenty windows were sitting in the front room of the house. He saw a red pickup truck with a wooden trailer parked between that house and the next house, toward the back of the houses near an alleyway. He stated that he saw a black man come out of the garage and put a door or a window into the trailer. He said he could tell there were other similar objects in the trailer. There was no construction activity going on in the neighborhood at that time of night. He noted that he was not used to seeing black construction workers in the neighborhood. He saw the man get in the truck and drive away.

Mr. Yde knew that the builder, Mark Blankenship, lived in the neighborhood. Mr. Yde and his wife walked to Mr. Blankenship's house and spoke with Wendy Blankenship about what he had just seen. Mrs. Blankenship called 911. Mr. Yde later spoke to a police officer about the incident. The Raleigh Police Department issued a "be on the lookout" alert for a red pickup truck with a wooden trailer, possibly being driven by a black male, which might contain stolen doors or windows.

Officer D.W. Deach of the Raleigh Police Department testified that he was on patrol around 10:00 p.m. on 27 August 2007 when he received the message to be on the lookout for a red pickup truck with a wooden trailer. He observed a vehicle with a trailer matching that description on Rock Quarry Road. He observed brand new vinyl windows wrapped in plastic in the back of the truck. Officer Deach stopped the truck and asked the driver, defendant, about the windows. Defendant was shaking and appeared to be

nervous. He replied that he had purchased the windows and gave the officer a receipt for double-hung windows. The windows in the back of the truck were single windows. When the officer asked defendant to get out of the truck, defendant told the officer that he had taken the windows from a construction site. Defendant stated that times were hard and that was why he took them. Defendant was placed under arrest. Mr. Blankenship was called to the scene; he identified the windows as his, then put them in his own truck and took them away.

Defendant did not present any evidence. The jury returned a verdict of guilty of non-felonious breaking or entering[1] regarding the 17 May 2007 incident, and verdicts of guilty of felony breaking or entering, felony larceny, and felony possession of stolen goods with regard to the 27 August 2007 incident. The jury also returned a verdict of guilty of obtaining the status of habitual felon. The trial court arrested judgment on the possession of stolen goods offense. Defendant was determined to be a prior record level III based on five prior record level points. The trial court consolidated the offenses for judgment and sentenced defendant as a habitual felon to an active term of a minimum of 93 months to a maximum of 121 months imprisonment. From the judgment entered, defendant appeals.

Defendant first argues that the trial court erred by allowing the State's motion to join the offenses from 17 May 2007 and 27

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[1]The verdict sheets say "Guilty of Felonious Breaking or Entering" and "Guilty of non-felonious Breaking or Entering" (emphasis added).

August 2007 in the same trial. He contends that there was no evidence of a single criminal plan, noting that the incidents occurred three months apart and lacked a transactional connection or distinct *modus operandi*. He asserts that he did not receive a fair trial and that the jury would have reached a different result had the offenses not been joined for trial. Defendant points to the jury's inquiry during deliberations as to whether they could consider the 27 August incident for purposes of establishing intent for the 17 May incident as proof, arguing that the jury's question indicated it was improperly considering evidence from one incident to determine guilt for the other incident. We do not agree with defendant's contentions.

Joinder is governed by section 15A-926 of the North Carolina General Statutes. That section provides: "Two or more offenses may be joined . . . for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2009). The decision whether to grant or deny a motion for joinder is within the sound discretion of the trial court. *State v. Miller*, 61 N.C. App. 1, 4-5, 300 S.E.2d 431, 435 (1983) (citations omitted). The determination of whether a group of offenses are transactionally related is a question of law reviewable on appeal. *State v. Williams*, 74 N.C. App. 695, 696-97, 329 S.E.2d 705, 707 (1985). The test is whether the offenses were so separate in time and place and so distinct in circumstances as

to render consolidation unjust and prejudicial to the defendant. *State v. Fultz*, 92 N.C. App. 80, 83, 373 S.E.2d 445, 447 (1988). Absent a showing that the defendant has been deprived of a fair trial, the trial court's ruling will be upheld on appeal. *Miller*, 61 N.C. App. at 4-5, 300 S.E.2d at 435 (citations omitted). If a serious question of prejudice arises, an appellate court must determine whether the case meets the statutory criteria. *State v. Wilson*, 57 N.C. App. 444, 448, 291 S.E.2d 830, 832 (1982). Cases should not be consolidated if doing so means that the defendant is deprived of his ability to present his defense. *Id.* at 448, 291 S.E.2d at 832-33 (citations omitted). Further, "[p]ublic policy strongly favors consolidation because it expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once." *State v. Jenkins*, 83 N.C. App. 616, 617-18, 351 S.E.2d 299, 301 (1986).

Here, the trial court determined in its discretion that, based on the evidence forecast, the two incidents were similar enough in nature as to indicate a common plan or scheme. In reviewing the trial court's decision, we find that the evidence tends to show that the two incidents, although occurring three months apart, had the following similarities, in that they both occurred: (1) at night, (2) at new home construction sites, (3) in downtown Raleigh, (4) involving entry into property under construction, (5) where

construction materials were stolen or present. Based on these common traits, we conclude that the two incidents were sufficiently alike such that the trial court's determination to join the two incidents for trial was not an abuse of discretion. Since there was adequate evidence of a transactional connection between the two incidents, we find no merit to defendant's assertion that he was deprived of a fair trial. Defendant's arguments on this issue are overruled.

By defendant's second argument, he contends the trial court erred by failing to answer the jury's question whether they could consider the 27 August incident when determining as to whether defendant had intent with regard to the earlier incident in May. He argues that the trial court's failure to specifically answer the jury's question amounted to an abuse of discretion for not providing proper clarification of the law. We are not persuaded by defendant's arguments.

During deliberations, the jury sent out the following question: "For purposes of establishing intent for the May 17 incident can we consider the August 27, 2007 incident?" Defense counsel requested that the jury be told "no," that they could not consider the August incident when determining intent for the May incident. After hearing from the attorneys and undertaking some discussion, the trial court called the jury to the courtroom and gave the following instruction: "The response that I can give to you that it is your duty to recall all of the evidence in the case and draw such reasonable inferences as you find from that evidence.

Okay. Go back to the jury deliberation room and resume your deliberations."

A trial court is permitted to "[r]espond to an inquiry of the jury made in open court" after jury deliberations have begun. N.C. Gen. Stat. § 15A-1234 (a)(1) (2009). Our Supreme Court has stated "that the trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations." *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986). Moreover, the trial court's decision whether to use the exact language proposed by trial counsel is within the court's discretion and will not be overturned absent an abuse of discretion. *State v. Herring*, 322 N.C. 733, 742, 370 S.E.2d 363, 369 (1988). Abuse of discretion occurs when a trial court's ruling is "manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

Here, the trial court reiterated the jury's responsibility to recall the evidence and make any reasonable inferences from that evidence. The trial court was not required to give the instruction requested by defendant. Further, we note that the jury ultimately determined that defendant did not have intent to commit a felony when he entered the house on 17 May 2007, because the jury convicted defendant of misdemeanor breaking or entering, an offense which does not require intent, unlike felonious breaking or entering. N.C. Gen. Stat. § 14-54 (2009). Thus, defendant suffered no prejudice from the instruction provided by the trial

court in response to the jury's inquiry. In any event, we conclude the trial court was not manifestly unreasonable in refusing to answer the jury in the manner requested by defendant, nor did the trial court's response to the jury constitute an abuse of discretion.

In conclusion, we find that the trial court did not abuse its discretion, either in joining the charges for trial, or in its handling of the question by the jury. Therefore, we conclude that defendant received a trial free from error.

No error.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).